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CASES ON PRIVATE INTERNATIONAL LAW

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CASES ON PRIVATE INTERNATIONAL LAW

BY

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To

M. J. M.

PREFACE TO THE SECOND EDITION

THIS book is intended primarily as a companion volume to Dr. Cheshire's *Private International Law*, but it is hoped that it may also be of use to students who use some other text-book. In this edition the principle of printing at least one judgment in full from every case has been abandoned, with some reluctance, but in the conviction that one who writes for students must consider their pockets and aim to give the maximum value for money. Accordingly, those parts of the judgments which do not deal with the conflict of laws at all, or which merely repeat the facts of previous cases already printed in this book, have been omitted, and more cases have been included in the space available. All the Notes have been rewritten since the first edition, and many new ones added.

I express my grateful thanks to the Incorporated Council of Law Reporting, to Messrs. Green and Son Ltd., and to the Canada Law Book Company, for permission to print extracts from the Law Reports, the English Reports, and the Dominion Law Reports respectively. I also express my grateful thanks to Dr. G. C. Cheshire, for invaluable encouragement and general advice; to my colleague Mr. Rupert Cross, B.C.L., M.A., Fellow of Magdalen College, who read all the Notes and contributed many helpful comments; to Dr. K. Lipstein, Lecturer in Law in the University of Cambridge, who made some valuable suggestions; and to my wife, for much long-suffering secretarial assistance.

J. H. C. M.

MAGDALEN COLLEGE
OXFORD

1 *January* 1950

CONTENTS

PART I. INTRODUCTION

CHAPTER I. CHARACTERIZATION

IN RE COHN 1

CHAPTER II. RENVOI

IN RE ANNESLEY 4
IN RE ROSS 6
IN RE ASKEW. 10
Note A: CHARACTERIZATION AND RENVOI 16

CHAPTER III. PENAL LAWS

HUNTINGTON *v.* ATTRILL 20
LUTHER *v.* SAGOR 25
BANCO DE VIZCAYA *v.* DON ALFONSO DE BORBÓN Y AUSTRIA . . 31

CHAPTER IV. DOMICILE

UDNY *v.* UDNY 33
BELL *v.* KENNEDY 37
RAMSAY *v.* LIVERPOOL ROYAL INFIRMARY 39
IN RE BEAUMONT 42
LORD ADVOCATE *v.* JAFFREY 44
A.-G. FOR ALBERTA *v.* COOK 48
Note B: THE DOMICILE OF MARRIED WOMEN 51

PART II. FAMILY LAW

CHAPTER I. MARRIAGE

Section A: Formalities

SIMONIN *v.* MALLAC 53
OGDEN *v.* OGDEN 59
APT *v.* APT 65

Section B: Capacity to marry

BROOK *v.* BROOK 70
SOTTOMAYOR *v.* DE BARROS (No. 1) 74
IN RE PAINE 78
Note C: CAPACITY TO MARRY 80

Section C: Polygamous marriages

HYDE *v.* HYDE 81
BAINDAIL *v.* BAINDAIL 87
Note D: POLYGAMOUS MARRIAGES 92

Chapter II. MATRIMONIAL CAUSES

Section A: Divorce

NIBOYET *v.* NIBOYET 94
LE MESURIER *v.* LE MESURIER. 100
MATRIMONIAL CAUSES ACT, 1950, S. 18 103
Note E: DIVORCE FOR THE DESERTED WIFE 104

Section B: Judicial separation

EUSTACE *v.* EUSTACE 105

Section C: Nullity of Marriage

SALVESEN *v.* ADMINISTRATOR OF AUSTRIAN PROPERTY . . . 109
DE MASSA *v.* DE MASSA 119
INVERCLYDE *v.* INVERCLYDE 121
DE RENEVILLE *v.* DE RENEVILLE 126
Note F: JURISDICTION TO ANNUL A MARRIAGE 140

Chapter III. LEGITIMACY AND LEGITIMATION

Section A: Legitimacy

BROOK *v.* BROOK 144
SHAW *v.* GOULD 144
IN RE PAINE 149
IN RE BISCHOFFSHEIM 149

Section B: Legitimation

IN RE GOODMAN'S TRUSTS 155
IN RE GROVE 160
LEGITIMACY ACT, 1926 164
IN RE ASKEW 166
IN RE LUCK'S SETTLEMENT TRUSTS 166
Note G: LEGITIMACY AND LEGITIMATION 171

Part III. LAW OF OBLIGATIONS

Chapter I. CONTRACTS

Section A: Essential Validity

P. & O. S.N. Co. *v.* SHAND 176
CHATENAY *v.* BRAZILIAN SUBMARINE TELEGRAPH CO. 179
LLOYD *v.* GUIBERT 183
MOUNT ALBERT BOROUGH COUNCIL *v.* AUSTRALASIAN ETC. SOCIETY . 189
VITA FOOD PRODUCTS *v.* UNUS SHIPPING CO. 193
BOISSEVAIN *v.* WEIL 203
Note H: THE PROPER LAW OF A CONTRACT 206

Section B: Capacity

BONDHOLDERS SECURITIES CORPORATION *v.* MANVILLE . . . 210
Note J: CAPACITY TO CONTRACT 213

Section C: Illegality

RALLI BROS. *v.* COMPANIA NAVIERA SOTA Y AZNAR 215

CHAPTER II. TORTS

THE HALLEY 218
PHILLIPS *v.* EYRE 220
MACHADO *v.* FONTES 224
Note K: TORTS 227

PART IV. LAW OF PROPERTY

CHAPTER I. IMMOVABLES

Section A: Distinction between movables and immovables

IN RE BERCHTOLD 229
IN RE HOYLES 233
Note L: MOVABLES AND IMMOVABLES 235

Section B: Jurisdiction

BRITISH SOUTH AFRICA COMPANY *v.* COMPANHIA DE MOÇAMBIQUE . 237
DESCHAMPS *v.* MILLER 244
IN RE HOYLES 248
IN RE ROSS 248
THE TOLTEN 248
Note M: JURISDICTION OVER FOREIGN LAND 252

Section C: Choice of Law

IN RE MILLER 255
IN RE OGILVIE 260
Note N: IMMOVABLES AND THE LEX SITUS 266

CHAPTER II. TRANSFER OF TANGIBLE MOVABLES

CAMMELL *v.* SEWELL 270
INGLIS *v.* ROBERTSON 275
Note O: THE TRANSFER OF TANGIBLE MOVABLES 277

CHAPTER III. ASSIGNMENT OF INTANGIBLE MOVABLES

LEE *v.* ABDY 279
REPUBLICA DE GUATEMALA *v.* NUNEZ 281
KELLY *v.* SELWYN 286
Note P: THE ASSIGNMENT OF INTANGIBLE MOVABLES 289

CHAPTER IV. TRANSFER OF NEGOTIABLE INSTRUMENTS

BILLS OF EXCHANGE ACT, 1882, S. 72 292
ALCOCK *v.* SMITH 293

EMBIRICOS *v.* ANGLO-AUSTRIAN BANK 298
KOECHLIN *v.* KESTENBAUM 301
Note Q: NEGOTIABLE INSTRUMENTS 303

CHAPTER V. BANKRUPTCY

IN RE ARTOLA HERMANOS 305
GIBBS *v.* SOCIÉTÉ INDUSTRIELLE DES MÉTAUX 308

CHAPTER VI. EFFECT OF MARRIAGE ON MOVABLES

DE NICOLS *v.* CURLIER 311
MARLBOROUGH *v.* A.-G. 317
IN RE BANKES 321
VIDITZ *v.* O'HAGAN 324
Note R: THE EFFECT OF MARRIAGE ON MOVABLES 328

CHAPTER VII

ADMINISTRATION AND SUCCESSION TO MOVABLES

Section A: Administration of Estates

IN RE KLOEBE 332
IN RE LORILLARD 334

Section B: Wills

IN RE COHN 336
IN RE ANNESLEY 336
IN RE ROSS 336
IN RE MARTIN 336
LORD KINGSDOWN'S ACT, 1861 342
Note S: LORD KINGSDOWN'S ACT 343

Section C: Powers of Appointment

IN RE PRICE 345
IN RE LEWAL'S SETTLEMENT TRUSTS 352
Note T: EXERCISE BY WILL OF POWERS OF APPOINTMENT 356

PART V. LAW OF PROCEDURE

CHAPTER I. FOREIGN JUDGMENTS

Section A: Jurisdiction: Judgments in rem

CASTRIQUE *v.* IMRIE 359

Section B: Jurisdiction: Judgments in personam

SCHIBSBY *v.* WESTENHOLZ 363
EMANUEL *v.* SYMON 369
HARRIS *v.* TAYLOR 372
Note U: WHAT CONSTITUTES A VOLUNTARY APPEARANCE 375

Section C: Finality of judgments

NOUVION *v.* FREEMAN 376

Section D: Defences

GODARD *v.* GRAY 382
PEMBERTON *v.* HUGHES 386
VADALA *v.* LAWES 390
Note V: DEFENCES TO ACTIONS ON FOREIGN JUDGMENTS . . . 394

Section E: Direct Enforcement

FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933 . . 396

CHAPTER II. JURISDICTION TO STAY ACTIONS

COHEN *v.* ROTHFIELD 404

CHAPTER III. SUBSTANCE AND PROCEDURE

LEROUX *v.* BROWN 408
HUBER *v.* STEINER 410

CHAPTER IV. PROOF OF FOREIGN LAW

LAZARD BROTHERS *v.* MIDLAND BANK 415

TABLE OF CASES

(*The leading cases reported in the book are italicized, and the page on which the report begins is printed in darker type.*)

A. *v.* B. (1868) L.R. 1 P. & M. 559 124
Abouloff *v.* Oppenheimer (1882) 10 Q.B.D. 295 . . . **392**, 393, 395
Adams *v.* Adams [1941] 1 K.B. 536 132
Adams *v.* Clutterbuck (1883) 10 Q.B.D. 403 266
Adelaide Electric Supply Co. *v.* Prudential Assurance Co. [1934] A.C. 122 192
Albert *v.* Fraser Companies [1937] 1 D.L.R. 39 253
Alcock v. *Smith* [1892] 1 Ch. 238 . . . 285, **293**, 299, 300, 303, 304
Alexander, *In bonis* (1860) 29 L.J. P. 93 351
Allen's Estate, *In re* (1945) 114 L.J. Ch. 298. 269
Alves *v.* Hodgson (1797) 7 T.R. 241 285
Anchor Line Ltd., *In re* [1937] Ch. 483 268
Andros, *In re* (1883) 24 Ch. D. 637 . . 151, 152, 155, 172, 173, 174
Annesley, In re [1926] Ch. 692 . . . . **4**, 7, 15, 16, 18, 19, 336
Antelope, The, 10 Wheat. 123 22
Anziani, *In re* [1930] 1 Ch. 407 289
Apt v. *Apt* [1948] P. 83 . . . . . **65**, 141
Archer *v.* Preston (1681) 1 Eq. Cas. Abr. 133 243
Arglasse *v.* Muschamp (1682) 1 Vern. 75 . . . . . 243, 254
Armytage *v.* Armytage [1898] P. 178 99
Artola Hermanos, In re (1890) 24 Q.B.D. 640 . . . . **305**
Askew, In re [1930] 2 Ch. 259 . . . . . **10**, 18, 166, 175
Atkinson *v.* Ritchie (1809) 10 East 530 216
A.-G. for Alberta v. *Cook* [1926] A.C. 444 . . . **48**, 51, 104, 112
Auckland Corporation *v.* Alliance Assurance Co. [1937] A.C. 587 . 193

Bagot's Settlement, *In re* [1894] 1 Ch. 177 232
Baindail v. *Baindail* [1946] P. 122 . . . . 81, **87**, 92, 141, 214
Ballantine *v.* Golding (1784) Cooke's Bankrupt Law 487 . . . 223
Banco de Vizcaya v. *Don Alfonso* [1935] 1 K.B. 140 . . . **31**
Bank of Africa *v.* Cohen [1909] 2 Ch. 129 . . . . . 267, 268
Bank of Australasia *v.* Harding (1850) 9 C.B. 661 384
Bank of Australasia *v.* Nias (1851) 16 Q.B. 717 . . . . 384, 392
Bankes, In re [1902] 2 Ch. 333 . . . . . **321**, 329
Barretto *v.* Young [1900] 2 Ch. 339 357
Bater *v.* Bater [1906] P. 209 394
Beale's Settlement, *In re* [1905] 1 Ch. 256 264
Beaumont, In re [1893] 3 Ch. 490 . . . . . **42**
Becquet *v.* MacCarthy (1831) 2 B. & Ad. 951 . . . 370, 371, 372
Bell v. *Kennedy* (1868) L.R. 1 Sc. & Div. 307 . . . . **37**, 41
Bent *v.* Young (1838) 9 Sim. 180. 254
Berchtold, In re [1923] 1 Ch. 192 . . . . . **229**, 236

Berthiaume *v.* Dastous [1930] A.C. 79 68
Bethell, *In re* (1887) 38 Ch. D. 220 92
Birtwhistle *v.* Vardill (1839) 7 Cl. & F. 895 . . 146, 158, 172, 173, 174
Bischoffsheim, In re [1948] Ch. 79 . . . . . **149**, 172, 173
Blackburn Bobbin Co. *v.* Allen [1918] 1 K.B. 540 216
Blackwood *v.* The Queen (1882) 8 App. Cas. 92 333
Blad *v.* Bamfield (1674) 3 Swan. 604 222
Blad's Case (1673) 3 Swan. 603 222
Boissevain v. *Weil* [1949] 1 K.B. 482; [1950] A.C. 327 . . . **203**, 209
Bondholders Securities Corporation v. *Manville* [1933] 4 D.L.R. 699 . **210**, 214
Boughton *v.* Boughton (1750) 2 Ves. Sen. 12. . . . . 262, 263
Bowyer *v.* Woodman (1867) L.R. 3 Eq. 313 231
Boyes *v.* Bedale (1863) 1 H. & M. 798 163
Bradlaugh *v.* De Rin (1868) L.R. 3 C.P. 538 . . . . 296, 302, 304
Bradshaw, *In re* [1902] 1 Ch. 436 264
Bremer *v.* Freeman (1857) 10 Moo. P.C. 306 . . . . 337, 343, 350
Brereton *v.* Canadian Pacific Railway Co. (1894) 29 O.R. 57 . . 253
Briggs *v.* Chamberlain (1853) 11 Hare 69 231
Brinkley *v.* A.-G. (1890) 15 P.D. 76 92
Bristow *v.* Sequeville (1850) 5 Exch. 275 . . . . . 284, 285
British South Africa Company v. *Companhia de Moçambique* [1893] A.C. 602 . . . . . **237**, 248, 249, 251, 252, 253
British South Africa Company *v.* De Beers Consolidated Mines [1910] 2 Ch. 502 268
Brodie *v.* Barry (1813) 2 V. & B. 127 . . . . . 262, 263, 264
Brodie *v.* Brodie (1861) 2 Sw. & Tr. 259 123
Brook *v.* Badley (1868) L.R. 3 Ch. 672 231
Brook v. *Brook* (1861) 9 H.L.C. 193 64, **70**, 77, 78, 80, 81, 132, 144, 152, 171
Brown *v.* Lynch (1852) 2 Bradf. Surr. (N.Y.) 214 43
Buchanan *v.* Rucker (1807) 1 Camp. 63; (1808) 9 East 192 . . 366, 388
Burchell *v.* Burchell (1926) 50 Ont. L.R. 515 396
Bushby *v.* Munday (1821) 5 Madd. 297 405

Cammell v. *Sewell* (1860) 5 H. & N. 728 187, **270**, 277, 278, 297, 361, 392
Carter *v.* Hungerford (1915) 59 S.J. 428 406
Casdagli *v.* Casdagli [1919] A.C. 145 15
Casey *v.* Casey [1949] P. 420 141
Castrique v. *Imrie* (1870) L.R. 4 H.L. 414 113, 297, **359**, 384, 385, 386, 389, 394
Central Control Board *v.* Cannon Brewery Co. [1919] A.C. 744 . 30
Chapelle *v.* Chapelle [1950] P. 134 143
Chatenay v. *Brazilian Submarine Telegraph Co.* [1891] 1 Q.B. 79 . 69, **179**
Chatfield *v.* Berchtoldt (1872) L.R. 7 Ch. 192 231
Chetti *v.* Chetti [1909] P. 67 . . . . . 80, 92
Chiwell *v.* Carlyon (1897) 14 S.C. 61 . . . . . 268, 329
Clegg *v.* Levy (1812) 3 Camp. 166 284
Cohen v. *Rothfield* [1919] 1 K.B. 410 . . . . . **404**
Cohn, In re [1945] Ch. 5 . . . . . **1**, 16, 336

Coleman *v.* American Sheet and Tinplate Co. (1936) 285 Ill. App. 542 290
Collins *v.* A.-G. (1931) 47 T.L.R. 484 175
Collis *v.* Hector (1875) 19 Eq. 334 328
Colonial Bank *v.* Cady (1890) 15 App. Cas. 267 285
Colorado, The [1923] P. 102 286
Compton *v.* Bearcroft (1769) 2 Hagg. Con. 444 n. . . . 57, 58, 74
Connolly Brothers, *In re* [1911] 1 Ch. 731 405
Conway *v.* Beazley (1831) 3 Hagg. Ecc. 639 147
Cook *v.* Gregson (1854) 2 Drew. 286 333
Cooke's Trusts, *In re* (1887) 56 L.T. 737 . . . . . 52, 330
Cooper *v.* Cooper (1888) 13 App. Cas. 88 . 212, 214, 283, 325, 327, 330
Copin *v.* Adamson (1875) 1 Ex. D. 17 396
Cottrell *v.* Cottrell (1872) L.R. 2 P. & M. 397 344
Courier, The (1862) Lush. 541 250
Cranstown *v.* Johnston (1796) 3 Ves. 170 243
Cunliffe Brooks; Huntley *v.* Gaskill [1906] A.C. 56 . . . 46
Cutcliffe, *In re* [1940] Ch. 565 236

Dalrymple *v.* Dalrymple (1811) 2 Hagg. Con. 61 . . . 55, 159, 160
De Bode's Case (1845) 8 Q.B. 208 416
De Bono *v.* De Bono [1948] 2 S.A.L.R. 802 143
De Cosse Brissac *v.* Rathbone (1861) 6 H. & N. 301 . . 368, 376, 384
De Fogassieras *v.* Duport (1881) 11 L.R. Ir. 123 266
De la Vega *v.* Vianna (1830) 1 B. & Ad. 284. 333
De Massa v. *De Massa* (1931) **119**, 142, 143, 394
De Montaigu *v.* De Montaigu [1913] P. 154 . . . . . 104, 143
De Nicols (No. 2), *In re* [1900] 2 Ch. 410 268
De Nicols v. *Curlier* [1900] A.C. 21 . . . . . **311**, 328, 329
De Reneville v. *De Reneville* [1948] P. 100
51, 80, 81, 118, **126**, 140, 141, 142, 143
Derwent Rolling Mills Co., *In re* (1904) 21 T.L.R. 81, 701 . . 406
Deschamps v. *Miller* [1908] 1 Ch. 856 . . . . . **244**
D'Este's Settlement Trusts, *In re* [1903] 1 Ch. 898 . . . 354
De Virte, *In re* [1915] 1 Ch. 920 262
D'Huart *v.* Harkness (1865) 34 Beav. 324 . . . 347, 349, 350, 357
Diana, The (1862) Lush. 539 250
Dobell *v.* Rossmore Steamship Co. [1895] 2 Q.B. 408 . . 200, 201, 207
Dobree *v.* Napier (1836) 2 Bng. N.C. 781 222
Doe d. Birtwhistle *v.* Vardill (1839) 7 Cl. & F. 895 146, 158, 172, 173, 174
Doe *v.* Oliver (1829) 10 B. & C. 181 384
Doglioni *v.* Crispin (1866) L.R. 1 H.L. 301 . . . . . 338, 389
Dolphin *v.* Robins (1859) 7 H.L.C. 390. . . . . 46, 47, 148
Don *v.* Lippmann (1837) 5 Cl. & F. 1 371
Don's Estate, *In re* (1857) 4 Drew. 194 172
Douglas *v.* Forrest (1828) 4 Bing. 368, 371
Doulson *v.* Matthews (1792) 4 T.R. 503 . . . 222, 240, 241, 249
Duke *v.* Andler [1932] 4 D.L.R. 529 254
Dulaney *v.* Merry [1901] 1 K.B. 536 283

Duncan *v.* Lawson (1889) 41 Ch. D. 394 . . . . 231, 236, 267
Dundas *v.* Dundas (1830) 2 Dow. & Cl. 349 . . . . . 263, 264

Eames *v.* Hacon (1881) 18 Ch. D. 351. 333
Easterbrook *v.* Easterbrook [1944] P. 10 . . . . . 140, 142
Edwards *v.* Carter [1893] A.C. 360 . . . . . 325, 326, 330
Eliza Cornish, The (1853) 1 Sp. Ecc. & Adm. 36 . . . . 273, 274
Ellerman Lines *v.* Read [1928] 2 K.B. 144 395
Ellis *v.* McHenry (1871) L.R. 6 C.P. 228 394
Emanuel v. *Symon* [1908] 1 K.B. 302 . . . . . **369**
Embiricos v. *Anglo-Austrian Bank* [1905] 1 K.B. 677 . 285, **298**, 302, 303
Eustace v. *Eustace* [1924] P. 45 . . . . . **105**
Ewing *v.* Orr-Ewing (1883) 9 App. Cas. 34 306

Fender *v.* Mildmay [1938] A.C. 1 68
Fenton *v.* Livingstone (1859) 3 Macq. 497 . . . . . 151, 152
Fitzgerald, *In re* [1904] 1 Ch. 573 231
Folliott *v.* Ogden (1789) 1 H. Bl. 135 . . . . . 22, 32
Freeman *v.* East India Company (1822) 5 B. & Ald. 617 . . 273, 274
Freke *v.* Carbery (1873) L.R. 16 Eq. 461 . . . . 231, 236, 267

G. *v.* M. (1885) 10 App. Cas. 171 123
Galene *v.* Galene [1939] P. 237 . . . . . 142, 143, 394
General Steam Navigation Co. *v.* Guillou (1843) 11 M. & W. 877 . 367, 368
Gibbs v. *Société Industrielle des Métaux* (1890) 25 Q.B.D. 399 . . **308**
Godard v. *Gray* (1870) L.R. 6 Q.B. 139. . 364, 365, 370, **382**, 389, 394
Goodman's Trusts, In re (1881) 17 Ch. D. 266
62, 151, 152, 154, **155**, 162, 164, 172, 173, 174, 175
Graham *v.* Graham [1923] P. 31 . . . . . 106, 107
Grassi, *In re* [1905] 1 Ch. 584 266
Gratitudine, The (1801) 3 C. Rob. 240 274
Grey's Trusts, *In re* [1892] 3 Ch. 88 173
Groos, *In bonis* [1904] P. 269 . . . . . 344, 345
Groos, *In re* [1915] 1 Ch. 572 329
Grove, In re (1888) 40 Ch. D. 216. . . . . 12, **160**, 168, 174
Guépratte *v.* Young (1851) 4 De G. & Sm. 217 329
Guiard *v.* De Clermont [1914] 3 K.B. 145 376

H. *v.* H. [1928] P. 206 104
Halley, The (1868) L.R. 2 P.C. 193 . . . . . **218**, 222, 227
Hallyburton, *In bonis* (1866) L.R. 1 P. & M. 90 351
Hamlyn & Co. *v.* Talisker Distillery [1894] A.C. 202 . . . 319
Harland & Wolff *v.* Burns [1931] S.C. 722 199
Harris v. *Taylor* [1915] 2 K.B. 580 . . . . . **372**, 375, 376
Harvey *v.* Farnie (1882) 8 App. Cas. 43 115
Hawthorne, *In re* (1883) 23 Ch. D. 743 247
Hay *v.* Northcote [1900] 2 Ch. 262 142
Hearle *v.* Greenbank (1749) 1 Ves. Sen. 298 262

Heath, *In re* [1945] Ch. 417 174
Herd *v.* Herd [1936] Ch. 205 104
Hill *v.* Good (1674) Vaugh. 302 71
Hole, *In re* [1948] 4 D.L.R. 419 236
Hooper *v.* Gumm (1867) L.R. 2 Ch. 282 297
Hope *v.* Hope (1857) 8 D.M. & G. 731 26
Hoyles, In re [1911] 1 Ch. 179 . 231, **233**, 235, 236, 248, 254, 267, 268
Huber, *In bonis* [1896] P. 209 351
Huber v. *Steiner* (1835) 2 Bing. N.C. 202 . . . . . 223, **410**
Hummel *v.* Hummel [1898] 1 Ch. 642 . . . . . 349, 357
Huntington v. *Attrill* [1893] A.C. 150 . . . . **20**, 31, 32, 396
Hussein *v.* Hussein [1938] P. 159. 141
Hutter *v.* Hutter [1944] P. 95 . . . . . 135, 140, 141, 142
Hyde v. *Hyde* (1866) L.R. 1 P. & M. 130 . . . 67, **81**, 87, 88, 92
Hyman *v.* Helm (1883) 24 Ch. D. 531 405

Inglis v. *Robertson* [1898] A.C. 616 . . . . . **275**, 277
Inverclyde v. *Inverclyde* [1931] P. 29 . . **121**, 129, 132, 137, 140, 141

Jacobs & Co. *v.* Crédit Lyonnais (1884) 12 Q.B.D. 589 . . 192, 197, 216
Johnson, *In re* [1903] 1 Ch. 821 15
Johnson *v.* Cooke [1898] 2 Ir. R. 130 141
Jopson *v.* James (1908) 77 L.J. Ch. 824 406

Kaufman *v.* Gerson [1904] 1 K.B. 591 . . . . . 26, 27, 30
Kelly v. *Selwyn* [1905] 2 Ch. 117. . . . . 285, **286**, 290, 291
Kenward *v.* Kenward (1950) 66 T.L.R. (Part 2) 157 93
Kildare *v.* Eustace (1686) 1 Vern. 419 243
Kirwan's Trusts, *In re* (1883) 25 Ch. D. 373 . . 347, 349, 350, 351, 357
Kloebe, In re (1884) 28 Ch. D. 175 . . . . . **332**
Koechlin v. *Kestenbaum* [1927] 1 K.B. 616, 889 . . . . **301**, 303
Kotia *v.* Nahas [1941] A.C. 403 18

Landry and Steinhoff, *In re* [1941] 1 D.L.R. 699 236
Lashley *v.* Hog (1804) 4 Paton 581 . . 313, 314, 315, 316, 317, 328
Lazard Brothers and Co. v. *Midland Bank* [1933] A.C. 289 . . **415**
Lebel *v.* Tucker (1867) L.R. 3 Q.B. 77 . . . 280, 296, 300, 302, 304
Lee v. *Abdy* (1886) 17 Q.B.D. 309 . . **279**, 283, 288, 289, 290, 296
Le Feuvre *v.* Sullivan (1855) 10 Moo P.C. 1 291
Le Mesurier v. *Le Mesurier* [1895] A.C. 517
46, 48, 49, 51, **100**, 104, 112, 115, 117, 123
Leroux v. *Brown* (1852) 12 C.B. 801 . . . . . 17, **408**
Le Sueur *v.* Le Sueur (1876) 1 P.D. 139 47
Lewal's Settlement Trusts, In re [1918] 2 Ch. 391 . . 345, **352**, 357, 358
Lewis *v.* Hayward (1866) 35 L.J. P. 105 . . . . . 136, 137
Linke *v.* Van Aerdre (1894) 10 T.L.R. 426 . . . . . 125, 141
Liverpool and Great Western Steam Co. *v.* Phenix Insurance Co. (1889)
129 U.S. 397 . . . . . 198, 201

Lloyd v. *Guibert* (1865) L.R. 1 Q.B. 115 . . . . . **183,** 207
London and North Western Railway Co. *v.* Lindsay (1858) 3 Macq. 99 368
Lord Advocate v. *Jaffrey* [1921] 1 A.C. 146 . . . **44,** 49, 51, 112
Lorillard, In re [1922] 2 Ch. 638 . . . . . **334**
Loucks *v.* Standard Oil Co. (1918) 224 N.Y. 99 228
Lougheed *v.* Clark [1948] St. R. Qd. 157 140
Luck's Settlement Trusts, In re [1940] Ch. 864 . . . 52, **166,** 175
Luther v. *Sagor* [1921] 3 K.B. 532 . . . . . **25,** 416

Macartney, *In re* [1921] 1 Ch. 522 396
McCarthy *v.* De Caix (1831) 2 Cl. & F. 568 n. 98, 117
Macdonald *v.* Macdonald [1932] S.C. 79 236
MacDougall *v.* Chitnavis [1937] S.C. 390 52
McElroy *v.* McAllister [1949] S.C. 110 228
Machado v. *Fontes* [1897] 2 Q.B. 231 . . . . . **224,** 228
McHenry *v.* Lewis (1882) 22 Ch. D. 397 . . . . . 405, 406
McLean *v.* Pettigrew [1945] 2 D.L.R. 65 228
Male *v.* Roberts (1800) 3 Esp. 163 . . . . 211, 212, 214, 284
Marlborough v. *A.-G.* [1945] Ch. 78 . . . . . **317,** 329
Marseilles &c. Land Co., *In re* (1885) 30 Ch. D. 598 . . . 300
Martin, In re [1900] P. 211. . . . . **336,** 344, 345
Mary Moxham, The (1876) 1 P.D. 107 . . . . 225, 227, 251, 253
Mason *v.* Mason [1944] N.I. 134 . . . . . 137, 141
Maudslay, Sons and Field, *In re* [1900] 1 Ch. 602 285
Mehta *v.* Mehta [1945] 2 All E.R. 690 . . . . 52, 93, 139, 141
Messina *v.* Petrococchino (1872) L.R. 4 P.C. 144 389
Metropolitan Water Board *v.* Dick, Kerr & Co. [1919] A.C. 119 . 216
Mette *v.* Mette (1859) 1 Sw. & Tr. 416 . . . . . 78, 79, 80
Middleton *v.* Janverin (1802) 2 Hagg. Con. 437 57
Mighell *v.* Sultan of Johore [1894] 1 Q.B. 149 29
Miller, In re [1914] 1 Ch. 511 . . . . . **255,** 267, 268
Milliken *v.* Pratt (1878) 4 Mass. 374 213
Missouri Steamship Co., *In re* (1888) 42 Ch. D. 321 . . 198, 201, 202
Mitford *v.* Mitford [1923] P. 130 . . . . . 125, 142
Moorhouse *v.* Lord (1863) 10 H.L.C. 272 36
Moses, *In re* [1908] 2 Ch. 235 254
Mostyn *v.* Fabrigas (1774) 1 Cowp. 161 . . . 219, 240, 242, 249
Moulis *v.* Owen [1907] 1 K.B. 746 29
Mount Albert Borough Council v. *Australasian &c. Life Insurance Society Ltd.* [1938] A.C. 224 . . . . . **189**
Municipal Council of Sydney *v.* Bull [1909] 1 K.B. 7 . . . 396
Munro *v.* Munro (1840) 7 Cl. & F. 842 . . . . . 163, 170
Murphy *v.* Deichler [1909] A.C. 446 . . . . . 357, 358
Murray *v.* Champernowne [1901] 2 I.R. 232 . . . . . 232, 266

Nachimson *v.* Nachimson [1930] P. 217 92
Naftalin *v.* L.M.S.R. [1933] S.C. 259 228
Nash, *In re* [1910] 1 Ch. 1 264

Nelson *v.* Bridport (1846) 8 Beav. 547 . . . . . 254, 267
New York Life Insurance Co. *v.* Public Trustee [1924] 2 Ch. 101 . 289
Niboyet v. *Niboyet* (1878) 4 P.D. 1 . . **94,** 101, 104, 112, 125, 389
Norris *v.* Chambres (1861) 29 Beav. 246; 3 D.F. & J. 583 . . 247
Northwestern Mutual Life Insurance Co. *v.* Adams (1914) 155 Wis. 335 290
Norton's Settlement, *In re* [1908] 1 Ch. 471 406
Nouvion v. *Freeman* (1889) 15 App. Cas. 1 . . . . . **376**

Ochsenbein *v.* Papelier (1873) L.R. 8 Ch. 695 392
Ogden *v.* Folliott (1790) 3 T.R. 734 22
Ogden v. *Ogden* [1908] P. 46 17, 52, **59,** 81, 104, 116, 118, 125, 143, 212, 284
Ogilvie, In re [1918] 1 Ch. 492 . . . . . .**260,** 269
Oliver's Settlement, *In re* [1905] 1 Ch. 191 264
O'Neill, *In re* [1922] N.Z.L.R. 468 236
Orrell *v.* Orrell (1871) L.R. 6 Ch. 302 . . . . . 262, 263, 264

Paine, In re [1940] Ch. 46 . . . . . **78,** 80, 149, 172, 173
Papadopoulos *v.* Papadopoulos [1930] P. 55 395
Paradine *v.* Jane (1647) Aleyn 26 216
Parlement Belge, The (1880) 5 P.D. 197 . . . . . 27, 248
Pearse's Settlement, *In re* [1909] 1 Ch. 305 . . . . . 254, 268
Pemberton v. *Hughes* [1899] 1 Ch. 781 . . 115, 118, **386,** 394, 395, 396
Peninsular and Oriental Steam Navigation Co. v. *Shand* (1865) 3 Moo. P.C. (N.S.) 272 . . . . . **176,** 186, 209
Penn *v.* Baltimore (1750) 1 Ves. Sen. 444 254
Pepin *v.* Bruyere [1902] 1 Ch. 24 266
Phillips v. *Eyre* (1870) L.R. 6 Q.B. 1 . . . . **220,** 225, 226, 227
Piercy, *In re* [1895] 1 Ch. 83 254
Potinger *v.* Wightman (1817) 3 Mer. 67 . . . . . 42, 44
Potter *v.* Brown (1804) 5 East 124 223
Pouey *v.* Hordern [1900] 1 Ch. 492 358
Price, In re [1900] 1 Ch. 442 . . . . . .**345,** 357
Price *v.* Dewhurst (1838) 4 My. & Cr. 76 388
Proctor *v.* Frost (1938) 89 N.H. 304 267
Pryce, *In re* [1911] 2 Ch. 286 358

Quarrier *v.* Colston (1842) 1 Ph. 147 29
Queensland Mercantile Agency Co., *In re* [1891] 1 Ch. 536; [1892] 1 Ch. 219 . . . . . 288, 291

R. *v.* Chadwick (1847) 11 Q.B. 173 71
R. *v.* Hammersmith Marriage Registrar [1917] 1 K.B. 634 . . 92
R. *v.* International Trustee [1937] A.C. 500 196
R. *v.* Lesley (1860) Bell C.C. 220 222
R. *v.* Lolley (1812) 2 Cl. & F. 567 n. . . 98, 101, 115, 116, 117, 147, 148
R. *v.* Millis (1844) 10 Cl. & F. 534 . . . . . 67, 68
Ralli Brothers v. *C.N. Sota y Aznar* [1920] 2 K.B. 287 . . . 197, **215**
Ramsay v. *Liverpool Royal Infirmary* [1930] A.C. 588 . . . **39**

Reid, *In bonis* (1866) L.R. 1 P. & M. 74 345
Republica de Guatemala v. *Nunez* [1927] 1 K.B. 669 . 214, **281**, 289, 290
Ritchie, *In re* [1942] 3 D.L.R. 330 236
Robert *v.* Robert [1947] P. 164 135
Roberts *v.* Brennan [1902] P. 143 . . . . . 125, 134
Robinson, *Ex parte* (1883) 22 Ch. D. 816 306
Ross, In re [1930] 1 Ch. 377 . . **6**, 15, 18, 19, 248, 254, 267, 336
Rousillon *v.* Rousillon (1880) 14 Ch. D. 351 . . . 370, 371, 388, 396
Rudd *v.* Rudd [1924] P. 72. 396
Russell *v.* Smyth (1842) 9 M. & W. 810 . . . . . 365, 370
Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse [1925] A.C. 112 417
Ryall *v.* Kennedy 40 N.Y. Sup. Ct. 347 42

Salvesen v. *Administrator of Austrian Property* [1927] A.C. 641
51, 52, 99, 104, **109**, 122, 123, 124, 125, 126, 128, 129, 133, 134, 140, 142, 143
Santos *v.* Illidge (1860) 8 C.B. (N.S.) 861 . . . . . 26, 29
Schibsby v. *Westenholz* (1870) L.R. 6 Q.B. 155 . **363**, 370, 371, 375, 388
Scholefield, *In re* [1905] 2 Ch. 408 354
Scrimshire *v.* Scrimshire (1752) 2 Hagg. Con. 395 57
Segredo, The (1853) 1 Sp. Eccl. & Adm. 36 . . . . . 273, 274
Shaw v. *Gould* (1868) L.R. 3 H.L. 55
80, 101, 115, **144**, 153, 154, 155, 172, 173, 174
Simonin v. *Mallac* (1860) 2 Sw. & Tr. 67
17, **53**, 64, 74, 76, 77, 78, 81, 124, 125, 141, 142, 211
Simpson, *In re* [1916] 1 Ch. 502 . . . . . 354, 357
Simpson *v.* Fogo (1863) 1 H. & M. 195. . . . . 30, 367, 394
Sinha Peerage Claim, The (1939). 89, 92
Sirdar Gurdyal Singh *v.* Rajah of Farikdote [1894] A.C. 670 . . 371, 388
Skinner *v.* East India Company (1665) 6 St. Tr. 710 . . . 240
Smith, *In re* [1916] 2 Ch. 206 268
Smith *v.* Buchanan (1800) 1 East 6 . . . . . 309, 310
Sottomayor v. *De Barros* (*No. 1*) (1877) 3 P.D. 1
64, **74**, 78, 81, 125, 141, 210, 212, 283, 284
Sottomayor *v.* De Barros (No. 2) (1879) 5 P.D. 94 . 78, 80, 81, 284
Srini Vasan *v.* Srini Vasan [1946] P. 67 92
Stathatos *v.* Stathatos [1913] P. 46 . . . . . 104, 143
Steele *v.* Braddell (1838) Milw. Ecc. Rep. (Ir.) 1 74
Stirling, *In re* [1908] 2 Ch. 344 254
Strong, *In re* (1925) 95 L.J. Ch. 22 357
Studd *v.* Cook (1883) 8 App. Cas. 577 . . . . . 258, 259, 268
Sussex Peerage Case (1844) 11 Cl. & F. 85 . . . . 158, 416, 417
Sutton *v.* Warren (1845) 10 Met. Mass. Rep. 451 74
Suzanna, *Ex parte* (1924) 295 Fed. 713. 67
Syal *v.* Heyward [1948] 2 K.B. 443 395

Tallmadge, *In re* (1919) 181 N.Y. Sup. 336 . . . . . **6**
Thomas, *In re* (1886) 34 Ch. D. 166 231

Thornton *v.* Thornton (1886) 11 P.D. 176 . . . . . 99, 406
Tolten, The [1946] P. 135 . . . . . **248**, 252, 253, 255
Torni, The [1932] P. 78 202
Trimbey *v.* Vignier (1834) 1 Bing. N.C. 151 304
Trinidad Shipping Co. *v.* G. R. Alston & Co. [1920] A.C. 888 . . 202
Trufort, *In re* (1887) 36 Ch. D. 600 . . . . . 338, 389, 394
Turner *v.* Thompson (1888) 13 P.D. 37. . . . . 118, 123, 132

Udny v. *Udny* (1869) L.R. 1 Sc. & Div. 441 . . . 12, **33**, 41, 163, 168
Union Trust Co. *v.* Grosman (1918) 245 U.S. 412 . . . . 213, 214

Vadala v. *Lawes* (1890) 25 Q.B.D. 310 . . . . . **390**, 395
Van Grutten *v.* Digby (1862) 31 Beav. 561 . . . . . 326, 329
Vanquelin *v.* Bouard (1863) 15 C.B. (N.S.) 341 . . . 388, 389, 394
Vardopulo *v.* Vardopulo (1909) 25 T.L.R. 518 405
Vavasseur *v.* Krupp (1878) 9 Ch. D. 351 28
Velasco *v.* Coney [1934] P. 143 358
Veritas, The [1901] P. 304 251
Viditz v. *O'Hagan* [1900] 2 Ch. 87 . . . . . 323, **324**, 330
Visser, *In re* [1928] Ch. 879 396
Vita Food Products Inc. v. *Unus Shipping Co.* [1939] A.C. 277 **193**, 205, 208, 209
Voinet *v.* Barrett (1885) 55 L.J. Q.B. 39 376

Walker, *In re* [1908] 1 Ch. 560 357
Wall *v.* Wall [1950] P. 112 105
Warrand, *In re* (1892) 93 L.T. Jo. 82 406
Warrender *v.* Warrender (1835) 2 Cl. & F. 488 . . 98, 115, 116, 117
Wellington, *In re* [1947] Ch. 506; [1948] Ch. 118 . . . 18, 253, 254
White *v.* White [1937] P. 111 . . . . 131, 134, 135, 138, 141
Wilkinson's Settlement, *In re* [1917] 1 Ch. 620 . . . 354, 355, 357
Williams, *In re* [1945] V.L.R. 213 236
Williams *v.* Colonial Bank (1890) 15 App. Cas. 267 . . . 297
Williams *v.* Jones (1845) 13 M. & W. 628 . . . 365, 370, 379, 383
Wilson *v.* Wilson (1872) L.R. 2 P. & M. 435 . . . 49, 102, 123, 126
Winans *v.* A.-G. [1904] A.C. 287 . . . . . 41, 46
Wisconsin *v.* Pelican Insurance Co. (1888) 127 U.S. 265 . . . 23
Wolfenden *v.* Wolfenden [1946] P. 61 68
Wright's Trusts, *In re* (1856) 2 K. & J. 595 12, 167, 168, 169, 170, 171, 174, 175

Yelverton *v.* Yelverton (1859) 1 Sw. & Tr. 574 47
Young, *In re* [1942] V.L.R. 4 236

TABLE OF STATUTES

1235. Statute of Merton (20 Hen. 3, c. 4) 147
1531. Statute of Citations (23 Hen. 8, c. 9) 107, 108
1623. Statute of Limitations (21 Jac. 1, c. 16) 410
1670. Statute of Distribution (22 & 23 Car. 2, c. 10) . . . 159
1677. Statute of Frauds (29 Car. 2, c. 3) 263
S. 1 409
S. 3 409
S. 4 . . . . . 17, 408, 409, 410
S. 17 409
1736. Mortmain Act (9 Geo. 2, c. 36) 233, 234, 235
1753. Marriage Act (26 Geo. 2, c. 33) 57
1772. Royal Marriage Act (12 Geo. 3, c. 11) 56
1796. Legacy Duty Act (36 Geo. 3, c. 52) 231
1809. Foreign Enlistment Act (59 Geo. 3, c. 69) 222
1823. Marriage Act (4 Geo. 4, c. 76) 54, 67
1833. Fines and Recoveries Act (3 & 4 Will. 4, c. 74) . . . 259
1835. Marriage Act (5 & 6 Will. 4, c. 54) 71, 114, 150
1837. Wills Act (7 Will. 4 & 1 Vict., c. 26)
S. 9 . . . . . 336, 345, 347, 348, 349, 350, 357
S. 10 . . . . . 348, 349, 350, 351, 357
S. 18 . . . . . 337, 339, 341
S. 20 350
S. 27 . . . . . 352, 354, 355, 357, 358
1846. Fatal Accidents Act (9 & 10 Vict., c. 93) 228
1852. Common Law Procedure Act (15 & 16 Vict., c. 76) . . 366
S. 18 365
S. 19 . . . . . 55, 365
1853. Succession Duty Act (16 & 17 Vict., c. 51), s. 2 . . . 318
1854. Merchant Shipping Act (17 & 18 Vict., c. 104), s. 388 . . 219
1855. Intestate Movable Succession (Scotland) Act (18 & 19 Vict., c. 23), s. 6 315
1855. Infants' Settlements Act (18 & 19 Vict., c. 43) . . 318, 321, 353
1857. Matrimonial Causes Act (20 & 21 Vict., c. 85)
49, 50, 51, 85, 88, 89, 99, 100, 102, 106, 107, 109, 115, 122, 124, 147, 153, 154
S. 16 108
S. 17 108
S. 22 108
S. 25 . . . . . 50, 108
S. 26 . . . . . 50, 108
S. 27 . . . . . 102, 108
S. 42 . . . . . 54, 55, 108
1859. Law of Property Amendment Act (22 & 23 Vict., c. 35) . 144, 155

1861. Admiralty Court Act (24 & 25 Vict., c. 10) 248
1861. Wills Act (24 & 25 Vict., c. 114). . 236, **342**, 348, 350, 351, 357
S. 1 . . . . . 266, 343, 344, 345, 349, 357
S. 2 . . . . . 266, 343, 344, 345
S. 3 . . . . . 343, 344, 345
1870. Naturalization Act (33 Vict., c. 14), s. 10 (1) . . . 346
1873. Judicature Act (36 & 37 Vict., c. 66) . 238, 243, 244, 248, 254, 380
1882. Settled Land Act (45 & 46 Vict., c. 38)
S. 22 (5) 236
S. 63 232
1882. Bills of Exchange Act (45 & 46 Vict., c. 61)
S. 4 304
S. 24 301
S. 29 (2) 294, 295
S. 32 (1) 301
S. 36 (2) 294, 297
S. 72 . . . . . **292**, 299, 301, 303
S. 72 (1) 302, 303, 304
S. 72 (2) 294, 301, 302, 303, 304
S. 72 (3) 304
S. 72 (4) 304
S. 72 (5) 304
1883. Bankruptcy Act (46 & 47 Vict., c. 52). 305
1884. Matrimonial Causes Act (47 & 48 Vict., c. 68), s. 5 . . 106
1893. Sale of Goods Act (56 & 57 Vict., c. 71), s. 17 (1) . . . 207
1894. Merchant Shipping Act (57 & 58 Vict., c. 60) . . . 197
1908. Fatal Accidents Act (8 Ed. 7, c. 7) 228
1924. Carriage of Goods by Sea Act (14 & 15 Geo. 5, c. 22) . . 194
1925. Settled Land Act (15 Geo. 5, c. 18), s. 75 (5) . . . 236
1925. Law of Property Act (15 Geo. 5, c. 20), s. 184 . . . 1, 2, 3
1925. Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. 5, c. 49) 122
S. 22 (1) 248
S. 32 108
S. 33 (2) 252
S. 102 416
1926. Legitimacy Act (16 & 17 Geo. 5, c. 60). . 12, **164**, 167, 174, 175
S. 1 (1) 174
S. 1 (2) 12, 174
S. 3 174
S. 8 . . . . . 12, 168, 169, 173, 174, 175
S. 10 174
1933. Foreign Judgments (Reciprocal Enforcement) Act (23 Geo. 5, c. 13) **396**
S. 4 (1) (*a*) (iii) 396
S. 4 (1) (*a*) (iv) 395
S. 4 (2) (*a*) (i) 376
1934. Law Reform (Miscellaneous Provisions) Act (24 & 25 Geo. 5, c. 41) 228

1937. Matrimonial Causes Act (1 Ed. 8 & 1 Geo. 6, c. 57)
S. 7 . . . . . 129, 137
S. 8 105
S. 13 . . . . . 103, 104, 105, 140
1939. Emergency Powers (Defence) Act (2 & 3 Geo. 6, c. 62), s. 3 (1) 203, 204
1944. Matrimonial Causes (War Marriages) Act (7 & 8 Geo. 6, c. 43) 105, 140, 141
1949. Law Reform (Miscellaneous Provisions) Act (12, 13, & 14 Geo. 6, c. 100), s. 1 . . . . . 103, 104, 105
1950. Matrimonial Causes Act (14 Geo. 6, c. 25)
S. 16 103
S. 18 . . . . . **103,** 105, 109, 140, 141, 142

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PART I
INTRODUCTION

CHAPTER I
CHARACTERIZATION

The Court does not necessarily characterize rules of foreign law in the same way as their nearest equivalents in English law.

In re COHN, [1945] Ch. 5 (Chancery Division)

In re COHN.

A MOTHER and daughter, Mrs. Cohn and Mrs. Oppenheimer, were German nationals domiciled in Germany but resident in England. They were killed in an air raid in London as a result of the same explosion, and it could not be proved which of them survived the other. Mrs. Oppenheimer was entitled to movable property under Mrs. Cohn's will if she survived Mrs. Cohn.

UTHWATT J.: . . . There is a difference between the law of England and the law of Germany regarding the presumption which is to be made about the order of the deaths in the circumstances stated. The law of England, by s. 184 of the Law of Property Act, 1925, prescribes that, where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, 'such deaths shall (subject to any order of the court), for all purposes affecting the title to the property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder'. The Civil Code of Germany makes different provision. In the first book of the German Civil Code, headed 'General Principles', the first chapter of the first part deals with 'Natural Persons'. Article 20 contained in that chapter provides that, if several persons perish in a common danger, it is presumed that they have died simultaneously. On July 4, 1939, this was replaced by the following article:— 'If it cannot be proved that of several deceased persons or persons declared dead one has survived the other, it is presumed that they have died simultaneously.' It may be observed in passing that the date of the widening of the scope of art. 20 effected by the amendment is of interest to the general historian. Under German law Mrs. Oppenheimer can benefit under the will of Mrs. Cohn only if she (Mrs. Oppenheimer) was the survivor of the two.

In re COHN. — Uthwatt J.

It was argued by Mr. Danckwerts, on behalf of those interested in Mrs. Oppenheimer's estate, that the first question which the court was called on to ascertain was whether or not Mrs. Oppenheimer survived Mrs. Cohn; that, in ascertaining that fact, the method of proof was determined by the lex fori (the law of England)—a general proposition which cannot be disputed; and that, when once it was shown that it was uncertain which of them survived the other, s. 184 of the Law of Property Act, 1925, came into operation as part of the lex fori compelling the court to draw the inference or proceed on the footing that Mrs. Oppenheimer survived Mrs. Cohn. It was, according to his argument, only after reaching that point, that one turned to the law of the domicile.

In my opinion, this argument is not well founded. The law of the domicile, namely the law of Germany, is alone relevant in determining the effect of the testamentary dispositions of movables made by Mrs. Cohn, the basis on which the movables are to be administered, and the facts which it is necessary to ascertain to administer that estate. If, for instance, under the law of Germany, it was not necessary for the efficacy of the disposition in her favour that Mrs. Oppenheimer should survive Mrs. Cohn, but was only necessary that she should survive either Mr. or Mrs. Cohn, no inquiry as to survivorship such as is here being made would have been necessary. The question of survivorship is, in fact, opened up by the provisions of German law as to inheritance and is formally not: 'Did or did not Mrs. Oppenheimer survive Mrs. Cohn?' but 'Is the administration of Mrs. Cohn's estate to proceed on the footing that Mrs. Oppenheimer survived Mrs. Cohn or on the footing that she did not?' The purpose to which the inquiry as to survivorship is directed must be kept in mind. The mode of proving any fact bearing on survivorship is determined by the lex fori. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there. Section 184 of the Law of Property Act, 1925, does not come into the picture at all. It is not part of the law of evidence of the lex fori, for the section is not directed to helping in the ascertainment of any fact but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where title is governed by the law of England. It has no application where title is determined by the law of any other country.

I turn now to consider the law of Germany in relation to the facts proved, unhampered by s. 184 of the Law of Property Act, 1925. In my view, the provision contained in the article of July 4, 1939, is part of the general substantive law of Germany and not part of its law of evidence. Its terms and the place in which the repealed article dealing with the same general subject-matter was to be found make that clear. That rule of law has to be applied, inter alia, as part of the Law of Inheritances, contained in the German Civil Code. Predicating of Mrs. Oppenheimer that she is presumed to have died simultaneously with Mrs. Cohn, it is clear that Mrs. Oppenheimer was not a person living at the time when the succession to Mrs. Cohn's estate opened, and that, accordingly, having regard to arts. 1922 and 1923 of the German Civil Code, the defendants, Mrs. Freudenthal and Siegfried Cohn, take Mrs. Cohn's movable estate.

CHAPTER II

RENVOI

When a rule of the English conflict of laws refers to the 'law' of a foreign country, the reference sometimes means the 'whole' law of the foreign country, including its rules of the conflict of laws, in which case the English court will decide the case as nearly as possible as it would be decided by a court in the foreign country.

In re ANNESLEY.

In re ANNESLEY, [1926] Ch. 692 (Chancery Division)

THE testatrix, a British subject who had lived in France since 1866, died in 1924 having by her will (made in the English language and form) given the residue of her property after a trust for sale and conversion to her daughter absolutely. In her will she declared that it was not her intention to abandon her English domicile of origin and that she had made no application under Article 13 of the French Civil Code (since repealed) for permission to establish her domicile in France. As the testatrix left two children surviving her, by French domestic law she could only dispose of one-third of her movable property. The testatrix by her will purported to dispose of the whole of her movable property.

RUSSELL J. (after deciding that on the facts the testatrix was domiciled in France at the date of her death, notwithstanding the declaration in her will and her failure to comply with Article 13, continued):

I accordingly decide that the domicile of the testatrix at the time of her death was French. French law accordingly applies, but the question remains: what French law? According to French municipal law,[1] the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality refers the question back to French law, the law of the domicile; and the question arises, will the French law accept this reference back, or renvoi, and apply French municipal law?

Upon this question arises acute conflict of expert opinion. Two experts took the view that the renvoi would not be accepted, but that a French court would distribute the movables of the testatrix in accordance with English municipal law. One expert equally strongly took the view that a French court would accept the renvoi and distri-

[1] Evidently a slip for 'French private international law' (*Ed.*).

bute in accordance with French municipal law. I must come to a conclusion as best I can upon this question of fact upon the evidence after considering and weighing the reasons given by each side in support of their respective views. It is a case rather of views expressed by the experts as to what the French law ought to be, than what it is. Although there is in France no system of case law such as we understand it here—the decisions of higher courts not being binding upon inferior tribunals—yet I think I must pay some attention to the fact that this question of renvoi has at different times come for consideration before the Cour de Cassation, the highest court in France, and each time with the same result—namely, the acceptance of the renvoi and the application of the French municipal law. It is true that the Cour de Cassation is quite free to take the opposite view on a future occasion, but it has never done so. I refer to the cases which were discussed and expounded before me—namely, the *Forgo* case in 1882, and the *Soulié* case in 1910. In the former case, a decision of the Cour de Cassation, the renvoi was accepted, and French municipal law was applied to the disposition of the estate of a Bavarian national domiciled de facto in France (but not domiciled there according to French law), because according to Bavarian law the law of the domicile or usual residence was applicable. The *Forgo* case gave rise to grave differences of opinion among French jurists and was followed by many conflicting decisions in lower courts, some favouring the 'Théorie du Renvoi', others against it. The matter again came under the consideration of the branch of the Cour de Cassation entitled Chambre de Requêtes, one of whose functions is to decide whether or not an appeal to the Cour de Cassation should be allowed to proceed. That was the *Soulié* case, in which the court below had held that French municipal law governed the succession to the movable property of an American subject who had died in France with a de facto domicile in that country. The Chamber declined to allow an appeal to the Cour de Cassation to proceed. This decision, coming as it did after the grave differences of opinion which resulted from the *Forgo* case, strikes me as of great importance. As is pointed out in a note to the report in Clunet, it shows that the Supreme Court persists with energy in its former view, notwithstanding the views of text-writers to the contrary.

In these circumstances, and after careful consideration of the evidence of the experts called before me, I have come to the conclusion that I ought to accept the view that according to French law the French courts, in administering the movable property of a deceased

In re ANNESLEY. — Russell J.

foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with art. 13 of the Code.

The result is that as regards her English personal estate and her French movable property the testatrix in this case had power only to dispose of one-third thereof by her will.

Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of renvoi need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of English law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicile, while the law of the country of domicile in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogate's Court of New York: *In re Tallmadge* (1919), 181 N.Y. Supp. 336.

In re ROSS.

In re Ross, [1930] 1 Ch. 377 (Chancery Division)

Janet Anne Ross, a British subject domiciled in Italy, died in 1927 leaving movable property in England and Italy and immovable property in Italy. She left two wills, one in English and the other in Italian. By her English will she gave the residue of her property in England to her niece, the defendant Caroline Waterfield, absolutely. By her Italian will she appointed her grand-nephew Aymand Waterfield heir of her movable and immovable property in Italy, subject to a usufruct in favour of his mother Caroline Waterfield during her life. Neither will left anything to the plaintiff, who was the testatrix's only son. The plaintiff claimed a declaration that he was entitled, not-

withstanding the testamentary dispositions of his mother, to one moiety of her movable and immovable property in Italy and one moiety of her movable property in England as his legitima portio under Italian law. *In re* ROSS.

Article 8 of the Italian Code provided that succession, whether under an intestacy or under a will, was regulated by the national law of the deceased, whatever the nature of the property. Article 9 provided that the substance and effect of testamentary dispositions were deemed to be governed by the national law of the testator.

LUXMOORE J.: . . . I will deal first with the movable property. Both the plaintiff's and defendants' counsel agree that by English law, the succession to movable property wherever situate is governed by the law of the domicile, in this case the law of Italy. In Italy, as in most of the European countries, the law refuses to recognise domicile as governing succession and other personal rights, and accepts the law of the nationality as the governing law. . . . The parties are agreed that 'the law of the domicile' governs the succession to the movable property. The dispute which arises between them and which I have to determine, is what is meant by 'the law of the domicile'. Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicile (sometimes called 'the municipal law', or 'the internal law'); or does it mean the whole law of the country of domicile, including the rules of private international law, administered by its tribunals? If the former contention is correct, then the English court, in deciding a case like the present, is not concerned to inquire what the courts of the country of domicile would in fact decide in the particular case, but what the courts of the domicile would decide if the propositus, instead of being domiciled in the foreign country, was also a national of that country. Whereas if the latter view is the correct one, the English court is solely concerned to inquire what the courts of the country of domicile would in fact decide in the particular case. In my opinion the latter is the correct view, as laid down by the English decisions, and there is no decision that has been quoted to me in argument or that I have been able to discover which supports the former view, though there is a dictum in the most recent case dealing with the question, which expresses approval of that view. I refer to the dictum of Russell J. in *In re Annesley* (*ante*, p. 6).

The argument against the view that the law of the country of domicile means the whole of the law of that country, including its rules

In re Ross. — Luxmoore J.

of private international law, is based on a claim that if this be the meaning of the expression 'the law of the domicile', then logically the meaning of the expression 'the law of the nationality' must also mean the whole of that law, including its rules of private international law; and it is said that if this be the true rule, the English court, in effect, has to say—I am putting the argument in the concrete form applicable to the case before me—the Italian law provides that the law of the nationality (the English law) is to be the governing law on the basis that the domicile of origin is English; but as the English law considers the law of the domicile to be the governing law, there is a further reference back from it to the Italian law as the domiciliary law, the logical result being an endless oscillation backwards and forwards from one law to the other, the English court sending the case back according to the English doctrine of domicile to the Italian court, and the Italian court sending it back again to the English court according to the Italian doctrine of nationality, and so on ad infinitum; the result being the establishment of what has been called by some of the text-writers a 'circulus inextricabilis'. The circle can only be cut if and when one or other of the opposing systems of law—to use once more a phrase adopted by the text-writers—'accepts the renvoi'.

Is this argument well founded? Indeed, does it arise at all? It does not in fact arise if the true view of the English court is that, by the phrase 'the law of the country of domicile' is meant that law which the courts of the country of domicile apply to the decision of the case to which the rule refers. If this is the correct view, the English courts in deciding the case 'accept the renvoi'. Let me illustrate what I mean by a reference to the question before me. It is admitted on both sides that the English court must adhere to the rule that, Janet Anne Ross having died domiciled in Italy, the distribution of her movable property must be governed by the law of Italy. On the proposition with which I am dealing this means the law which the Italian courts would hold to be applicable to the case of Janet Anne Ross, she being a British subject with an English domicile of origin. If because of her nationality the Italian courts hold that her movable property ought to be distributed in accordance with English internal law as applicable to English nationals domiciled in England—then the English courts will distribute this property in exactly the same way as if Janet Anne Ross was in fact at her death domiciled in England. If, on the other hand, the Italian courts should hold that her movable

property should be distributed in accordance with the internal law of Italy applicable to Italian nationals, then the English courts will distribute Janet Anne Ross's movable property in accordance with Italian internal law. In other words, the English court will endeavour to ascertain what the Italian courts would in fact decide with regard to that part of Janet Anne Ross's movable property as might come under the actual control of the Italian courts.

My attention has been called in the course of the argument of this case to a number of authorities, and I have also considered a number of other decisions. In my view the general trend of the authorities establishes that the English courts have generally, if not invariably, meant by 'the law of the country of domicile', the whole law of that country as administered by the courts of that country, and with the exception of the dictum already referred to, there is no case to the contrary.

(His Lordship reviewed the authorities and continued:) In my opinion the present case must be decided in accordance with the law of Italy, as that law would be expounded in the Italian courts. If the Italian court had in fact dealt with the matter there would be no necessity to inquire into the law, and it would be my duty simply to follow the decision. Since there is no decision by the Italian court, I am bound to ascertain how the Italian court would decide the case from the evidence of those competent to instruct me. I am glad to say that the Italian lawyers who have been called on both sides are unanimous in this conclusion, that if the case fell to be decided in the Italian courts, it would be held that the testamentary dispositions of Mrs. Janet Anne Ross were valid, and provide for the total disposition of her property in Italy; and that in no circumstances would the Italian court recognise any right on the part of the plaintiff to any part of her property as legitima portio, as it would have done had Mrs. Janet Anne Ross been an Italian national.

... This disposes of the case so far as the movables in Italy are concerned. The position as to the immovable property in Italy seems to me to stand on a different basis. It is true that the law of Italy provides, by arts. 8 and 9 of the Code, that the succession to movable and immovable property is governed by the law of the nationality of the deceased owner, yet the English law has never suggested that the law of the domicile has anything to do with the succession to immovables. On the contrary it has always recognised that the lex situs governs the succession to immovables, and the lex situs must

In re Ross. — Luxmoore J.

necessarily be the law of the country where the property is situate, as it would be expounded by the courts of that country; and domicile cannot under any circumstances have any bearing on the case. But to some extent the theory of the renvoi may apply, for the law of England refers the question of succession to immovables to the lex situs (in this case the law of Italy), and the lex situs (the Italian law) refers the case to the law of the nationality, and this might mean the law of the nationality including the rule relating to the lex situs, and once again the circulus inextricabilis would be constituted. But in my view the lex situs must, for the reasons I have already stated with regard to the meaning to be placed on the phrase, 'law of the domicile', be construed in the way the courts of the country where the immovables are situate would themselves determine. On this basis the expert evidence is clear that the Italian courts would decide the succession to the immovable property in the same manner as the English court would determine it if the immovable property in question belonged to an Englishman and was situate in England.

... In the result the plaintiff has failed to substantiate either of his claims in this action, and I therefore dismiss it with costs.

In re Askew.

In re Askew, [1930] 2 Ch. 259 (Chancery Division)

By an English marriage settlement made in 1893 on the marriage of John Bertram Askew, a British subject then domiciled in England, it was provided that if John Bertram Askew should marry again he might by deed or will revoke in part the trusts of the husband's trust fund and might appoint that part upon such trusts for the benefit of any child of such subsequent marriage as he might think proper.

John Bertram Askew separated from his wife, and acquired a domicile of choice in Germany prior to 1911. In June 1911 a German court made a decree dissolving his marriage. In 1912 he married Anna Askew in Berlin. In January 1911, before the divorce, a daughter named Margarete Askew had been born to Anna Askew in Switzerland and she was acknowledged to be the daughter of John Bertram Askew.

By deed poll dated in 1913 John Bertram Askew purported to revoke part of the trusts of the husband's trust fund under the settlement of 1893 and to appoint that part to Margarete Askew absolutely.

The trustees of the settlement took out a summons for the determination of the question whether the power of appointment had been

validly exercised in favour of Margarete Askew by the deed poll of 1913. *In re* ASKEW.

An affidavit by a German lawyer, accepted by all parties as correct, stated as follows: 'A general principle of German law is that the law of the country of which the father at the time of the marriage is a national governs the question of legitimation per subsequens matrimonium. I am informed and believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German court in deciding the question. (I am informed that the English law refers the question back to the law of the domicile, in the present case German law.) The German court would in these circumstances first have to decide whether to apply the municipal law of England only, or also the principles of international private law as interpreted by the English courts. The rule followed by the German court is that both the municipal law and the rules of international law, as interpreted by the English court, are to be applied. The German court therefore accepts the renvoi. There is no general statutory rule of German law as to which municipal law in the case of renvoi as in the present case is to be ultimately applied. The question has, however, been decided by numerous decisions of the Reichsgericht, the court of the highest instance in Germany. These decisions are to the effect that in a case where the German law provides that the law of the nationality is to govern a question and the law of nationality refers to the law of domicile and the domicile is German, the German court is to apply German municipal law.

'I am therefore of opinion that the German court would hold that according to German law Margarete Askew was legitimated by the marriage of her parents notwithstanding the fact that her father at the time of her birth was still married to a woman other than her mother and that by reason of the legitimation the child Margarete Askew has become issue of the marriage between John Bertram Askew and Anna Askew née Wengels.'

MAUGHAM J.: There is no doubt that, if German local law were applicable, the subsequent marriage of the parents of the defendant Margarete Askew would effect her legitimation, and that although she was born before the divorce, which was not made absolute until July 27, 1911. The trustees are naturally desirous of the protection of the court in relation to the question whether the power of appointment in question was validly exercised by the deed poll, and for this purpose it is necessary to determine whether the defendant Margarete

In re ASKEW. — Maugham J.

Askew, though born out of wedlock during the continuance of a previous marriage, is, having regard to her father's domicile, legitimate. It is admitted that the Legitimacy Act, 1926, would not have had that effect, having regard to the fact that John Bertram Askew was married to his first wife when the defendant Margarete Askew was born.[1]

The question of legitimation of a child by the subsequent marriage of its parents in a foreign country (apart from the provisions of the Legitimacy Act, 1926, s. 1, sub-s. 2, and s. 8) appears at first sight to be well settled. Dicey (Rule 137,[2] Case I, in his Conflict of Laws) states the result of the decisions thus: 'If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the date of the subsequent marriage allow of legitimatio per subsequens matrimonium, the child becomes or may become legitimate on the marriage of the parents.' The authorities cited are *Udny* v. *Udny* (*post*, p. 33); *In re Wright's Trusts* (1856), 2 K. & J. 595; *In re Grove* (*post*, p. 160), and they bear out the proposition. Now, John Bertram Askew was admittedly domiciled in Germany both at the date of the birth and at the time of the subsequent marriage. But what is the meaning of the phrase 'the law of the father's domicile'? Does it refer to the municipal law or local law of Germany, or does it refer to the whole of the laws applicable in Germany, including the views entertained in Germany as to the rules of private international law? There is no doubt that Dicey means the latter (see his Interpretation of Terms, Definition II); but in my opinion it is very doubtful whether the courts who have dealt with the matter did not mean the former. The so-called doctrine of renvoi, which has been so much discussed by jurists of recent years, had not been formulated in earlier days; and those who look at the statement of the foreign law in the earlier cases (see, for example, *In re Wright's Trusts* (1856), 2 K. & J. 595, 603–6, and *In re Grove* (*post*, p. 160)) will find that the foreign law as stated was the local or municipal law, and that no evidence was adduced as to the rules of private international law applied in the foreign country. It would seem that rules of private international law, not being founded on custom or statute, but being based upon considerations of justice and what is called 'comity', ought to be the same in all countries, though it is now well known (contrary to the belief entertained by Lord Westbury: see *Udny* v. *Udny*, *post*, p. 33) that they are not. I am convinced that

[1] As to this, see p. 174, *post*.

[2] Rule 121 in the sixth edition.

sixty or seventy years ago it never would have occurred to lawyers who were proving, say, the law of Italy (or France) in relation to the succession to an Englishwoman dying domiciled in Italy (or France) to depose (first) that the Italian (or the French) law gave a son a legitima portio; (secondly) that foreigners domiciled in Italy (or France) were deemed to retain their personal law; (thirdly) that he was informed that according to English law an English testator had a free power of disposition; and (finally) that, accordingly, by an application of Italian (or French) rules of private international law, the son had not (or had) a right to a legitima portio. It is on evidence of this kind that English courts have now to decide cases relating to the succession to movables belonging to British subjects who die domiciled abroad, and other cognate matters. It may be added that there is generally an acute conflict of expert opinion as to the foreign law, which has to be proved afresh in each case. Foreign jurists and foreign courts take from time to time varying views on the subject of renvoi. The result is not always satisfactory. It may, then, be useful to consider the question from the point of view of principle before dealing with the four modern authorities which must, I think, guide me in the matter.

I will take the case of John Doe, a British subject, who goes to a foreign country, the Commonwealth of Utopia, and there acquires a permanent home without any intention of returning to his native land. He does not care to become a naturalized Utopian, and he does not trouble to fulfil the legal formalities which Utopia requires before legally admitting him to a Utopian domicile. Now the State of Utopia is one which (I assume) has adopted what is called the principle of nationality for foreigners, including those who have permanently settled in the realm, and it accordingly applies their national law in all questions relating to their status, capacity, and the succession to their surplus assets and the like. The first question that arises is whether in these circumstances John Doe in an English court can be said to have acquired a Utopian domicile. Clearly this depends upon the true meaning to be attached to the word 'domicile'. Until the decision of the House of Lords to be referred to later, this was at least doubtful; but it is now, I think, finally settled that in an English court John Doe must be taken to have been domiciled in Utopia, because domicile is a pure question of fact and does not in any true sense connote a legal relation. In English courts, English law must be applied; and by that law all these matters must be decided, at any

In re ASKEW. — Maugham J.

rate prima facie, by the lex domicilii, that is, in the case under consideration, by the law of Utopia, and not the less that the courts of Utopia attach no importance in such a case to the lex domicilii. Now the second question arises—when the English courts refer the matter to the law of Utopia as the lex domicilii, do they mean the whole of that law, or do they mean the local or municipal law which in Utopia would apply to Utopian subjects? In order fully to appreciate this matter, it is necessary to answer the question, how comes it that an English court applies to John Doe the system of law of Utopia to which he does not owe allegiance? The answer must be that, in the view of an English court, John Doe, by acquiring a permanent home in Utopia, has attracted to himself the system of personal law which Utopia would apply to him, and it may be added that this would be in accordance with his presumed intention. Moreover, questions of private international law, in the absence of statute, depend largely on the historical views and the opinions of jurists which have been adopted in our courts; and it is the fact that, for some hundreds of years before the nineteenth century, continental and British jurists alike were practically united in the view that there existed in the world a number of civil societies based on domicile in the sense that the status and capacity of the members of those societies were governed by the lex domicilii, whatever their nationalities might be. In France, Italy, Germany and elsewhere a different principle—namely, that of nationality—has gradually been introduced and now prevails; but in the British Empire, including as it does within its area so many distinct systems of law, the old doctrine is retained, and domicile is still the criterion in our courts of the personal law. If the law of Utopia had taken the same view as the English courts and applied to John Doe the Utopian local law, there would of course be no difficulty whatever. But since the jurists of Utopia have adopted the principle of nationality as governing the question of his personal law, the result is that, when the English court makes an inquiry as to the Utopian law, the first answer may be that Utopia prima facie applies to John Doe the laws of England. It is, I think, a misunderstanding of the problem to suggest that this leads to a deadlock. Like others before me, I have spoken of the lex domicilii as applying to John Doe; but it should not be forgotten that the English court is not applying Utopian law *as such*, and the phrase is really a short way of referring to rights acquired under the lex domicilii. The inquiry which the court makes is, of course, as to Utopian

law as a fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the parties to the English suit by reason of the de facto domicile of John Doe in Utopia? For the English court will enforce those rights, though, I repeat, it does not, properly speaking, enforce Utopian laws. It is evident that, so stated, the question involves this. Have the parties acquired rights in Utopia by reason of the personal law of John Doe being English local law or Utopian local law? There is this alternative and no other. It is apparent that there is no room here for a deadlock, and that the circulus inextricabilis is no better than a (perhaps amusing) quibble.

The English judges and the foreign judges do not bow to each other like the officers at Fontenoy. The English court has to decide a matter within its jurisdiction according to English law in the wide sense, and if the matter depends on foreign domicile it is only necessary to prove certain facts as to rights under the foreign law. It is therefore, I think, clear that, when we inquire whether John Doe has acquired rights in Utopia by Utopian law, we must mean by the whole of the laws of Utopia including any views of private international law which may be deemed to give him rights (or subject him to restrictions), though an Englishman settled in that land. A final question may sometimes remain—namely, whether the lex domicilii is one which the English courts can recognise. If it is (as it nearly always is), we have only to ascertain what the lex domicilii in the wider sense is. I will add that I am not aware of any satisfactory definition of the term renvoi; but it will be noted that, if I am right, an English court can never have anything to do with it, except so far as foreign experts may expound the doctrine as being part of the lex domicilii. . . .

(His Lordship discussed the cases of *In re Johnson*, [1903] 1 Ch. 821, *Casdagli* v. *Casdagli*, [1919] A.C. 145, *In re Annesley* (*ante*, p. 4), and *In re Ross* (*ante*, p. 6) and the evidence of German law and continued:) For the reasons given above I hold that in an English court the lex domicilii in the wide sense must prima facie apply, and, this being a law which the English courts will recognise, the conclusion is that the defendant Margarete is a legitimate child of John Bertram Askew in our courts and that the power of appointment was effectively exercised in her favour.

I think it proper to add that in my opinion it is unsatisfactory to find that, upon the evidence adduced in the two cases of *In re Annesley* (*ante*, p. 4) and *In re Ross* (*ante*, p. 6), the courts were

In re ASKEW. — Maugham J.

bound to hold that, although both in France and in Italy the national law of the de cujus is held to prevail, yet, owing to a divergence on the theoretical question of renvoi, the property and capacity of an Englishman domiciled in Italy is held to be a matter of (local) English law, whilst the property and capacity of an Englishman domiciled in France is held to be a matter of (local) French law. Nor is there any certainty that a contrary result will not be reached upon the evidence adduced in the next two cases which arise as to persons dying in France and Italy respectively. Those who have any acquaintance with the extensive literature that has appeared on the Continent on the subject of renvoi and the great diversity of view that exists would not be surprised to find that the legal decisions in France and Italy, where legal decisions are not binding as authorities to be followed, had changed in their effect. An Englishman domiciled de facto in France can have no certainty that his personal law is the municipal law of France, nor can he be sure if he crosses the frontier and becomes domiciled de facto in Italy that the municipal law of England will become his personal law. It may be added that views which seem strange to an English lawyer are entertained on these matters in some Eastern countries and also in some of the States in South America; and in those countries the result of acquiring a domicile must be very doubtful. I cannot refrain from expressing the opinion that it is desirable that the position of British subjects who acquire domiciles in countries which do not agree with our views as to the effect of a foreign domicile should be made clear by a very short statute. There is much to be said for the 'simple and rational solution' suggested by Russell J. in *In re Annesley* (*ante*, p. 6); but whether the municipal law of the foreign country or the municipal law of England is to be held applicable in British courts in these cases, it is clearly desirable that the matter should be certain and should not be held ultimately to depend on the doubtful and conflicting evidence of foreign experts.

NOTE A: CHARACTERIZATION AND RENVOI

THESE two subjects appear at the beginning of this book because that is the logical place for them, the place they would occupy if the English conflict of laws were ever codified. But the student is strongly advised to postpone consideration of them until he comes to the end of the subject, because they are both very difficult topics. Moreover, they are both topics about which more can be learnt by reading text-books and articles than by studying cases. This is especially true of Characterization, because *Re Cohn* (*ante*, p. 1) is the only

English case in which the court even mentions the problem. The following books and articles are recommended for study: Cheshire, pp. 58–129; Beckett, 15 B.Y.B.I.L. 46 (1934); Dicey, pp. 47–76; Falconbridge, pp. 35–222; Lorenzen, pp. 19–135; Cook, pp. 211–51; Schreiber, 31 Harv. L.R. 523 (1918); Griswold, 51 Harv. L.R. 1165 (1938). Most of these discussions emphasize the relation between the two problems. A detailed treatment is outside the scope of this book, but something must be said about the nature of the problems and the various solutions which have been propounded.

(1) *Characterization*

The nature of the problem can best be understood from some examples. (i) A Frenchman under 21 marries an Englishwoman in England without obtaining the consent of his parents as required by French law. The French and English conflict of laws rules agree that the formalities of marriage are governed by the law of the place of celebration (English law), and also that capacity to marry is governed by the husband's personal law (French law). But this does not solve the problem until we know what is the nature of the French rule about parental consents: is it a rule relating to formalities (in which case it will not apply to a marriage in England)? Or is it a rule relating to capacity to marry (in which case it will apply to the marriage of a Frenchman)? This is a question of characterization: and the problem is to know by which law, French or English, the characterization of the French consents rule is to be governed. See *Simonin* v. *Mallac* (*post*, p. 53) and *Ogden* v. *Ogden* (*post*, p. 59). (ii) Two Frenchmen make an oral contract in France whereby one agrees to serve the other for three years in France. An action for breach is brought in England, and the defence is s. 4 of the Statute of Frauds. Does the section lay down a rule of substance (in which case it will not apply to a French contract) or a rule of procedure (in which case it will apply in an action in an English court)? By which law, French or English, will the characterization of the section be governed? See *Leroux* v. *Brown* (*post*, p. 408).

Four principal solutions of the problem have been suggested:

(*a*) Characterization should be governed by the lex fori. The forum should characterize rules of its own domestic law in accordance with that law, and should characterize rules of foreign law in accordance with their nearest analogy in its own domestic law. The main objections to this view are (i) that to argue by analogy from a rule of domestic law to a rule of foreign law is to indulge in mechanical jurisprudence of a particularly vicious kind, and may result in the forum seriously distorting the foreign law, applying it in cases where it would not be applicable and vice versa; and (ii) that the view breaks down altogether when there is no close analogy to the foreign law in the domestic law of the forum.

(*b*) Characterization should be governed by the lex causae, that is, the appropriate foreign law. This view is open to even more serious objections. In the first place, it is arguing in a circle to say that the foreign law governs the process of characterization before the process of characterization has led to the selection of the foreign law. Secondly, if there are two potentially applicable foreign laws, why should the forum adopt the characterization of one rather than that of the other?

(*c*) According to a third view, the problem can be solved by distinguishing between primary characterization, a matter for the lex fori, and secondary characterization, a matter for the lex causae, the difference between them being that primary characterization precedes, and secondary characterization follows, the selection of the proper law. The objections to this theory are too numerous to mention here, but perhaps the chief one is that its advocates are not even approximately agreed on what for them is the crucial point, namely, where the line is to be drawn between primary and secondary characterization. It is significant that the author of this theory seems in substance to have abandoned it: see Dicey, pp. 68–70.

(*d*) A fourth view is that the process of characterization ought to be performed in accordance with the principles of analytical jurisprudence and comparative law. It is objected that there are very few principles of analytical jurisprudence and comparative law of universal application, and that judges are not learned in those subjects. The objection would appear to be largely one of terminology. If the theory were restated in terms that characterization should be performed in accordance with the dictates of common sense, the theory would appear to be free from objection. Common sense is a quality with which even the least learned English judge is liberally endowed.

(2) *Renvoi*

The nature of this problem can also best be understood from an example. Suppose a British subject dies intestate domiciled in Italy, leaving movables in England; and that by the English conflict of laws rule, succession to movables is governed by the law of the domicile (Italian law), but by the Italian conflict of laws rule, succession to movables is governed by the law of the nationality (English law). Which law, English or Italian, will regulate the distribution of the English movables? Three solutions have been suggested:

(*a*) *The internal law theory.* The English court should distribute the movables in accordance with domestic Italian law, disregarding the factors which render the situation a conflict of laws situation for the Italian court: that is, disregarding the British nationality of the intestate and the English situation of the movables. This theory has been recommended obiter by Russell J. in *Re Annesley* (*ante*, p. 6) and by Maugham J. in *Re Askew* (*ante*, p. 16), on the ground that it is 'simple and rational'.

(*b*) *The partial renvoi theory.* The English court should 'accept the renvoi' from Italian law and apply English domestic law, disregarding the Italian domicile of the intestate. This theory has been adopted in a number of celebrated continental cases (e.g. *L'Affaire Forgo*, 1883, and *L'Affaire Soulié*, 1910), but never by an English court.

(*c*) *The total renvoi theory.* The English court should decide the case as it would be decided by the Italian court: if for any reason that court would apply English domestic law, or if for any reason that court would apply Italian domestic law, the English court should do likewise. This theory was applied in *Re Annesley* (*ante*, p. 4), *Re Ross* (*ante*, p. 6), and *Re Askew* (*ante*, p. 10), and up to a point those cases are reinforced by a dictum of the Privy Council in *Kotia* v. *Nahas*, [1941] A.C. 403, 413, and by the decision of Wynn Parry J. in *Re Duke of Wellington*, [1947] Ch. 506; affirmed on other grounds, [1948]

Ch. 118. One has to add the qualification, because the Privy Council was sitting on appeal from a Palestine court and dealing with the Palestine, not the English, conflict of laws; and because no two writers are in agreement as to what the *Wellington* case decided, or even what the issue was in that case: see Mann, 11 Mod. L.R. 232; Falconbridge, 26 Can. Bar Rev. 467; Morris, 64 L.Q.R. 265; Jennings, 64 L.Q.R. 321.

How this theory works in practice can best be seen by comparing *Re Annesley* and *Re Ross*. In *Re Annesley*, the Judge looked first at French law (lex domicilii); finding that it referred to English law (lex patriae) and would accept the reference back to French law, he applied French law. In *Re Ross* the Judge looked first at Italian law (lex domicilii and lex situs); finding that it referred to English law (lex patriae) and would not accept the reference back to Italian law, he applied English law. All three cases printed above, and also *Re Wellington*, are vitiated by the fallacy that the national law of a British subject is English law, although it is obvious that 'British' law does not exist. This assumption is perhaps excusable in a foreign lawyer, but it is strange that an English court should base a decision on it. Other difficulties, too numerous to mention here, are discussed by the writers referred to above.

The crucial question is whether the English cases lay down a rule of universal application in the conflict of laws, or whether they must be confined to questions of succession, title to foreign land, and status. In view of the difficulties discussed by the writers, and the thousands of cases in which the foreign domestic law has been applied without reference to the foreign conflict of laws, the former would appear to be the preferable view. 'Much of the discussion of the renvoi doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected' (Dicey, p. 56).

CHAPTER III

PENAL LAWS

English Courts will not enforce the penal laws of foreign countries. What is a foreign penal law is a matter to be decided by the English Court.

HUNTINGTON v. ATTRILL.

HUNTINGTON *v.* ATTRILL, [1893] A.C. 150 (Privy Council)

THE judgment of their Lordships (Lords Halsbury, Watson, Bramwell, Hobhouse, Morris, and Shand) was delivered by

LORD WATSON: The appellant, in June, 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 611 of the State laws of 1875. Sect. 21 of the Act provides that: 'If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.'

The respondent was, in June, 1880, a director, and in that capacity an officer of the company within the meaning of the statute. On the 30th of that month he, along with other officers of the company, signed and verified on oath, as prescribed by sect. 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the appellant instituted a suit against the respondent before the Supreme Court of New York State for the unpaid balance of his loan to the company, alleging that the certificate contained representations which were material and false, and that the respondent had incurred personal responsibility for the debt as provided by sect. 21. The respondent defended the action; but, a verdict having been found against him, the court, on the 15th of June 1886, gave final judgment, ordering him to pay to the appellant the sum of $100,240.

Having failed to recover payment, the appellant, in September, 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal

character ought not to be entertained by the courts of a foreign state.

Mr. Justice Street, who tried the case, being of opinion that the enactments of sect. 21 were strictly punitive and not remedial, dismissed the action with costs. The judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the appellant as a creditor of the company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from giving effect to it for reasons which he thus explains: 'The courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed; but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here.' In the conclusion thus stated, Mr. Justice Maclennan expressed his concurrence. But the learned Judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was 'passed in the public interest, providing a punishment for an offence', and that 'it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts'.

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law

HUNTINGTON v. ATTRILL. — Lord Watson.

of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his 'Conflict of Laws', and by other text-writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase 'penal actions', which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well-known case (*Folliott* v. *Ogden* (1789), 1 H. Bl. 135, and *Ogden* v. *Folliott* (1790), 3 T.R. 734) and also by Chief Justice Marshall, who, in *The Antelope*, 10 Wheaton 123, thus stated the rule with no less brevity than force: 'The courts of no country execute the penal laws of another.' Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expres-

sions 'penal' and 'penalty', when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin* v. *The Pelican Insurance Company* (1888), 127 U.S. 265. By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the commissioner of insurance, an official entrusted with the administration of the Act in the public interest, one half of it being payable into the State Treasury, and the other to the commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the bench, Mr. Justice Gray, after referring to the text-books, and the dictum by Chief Justice Marshall already cited, went on to say: 'The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, *but to all suits in favour of the State* for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.'

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to

HUNTINGTON v. ATTRILL. — Lord Watson.

prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an actio popularis pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (sect. 18) to publish an annual report stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (sect. 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is that every director or officer who vouched its accuracy becomes, under sect. 21, liable personally for all the debts of the corporation contracted during his period of office.

The provisions of sect. 21 are in striking contrast to the enactments of sect. 34, which inflicts a penalty of $100 upon every director or officer of a corporation with limited liability, who authorizes or permits the omission of the word 'limited' from its seal, official publications, or business documents. In that case, the penalty is recoverable 'in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county'. It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

HUNTINGTON v. ATTRILL. — Lord Watson.

In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give 'a civil remedy only to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public'. In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors. . . .

Appeal allowed.

English courts will recognize a foreign decree confiscating property situated within the territory of the foreign country, even if it is later brought to England.

LUTHER v. SAGOR. — LUTHER v. SAGOR, [1921] 3 K.B. 532 (Court of Appeal)

The plaintiffs were a Russian company incorporated in Russia in 1898. They had a factory or mill at Staraja Russa in Russia where in 1919 they had a large stock of manufactured boards. On 20 June 1918 a confiscatory decree was signed by Lenin in the presence of the Council of People's Commissars purporting to vest in the Russian State the capital and assets of all mechanical saw-mills and all woodworking establishments belonging to private or limited companies. In January 1919 officials armed with authority from the Soviet Government took possession of the plaintiff's factory or mill at Staraja Russa and of the manufactured goods lying there. In August 1920 a contract was made in London between one Krassin, the representative of the Russian Commercial Delegation in London, and the defendants, an American firm carrying on business in London, whereby Krassin sold to the defendants a quantity of plywood including the boards seized by the officials as above stated. Under this contract the defendants obtained possession of the plywood boards and imported them into England.

The plaintiffs claimed a declaration that these goods were their property; an injunction restraining the defendants from dealing with the goods; and damages for conversion and detention thereof.

LUTHER v. SAGOR.

Roche J. found that His Majesty's Government had not recognized the Russian Soviet Government as the government of a sovereign state; he therefore gave judgment for the plaintiffs. The defendants appealed.

Before the hearing of the appeal the Foreign Office informed the defendants' solicitors that His Majesty's Government recognized the Soviet Government as the de facto Government of Russia.

BANKES L.J. (having held that the de facto recognition of the Soviet Government related back to the seizure of the plaintiffs' goods, continued): It is necessary now to deal with the point made by the respondents, that the decree of confiscation of June, 1918, even if made by the Government which is now recognized by His Majesty's Government as the de facto Government of Russia, is in its nature so immoral, and so contrary to the principles of justice as recognized by this country, that the courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the court is not one in which the assistance of the court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope* v. *Hope* (1857), 8 D.M. & G. 731, and *Kaufman* v. *Gerson*, [1904] 1 K.B. 591. The question before the court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under an f.o.b. contract for export to this country. The court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser dealing with the goods. I do not think that any authority can be produced to support the contention. Authority appears to negative it. (After quoting from *Santos* v. *Illidge* (1860), 8 C.B. N.S. 861, 876, his Lordship continued): The respondents' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognized sovereign state whose law conferred the title which is challenged. Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it

necessary to discuss the authorities to which our attention has been called. . . .

WARRINGTON L.J.: . . . Some reliance was placed by the respondents upon the principle enunciated in such cases as *Kaufman* v. *Gerson*, [1904] 1 K.B. 591, that the courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no such objection could be raised to it. In my opinion this principle has no application. The appellants are not seeking to enforce such a contract. They are resisting an endeavour on the part of the respondents to induce the court to ignore and override legislative and executive acts of the Government of Russia and its agents affecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do. . . .

SCRUTTON L.J.: An appeal to this court is a rehearing, and it has been frequently decided that the court must give the judgment which the judge below would have given had any retrospective statute, passed since the date of his judgment, been in force at that date. His Majesty's Government having in 1921 clearly recognized the Soviet Government as the de facto Government of Russia, the questions argued before us were (1) Whether that recognition extended back to August 14, 1920, when L. B. Krassin sold the goods in question to the defendants, or to June 20, 1918, when the decree nationalizing the factories was passed. This would include the question whether the government de facto on those dates was the same government as was recognized by the British Government in 1921, or a predecessor in title of that government; (2) whether, assuming that recognition to extend to the dates in question, yet the legislation in question in confiscating private property without compensation was so contrary to British moral and political ideas that the English courts would decline to recognize it, or to give effect to rights derived from it.

The principle of the immunity of foreign states from the jurisdiction of this country was stated by this court in *The Parlement Belge* (1880), 5 P.D. 197, 217: 'We are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state

LUTHER v. SAGOR. — Scrutton L.J.

to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.' On this question the case of *Vavasseur* v. *Krupp* (1878), 9 Ch. D. 351, is instructive. Shells alleged to infringe an English patent were landed in this country, but on the Mikado of Japan claiming the goods as the public property of his state the court ordered them to be released to him, without any inquiry whether in fact they infringed an English patent and so were, if found in England, liable to destruction. If M. Krassin had brought these goods with him into England, and declared on behalf of his Government that they were the property of the Russian Government, in my view no English court could investigate the truth of that statement. To do so would not be consistent with the comity of nations as between independent sovereign states. If by any misadventure the authorized representative of a sovereign state should claim property not really belonging to the state it appears to me that the remedy is by diplomatic means between states, not by legal proceedings against an independent sovereign. The case may be different where the sovereign state submits to the jurisdiction as plaintiff, and asks the court to use its remedies in favour of the plaintiff. But where the sovereign state is defendant I cannot conceive the courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property. In *Vavasseur* v. *Krupp* (1878), 9 Ch.D. 351, the Mikado, in joining as defendant, was held only to have done so in order more effectively to call the attention of the Court to the fact that inadvertently it had interfered by injunction with the property of a sovereign state. What the court cannot do directly it cannot in my view do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state. Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognize it as a sovereign state. Then the courts

could investigate the title without infringing the comity of nations. But it is impossible to recognize a government and yet claim to exercise jurisdiction over its person or property against its will. Further, the courts in questions whether a particular person or institution is a sovereign must be guided only by the statement of the sovereign on whose behalf they exercise jurisdiction. As was said by this court in *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, 158: 'When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive.' In the present case we have from the Foreign Office a recognition of the Soviet Republic in 1921 as the de facto Government, and a statement that in 1917 the Soviet authorities expelled the previous Government recognized by His Majesty. It appears to me that this binds us to recognize the decree of 1918 by a department of the Soviet Republic, and the sale in 1920 by the Soviet Republic of property claimed by them to be theirs under that decree, as acts of a sovereign state the validity of which cannot be questioned by the courts of this country, unless it is possible to do so for the second reason argued before us, incompatibility with the moral and political policy of the United Kingdom. . . .

It remains to consider the argument that the English courts should refuse to recognize the Soviet legislation and titles derived under it as confiscatory and unjust. This was based on the general principle stated by Mr. Dicey in his work on the Conflict of Laws (2nd ed. (1908), p. 33[1]) that 'English courts will not enforce a right otherwise duly acquired under the law of a foreign country . . . (B) where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political institutions'. When this is expanded later in the same work (at p. 36), the only head applicable to this case is (Inconsistency with) '*Morality*', i.e. as supported by English courts. There are very few instances in which this principle has been applied. Rights derived from a contract for the sale of slaves made in a country where such a sale is legal have been enforced by English courts: *Santos* v. *Illidge* (1860), 8 C.B. (N.S.) 861. Gaming debts incurred abroad where gaming is legal have been enforced here: *Quarrier* v. *Colston* (1842), 1 Ph. 147; though securities payable in England for gaming debts of the same character have not been enforced: *Moulis* v. *Owen*, [1907] 1 K.B. 746. Two cases in particular in

[1] Sixth edition, p. 17.

LUTHER v. SAGOR. — Scrutton L.J.

which English courts have ignored foreign law of which they disapproved, *Simpson* v. *Fogo* (1863), 1 H. & M. 195, 247, and *Kaufman* v. *Gerson*, [1904] 1 K.B. 591, have been the subject of considerable adverse comment. The former can perhaps be treated as a retaliation by English courts on foreign states whose tribunals refuse to recognize rights acquired by English law. The latter decision, in which English courts refused to recognize a contract validly made in France on the ground that it was contrary to English principles of morality, is adversely criticized by Mr. Dicey (Conflict of Laws, 2nd ed. (1908), App. Note 3, p. 727), who treats it as a mistaken application of the sound principle that English courts will not enforce foreign contracts, valid where made, where the court deems the contract to be in contravention of some essential principle of justice and morality. But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality'. Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. The English courts act on the rule 'that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms': *Central Control Board* v. *Cannon Brewery Co.*, [1919] A.C. 744, 752. If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the State more than half their income in income-tax and super-tax, and a large proportion of their capital in death duties, can hardly declare a foreign state immoral which considers (though we may think wrongly) that to vest individual property in the State as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.

Appeal allowed.

But English courts will not recognize a foreign decree purporting to confiscate property situated in England.

BANCO DE VIZCAYA *v.* DON ALFONSO DE BORBON Y AUSTRIA, [1935] 1 K.B. 140 (King's Bench Division)

Interpleader Issue.

Don Alfonso de Borbon y Austria, ex-King of Spain, brought an action against the Westminster Bank, Ltd., claiming the delivery up to him of £8,200 4 per cent. Victory bonds, and the certificates for 4,000 £1 shares in Trinidad Central Oilfields, Ltd. The bank claimed no interest in them but said that they were claimed by the Banco de Vizcaya, and this interpleader issue was ordered to be tried, the Banco de Vizcaya being plaintiffs and the ex-King of Spain defendant.

The securities in question had been purchased by the defendant with his own money, and were deposited with the Westminster Bank in London to the order of its Madrid branch as the defendant's agents. On 7 September 1923, the above branch being about to be closed, the defendant gave instructions that the London branch of the Westminster Bank should hold the securities to the order of the plaintiff bank, as the defendant's agents. On 13 May 1931, by a decree of the Spanish Republic, all the private property of the defendant in Spain was seized, and bankers established in Spain who had such property in deposit were ordered to deliver it up to the Spanish Treasury. On 25 November 1931, by a decree of the Constituent Cortes of Spain, the defendant was declared guilty of high treason and an outlaw and it was decreed that all his property, rights, and grounds of action should be seized for its own benefit by the Spanish State. In consequence the defendant on 25 April 1932 brought an action against the Westminster Bank, Ltd., in London, for the delivery up of the said securities held by them, which were also claimed by the plaintiffs, and this interpleader issue was ordered to be tried.

LAWRENCE J.: It is contended on behalf of the defendant that these decrees are penal laws of a foreign state and ought not to be recognized in an English court. In such circumstances the judgment of the Judicial Committee of the Privy Council in *Huntington* v. *Attrill* (*ante*, p. 20) lays down that I have to construe and apply an international rule and to determine, first, the substance of the right sought to be enforced, and in the second place whether its enforcement will directly or indirectly involve the execution of a penal law of another state.

In my judgment, the substance of the right sought to be enforced

BANCO DE VIZCAYA v. DON ALFONSO DE BORBON Y AUSTRIA. — Lawrence J.

by the plaintiffs is the delivery to them of the securities in question and the enforcement of this right will directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic. The plaintiffs' whole case is that they are bound by virtue of the decrees to hand over the securities to the Spanish Government in defiance of the mandate of the defendant, and, that being so, it seems to be unarguable that the enforcement of the plaintiffs' right will not directly or indirectly involve the execution of the decrees.

It was contended on behalf of the plaintiffs that, though the decrees may be penal, the plaintiffs' claim is not a penal action, because they are not asserting the right of the Spanish Government, but their own contractual right to the securities as against the Westminster Bank. I am unable to accept this contention. The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic. It is true, as is pointed out in *Huntington* v. *Attrill*, that some actions for penalties are not penal actions within the meaning of the above mentioned international rule—where, for instance, the penalties are not exigible by the State in the interest of the community, but by private persons in their own interest. But in the present case the penalty imposed is seizure by the State for its own benefit of all the defendant's properties, rights, and grounds of action, and this penalty is imposed in terms for high treason, and the only way in which the plaintiffs are able to assert their claim that they are entitled as against the defendant is by virtue of these decrees, and they are compelled to admit that they have no personal right or title to the property in the securities. In the words of Lord Loughborough in *Folliott* v. *Ogden* (1789), 1 H. Bl. 124, 135: 'The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.' These words have frequently been cited with approval, and in my judgment they are directly applicable to the present case. I therefore hold that H.M. Don Alfonso and not the plaintiffs is entitled to the securities in question. . . .

CHAPTER IV

DOMICILE

If a domicile of choice is abandoned, and a fresh domicile of choice is not acquired, the domicile of origin revives.

UDNY *v.* UDNY (1869), L.R. 1 Sc. & Div. 441 (House of Lords) UDNY v. UDNY.

APPEAL from the First Division of the Court of Session in Scotland.

Colonel Udny, of Udny in the county of Aberdeen, was born in 1779 at Leghorn (where his father was consul) with a Scottish domicile of origin. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married, retired from the Army, and took a leasehold house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and moved to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died.

Some time after the death of his wife Colonel Udny formed at Boulogne a connexion with Miss Ann Allatt, which resulted in the birth of a son (the respondent) in Surrey in 1853. Colonel Udny married Miss Ann Allatt at Ormiston in Scotland in 1854, and the question was whether the respondent had become legitimate per subsequens matrimonium.

The Court of Session decided that Colonel Udny's domicile of origin was Scottish, that he had never altered or lost it, notwithstanding his long absences from Scotland; and that therefore the respondent, though illegitimate at his birth, was legitimated by the subsequent marriage of his parents. Hence this appeal.

LORD WESTBURY: The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite

UDNY v. UDNY. — Lord Westbury.

different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate. This has been called the domicile of origin, and is involuntary. Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is sui juris it is competent to him to elect and assume another domicile, the continuance of which depends upon his will and act. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted animo et facto, in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as

the change of purpose, or animus manendi, can be inferred the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal; but it cannot be destroyed by the will and act of the party.

Domicile of choice, as it is gained animo et facto, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicile has animo et facto been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may, if he domiciles himself in Holland, acquire and have the status civilis of a Dutchman, which is of course ascribed to him in respect of his settled abode in the land, but if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity and, on the contrary, much reason, in holding that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicile of origin revives until a new domicile of choice be acquired. According to the dicta in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland, without acquiring a new domicile, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorized by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

UDNY v. UDNY. — Lord Westbury.

In Mr. Justice Story's Conflict of Laws (the last edition) it is stated that 'the moment the foreign domicile (that is the domicile of choice) is abandoned, the native domicile or domicile of origin is reacquired'. And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicile.

In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed, 'The result of the more recent English cases seems to be, that for a change of national domicile there must be a definite and effectual change of nationality.' In support of this proposition the editor refers to some words which appear to have fallen from a noble and learned lord in addressing this House in the case of *Moorhouse* v. *Lord* (1863), 10 H.L.C. 272, when in speaking of the acquisition of a French domicile, Lord Kingsdown says, 'A man must intend to become a Frenchman instead of an Englishman.' These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality, that is, of natural allegiance. That would be to confound the political and civil states of an individual, and to destroy the difference between patria and domicilium.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udny, the consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicile. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that when Colonel Udny married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicile. But if he did so, he as certainly relinquished that English domicile in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the pur-

pose of residence. If, therefore, he acquired an English domicile he abandoned it absolutely animo et facto. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicile of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicile. UDNY v. UDNY. Lord Westbury.

LORDS HATHERLEY, CHELMSFORD, and COLONSAY delivered judgment to the same effect.

Appeal dismissed.

A domicile of origin is retained until a new domicile of choice is acquired. A domicile of origin cannot be lost by mere abandonment.

BELL *v.* KENNEDY (1868), L.R. 1 Sc. & Div. 307 (House of Lords) BELL v. KENNEDY.

Appeal from the Second Division of the Court of Session in Scotland.

Mr. Bell was born in Jamaica of Scottish parents domiciled in Jamaica. He was educated in Scotland but returned to Jamaica in 1823 soon after attaining his majority. In 1828 he married in Jamaica. In April 1837 he left Jamaica for good and went to Scotland, where he lived with his mother-in-law and looked around for an estate on which to settle down. Owing to the bad weather and to the high price of land he became dissatisfied with Scotland and undecided whether to settle there or in England or the south of France. In September 1838 his wife died and the question was: Where was he domiciled on that date? The Second Division of the Court of Session held that he had become domiciled in Scotland.

LORD WESTBURY: What appears to me to be the erroneous conclusion at which the Court of Session arrived is in great part due to the circumstance, frequently lost sight of, that the domicile of origin adheres until a new domicile is acquired. In the argument, and in the judgments, we find constantly the phrase used that he had abandoned his native domicile. That domicile appears to have been regarded as if it had been lost by the abandonment of his residence in Jamaica. Now, residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may

BELL v. KENNEDY. — Lord Westbury.

be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicile. Domicile, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now this case was argued at the Bar on the footing, that as soon as Mr. Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the animus of the party clearly demonstrated, and the factum, which alone would remain to be proved, would in fact be proved, or, at least, would result immediately upon his arrival in Scotland.

The true inquiry, therefore, is—Had he this settled purpose, the moment he left Jamaica, or in course of the voyage, of taking up a fixed and settled abode in Scotland? Undoubtedly, part of the evidence is the external act of the party; but the only external act we have here is the going down with his wife to Edinburgh, the most natural thing in the world, to visit his wife's relations. We find him residing in Scotland from that time; but with what animus or intention his residence continued there we have yet to ascertain. For although residence may be some small primâ facie proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation.

I take it that Mr. Bell may be more properly described by words which occur in the Digest; that when he left Jamaica he might be described as *quaerens, quo se conferat, atque ubi constituat domicilium* (Dig. lib. 50, t. 1, 27). Where he was to fix his habitation was to him at that time a thing perfectly unresolved; and, as appears from the letters which your Lordships have heard, that irresolution, that want of settled fixity of purpose, certainly continued down to the time when he actually became the purchaser of Enterkine. But the punctum temporis to which our inquiries are to be directed as to Mr. Bell's intention is of an earlier date than that. The question is, had he any settled fixed intention of being permanently resident in Scotland on the 28th of September, 1838? I quite agree with an observation which was made in the Court of Session, that the letters are the best evidence in the case. To those letters your Lordships' attention has been directed, and whether you refer to the language of the wife's

BELL v. KENNEDY. — Lord Westbury.

letters, or look exclusively at the language of the husband's letters written to his familiar friends or his relatives whom he had left in Jamaica, it is impossible to predicate of him that he was a man who had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home. And unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues. And therefore I think we can have no hesitation in answering the question where he was settled on the 28th of September. It must be answered in this way; he was resident in Scotland, but without the animus manendi, and therefore he still retained his domicile of origin.

LORDS CAIRNS, CRANWORTH, CHELMSFORD, and COLONSAY delivered judgment to the same effect.

Appeal allowed.

Stronger evidence is required to prove the abandonment of a domicile of origin than the abandonment of a domicile of choice.

RAMSAY *v.* LIVERPOOL ROYAL INFIRMARY, [1930] A.C. 588 (House of Lords)

RAMSAY v. LIVERPOOL ROYAL INFIRMARY.

Appeal against an interlocutor of the First Division of the Court of Session in Scotland affirming an interlocutor of the Lord Ordinary (Lord Mackay).

George Bowie, whose domicile of origin was Scottish, but who had lived the latter part of his life in Liverpool, died in Liverpool on 5 November 1927, leaving a holograph will dated 7 August 1927, which was valid by the law of Scotland but was not valid by the law of England.

This action was brought by the respondents, the residuary legatees under the will, against the appellant, the testator's sole next of kin, for a declaration that the testator's domicile at the date of his death was Scottish.

The Lord Ordinary held that the defender had failed to prove that the testator had changed his domicile and granted the declaration, and the First Division (the Lord President, Lord Blackburn (doubting but not formally dissenting), and Lord Morison) affirmed his decision.

LORD THANKERTON: My Lords, the deceased George Bowie died in Liverpool, on November 5, 1927, aged 82 years and unmarried.

RAMSAY v. LIVERPOOL ROYAL INFIRMARY. — Lord Thankerton.

Originally employed as a commercial traveller in Glasgow, he gave up that employment about 1882, and did no work for the rest of his life. About 1891 or 1892 he came to Liverpool, where a brother and sister were already settled, and resided in Liverpool for the remaining thirty-five or thirty-six years of his life. His domicile of origin was Scottish, and the question in the present appeal is whether he still retained that domicile at his death, or was then domiciled in England.

George Bowie left a holograph will, which was made by him in Liverpool, on August 7, 1927. That will is valid according to Scottish law and invalid under English law. The appellant, as next of kin, maintains that George Bowie died domiciled in England and that the will is invalid. The respondents are the residuary legatees under the will, and maintain its validity on the ground that George Bowie retained his Scottish domicile.

Admittedly the appellant undertakes the burden of proving that George Bowie acquired an English domicile animo et facto; his long residence established the factum, but there remains the question of the animus. It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the animus; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-retention of any home in the domicile of origin, might be sufficient to prove the intention to acquire a new domicile. But the long residence of George Bowie in Liverpool is remarkably colourless and suggests little more than inanition.

George Bowie went to Liverpool to live on the bounty of his brother Alexander, and, during his residence there, his means of existence were supplied by that brother and his sister Isabella. He received a legacy of 1000*l.* from the former and succeeded to the latter's whole estate on her death in 1920. He lived in lodgings until 1914, when he went to live with his sister Isabella, then the only other surviving member of the family, in a leased house, where he lived till his death. With the exception of family ties, he appears to have had few, if indeed any, ties either in Scotland or England.

Apart from residence, the evidence bearing on animus is vague and indecisive. It is not certain whether he knew that his will would be invalid in England, but he named his cousin, a Glasgow writer, as trustee, and he directed that his residuary bequests, of one-fourth each to three Glasgow infirmaries and one Liverpool infirmary, should be given anonymously as from a 'Glasgow Man'. He told

people that he was proud to be a Glasgow man, and received a Glasgow weekly newspaper. With his sister Isabella's estate he became owner of a tenement property in Glasgow, which he desired to sell, but a bad market prevented its sale, and he retained it till his death. There is some evidence of his declining on one or two occasions to move to Glasgow and to visit Glasgow, but until 1912 he was dependent on his brother's bounty, and after 1912 it is probable that his disinclination was owing to the inertness of age and indifferent health. He was buried in Liverpool, but that was alongside of his brother Alexander and three sisters in ground for which Alexander had paid.

I am unable to find in this case sufficient evidence of a definite intention on the part of George Bowie to abandon his domicile of origin and to acquire a new domicile. The law on this subject is well fixed; the difficulty is found in its application to oft varying combinations of circumstances. The present case appears to me to be directly affected by the opinions (*a*) of Lord Westbury in *Bell* v. *Kennedy* (*ante*, p. 38), where he says: 'Although residence may be some small prima facie proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation'; (*b*) of Lord Chelmsford in *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441, 455, that 'in a competition between a domicile of origin and an alleged subsequently-acquired domicile there may be circumstances to shew that however long a residence may have continued no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile'; and (*c*) of Lord Macnaghten in *Winans* v. *Attorney-General*, [1904] A.C. 287, 291, where he states: 'Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other.' This last opinion appears to apply exactly to the circumstances of George Bowie's residence in Liverpool.

Accordingly, I am of opinion that the appellant has failed to prove the intention on the part of George Bowie to acquire an English domicile, and that the appeal fails.

RAMSAY v. LIVERPOOL ROYAL INFIRMARY.

LORDS BUCKMASTER, DUNEDIN, and MACMILLAN delivered judgment to the same effect.

Appeal dismissed.

After the death of his father an infant acquires the domicile of his mother; but his domicile does not necessarily continue to follow hers.

In re BEAUMONT.

In re BEAUMONT, [1893] 3 Ch. 490 (Chancery Division)

Mrs. Beaumont was a widow domiciled in Scotland with four infant children. In 1834 she married a domiciled Scotsman who went to London and became domiciled there in 1835. Shortly after his arrival his wife joined him with all her children except Catherine, who was left in Scotland under the care of an aunt, and lived in Scotland except for occasional visits to her mother in England. Catherine was born in 1819 and died in Scotland in 1841 and the question was what was her domicile at the date of her death.

STIRLING J.: This petition raises a question of some interest upon the subject of domicile. The facts are few and undisputed. [His Lordship then referred to the facts of the case, and continued:—]

In *Potinger* v. *Wightman* (1817), 3 Mer. 67, it was held that where the widow of a person domiciled in Guernsey brought her children to England after her husband's death, and herself gained a domicile in England, the domicile of the children became English likewise. . . .

Potinger v. *Wightman* is the only authority on the point; but it does not cover the present case in two respects—first, there the change of domicile took place, as I understand the facts, before the second marriage of the widow; and, secondly, the children were taken by the widow from the old to the new place of domicile.

Sir W. Grant based his decision on the authority of Voet, Bynkershoek, and Pothier. It appears from the extract from Pothier, that in the opinion of that jurist the power of the mother to change the domicile of the children is confined to her widowhood. The like view is expressed by Mr. Burge. He says (Burge's Colonial Law, vol. i, p. 39): 'It is, however, only during the mother's widowhood that she could change the domicile of her infant.'

The law is thus stated in the American case of *Ryall* v. *Kennedy*, 40 New York (Sup. Ct.) 347: 'The domicile of an infant follows that of its father. If the father dies it follows, in the absence of fraud, that of its mother until such time as the mother remarries, when, by reason of her own domicile becoming subordinate to that of her hus-

band, that of the infant ceases to follow any further change by the mother, or, in other words, it does not follow that of its stepfather.' This appears, however, to have been in the nature of a dictum not necessary for the decision of the case.

In re BEAUMONT. — Stirling J.

There is another American case in which the point seems to have arisen for decision—*Brown* v. *Lynch* (1852), 2 Bradf. Surrogate Rep. (N.Y.) 214. The headnote in that case is this: 'The mother, after the father's death, may change the domicile of her children, provided it be without fraudulent views to the succession of the estate. The domicile of the children does not necessarily follow that of the surviving mother; for, although changing her own, she may, from wise motives, refuse to alter that of the child. The presumption, however, is, that their domicile follows hers. But this rule does not obtain on the second marriage of the mother. By that act she acquires the domicile of her husband, and loses all power to control that of her children.'

In the judgment there is this passage: 'But she marries again, and leaves Hartford to reside at New York with her husband. It is a universal maxim that the wife takes the domicile of the husband. But was the residence of the minor changed by that act? In the first place, if it were true that the domicile of the minor follows that of the surviving mother, *on her second marriage*, it seems to me plain that it is not a matter of legal necessity. The mother is not *compelled* to change the residence of her child. She may, from wise and prudential motives respecting the comfort, happiness, or education of her offspring, determine not to change his residence. And if such determination be evinced and acted upon, the inference that might be drawn, that the domicile of the child followed that of the parent, is rebutted and destroyed. The ordinary presumption of law (if it existed in such a case) would give way before express and positive acts subversive of all inferences and presumptions. If, while the mother continues in her widowhood, it is within the scope of the parental authority, when she changes her own domicile, not to change that of her child, the moral reasons for such a power would be much stronger in the event of a second marriage, supposing she still retained any capacity to effect a change of her own domicile. But she does not. By the act of marriage she takes the domicile of the husband; and to hold that the domicile of the child is drawn after hers, would be to establish an arbitrary train of sequences unsupported by reason. The mother subjects herself to the control of another husband, and adopts his home; and when she ceases to occupy an independent position as the head

In re BEAUMONT. — Stirling J.

of the family, she cannot delegate to another a personal trust residing in her for the welfare of her children. I have no hesitation in saying that the proposition is unsound, which maintains as a necessary legal consequence that the domicile of the child follows that of the stepfather.'

In the present case, Catherine Beaumont's domicile of origin was Scotch. Her residence was in Scotland from her birth to her death, the only exception being the occasional temporary visits to her mother in England referred to in the evidence. She lived nine months after attaining twenty-one, and still remained in Scotland. Under these circumstances she retained her domicile of origin, unless the law be that the domicile of an infant whose father is dead necessarily follows that of the mother. Even so, the continued residence of Catherine Beaumont in Scotland after she attained twenty-one would be evidence of an intention on her part to reside there permanently; but without further information as to the facts, I am not quite satisfied that the case ought to be decided on that ground. There is a considerable weight of authority for the proposition that where the mother of infant children remarries, their domicile ceases to follow hers: if that be so, then the domicile of Catherine Beaumont remained Scotch. I think, however, that the better view is that the change in the domicile of an infant which, as is shewn by the decision in *Potinger* v. *Wightman*, may follow from a change of domicile on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising, even when she changes her own domicile.

In the present case, I think the mother abstained from exercising this power. Catherine Beaumont was not left in Scotland for any temporary purpose, such as education; upon the evidence her home was there with her aunt, not in England with her mother. In my opinion, therefore, her domicile was Scotch.

During the subsistence of a marriage the domicile of the husband is necessarily that of the wife.

LORD ADVOCATE *v.* JAFFREY.

LORD ADVOCATE *v.* JAFFREY, [1921] 1 A.C. 146 (House of Lords)

Appeal from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary.

The question raised by this appeal was as to the domicile of the late Mrs. Isabella Henderson Mackinnon, the wife of the late Robert Mackinnon.

Mrs. Mackinnon was married on 26 June 1878 to Robert Mackinnon, who was born in Campbeltown, Argyllshire, and was at the time of his marriage a Chief Quartermaster in the Navy. He retired from the Navy with the rank of Chief Petty Officer in October 1886. From that time he resided with his wife in Aberdeen until 1893. In 1893, owing to his drunken and dissipated habits, it was arranged, at the instance of his wife, that Mackinnon should leave Scotland for Australia, and his passage out was paid by his wife's mother. He landed in Sydney and remained for a time in New South Wales, but some time before July 1902 he went to Queensland and resided in Brisbane until his death on 7 January 1918. On 2 July 1902 he went through a form of bigamous marriage with a woman named Wilhelmina Bennett, with whom he lived until his death, and by whom he had two children. Mackinnon was engaged in casual work, but his main source of income was from the pension which he drew from the Admiralty. After his departure from Scotland no communication passed between him and his wife.

In 1915 Mrs. Mackinnon, who continued to live in Aberdeen, raised an action of divorce against her husband in the Court of Session on the grounds of desertion and adultery, but the action fell in consequence of her death, which occurred on 9 September 1915.

In these circumstances two questions arose: (1) Whether at the date of Mrs. Mackinnon's death Robert Mackinnon had acquired a domicile in Queensland, and (2) if so, whether Mrs. Mackinnon had a derivative domicile in Queensland by virtue of the marriage still subsisting between them.

The Lord Ordinary (Lord Ormidale) was of opinion (1) that Mackinnon had abandoned his Scottish domicile and had acquired a domicile in Queensland, but (2) that in the special circumstances of the case his wife's domicile remained Scottish. The First Division (Lord Mackenzie, Lord Skerrington, and Lord Cullen) unanimously affirmed the opinion of the Lord Ordinary upon the first point, but (Lord Mackenzie dissenting) reversed his decision upon the second point and held that the wife's domicile was also in Queensland.

LORD DUNEDIN: My Lords, all the learned judges of the Court of Session came to the conclusion that Mackinnon at the time of Mrs.

LORD ADVOCATE v. JAFFREY. — Lord Dunedin.

Mackinnon's death had acquired a domicile in Queensland. From this conclusion I am not prepared to differ. It is a question of fact, and I am satisfied that their Lordships approached that question of fact in full recognition of the onus lying upon any one who asserts that a domicile of origin has been abandoned; a doctrine laid down in many cases, and particularly by this House in the cases of *Cunliffe Brooks*, [1906] A.C. 56, and *Winans*, [1904] A.C. 287. Now that the domicile of the wife is that of the husband, and follows any change which he makes, even though she is not de facto resident with him, is acknowledged law and not controverted by the appellant. His only argument is that there is an exception to this general rule when the circumstances are such that a wife, had she chosen, would have been entitled to divorce or at least to judicial separation. The actual case of divorce need not be considered for if there is divorce the foundation of the rule is gone. She has no longer a husband and she could not therefore be bound by the changes of domicile of a person to whom she is connected by no family tie.

The sheet anchor of the appellant's argument is a certain dictum of Lord Cranworth in the case of *Dolphin* v. *Robins* (1859), 7 H.L.C. 390. In that case, Mrs. Dolphin, the wife of a domiciled Englishman, had obtained a decree of divorce in the Scottish courts on the ground of adultery against her husband who, at that time, was temporarily resident in Scotland. She had then gone to France where she had gone through the ceremony of marriage with a Frenchman. The question in the case was whether Mrs. Dolphin on her death was, by domicile, an Englishwoman or a Frenchwoman. This House first decided that the Scottish decree of divorce was null for want of jurisdiction, no courts having a power to divorce a vinculo except the courts of the country of the domiciled husband, a view followed long after in the case of *Le Mesurier* (*post*, p. 100); and then put the question for argument, 'whether the circumstances are such as to render the wife capable of gaining for herself a domicile, and if so, did she do it?' The noble and learned Lords unanimously held that, the null decree of divorce being in no sense equivalent to a decree of separation, Mrs. Dolphin remained a married woman not separated from her husband by judicial decree, and therefore incapable of acquiring a different domicile from that of her husband.

My Lords, I confess I think that decision rules this case, and with great deference to Lord Cranworth I cannot hold his remarks as free from the criticism of self-contradiction. Having indicated a doubt as

to whether, if there was a decree of judicial separation, the wife might not have acquired a domicile different from that of her husband—nay, having almost expressed his preference for the view that she might, he proceeds as follows (7 H.L.C. 417, 418): 'On this question it is unnecessary, and it would be improper, to pronounce an opinion, for here there was no judicial sentence of divorce a mensa et thoro, no decree enabling the wife to quit her husband's home and live separate from him. I have adverted to the point only for the purpose of pointing out, that the conclusion at which I have arrived in the case now under discussion would afford no precedent in the case of a wife judicially separated from her husband. For, whatever might have been the case if such a decree had been pronounced, I am clearly of opinion that, without such a decree, it must be considered that the marital rights remain unimpaired.' He then goes on to say, and it is on these words that the appellants found: 'Before quitting the subject, I should add, that there may be exceptional cases to which, even without judicial separation, the general rule would not apply, as, for instance, where the husband has abjured the realm, has deserted his wife, and established himself permanently in a foreign country, or has committed felony and been transported.' My Lords, I cannot reconcile these words with the plain sentence 'without such a decree the marital rights remain unimpaired'. Lord Kingsdown has carefully withheld his assent to the idea that even a judicial separation would be sufficient. He does not give a decisive opinion, and I think, considering the importance of the subject, it will be well that we should follow his example, and wait till the circumstance arises. It is true that in *Le Sueur* (1876), 1 P.D. 139, Sir R. Phillimore puts into effect the suggestion of Lord Cranworth. Against that may be put the decision of Sir Cresswell Cresswell in *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574, 584, where he said: 'The domicile of the husband is the domicile of the wife; and even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicile for herself.' He adds: 'As was recently held by the House of Lords in *Dolphin* v. *Robins*', which shows that the learned judge took the same view of that case as I do. The practical consequences of the other view would be, I think, extremely inconvenient. In the present case, it is left in doubt at what precise date the husband acquired his Australian domicile. It may well have been before the adultery was committed. Assuming it was

LORD ADVOCATE v. JAFFREY. — Lord Dunedin.

so, it seems impossible to suppose that a supervening adultery would alter the wife's domicile. There would therefore have to be inquiry as to the precise date. In other cases there may be allegations of adultery of dubious proof; and finally, as was ingeniously, but I think soundly, argued by Mr. Moncrieff, if the wife under this doctrine is entitled to assert a different domicile from that of her husband, it would induce great difficulty in carrying out the views in *Le Mesurier's Case*, for, if either spouse wished a divorce a vinculo, which would be the court which would be empowered to grant it?

My Lords, I think the only safe course is to keep close to the well-established rule that the domicile of a husband and wife, undivorced and unseparated, is one and the same, and I am therefore of opinion that this appeal fails.

LORDS FINLAY, CAVE, and SHAW delivered judgment to the same effect.

Appeal dismissed.

A.G. FOR ALBERTA v. COOK.

ATTORNEY-GENERAL FOR ALBERTA *v.* COOK, [1926] A.C. 444
(Privy Council)

Appeal from a judgment of the Supreme Court of Alberta reversing a judgment of Walsh J.

In November 1921 the respondent obtained in Alberta a decree of judicial separation from her husband, both spouses being at that time resident in Alberta.

In 1922 the respondent instituted in Alberta a suit for divorce on the ground of adultery and cruelty; she obtained an order for substituted service on her husband.

Walsh J. found that the husband had not lost his domicile of origin in Ontario. He dismissed the suit on the ground that the court had no jurisdiction, as the wife was not competent to acquire a domicile separate from that of her husband.

The Appellate Division allowed the wife's appeal and made a decree dissolving the marriage.

The judgment of their Lordships (Lords Cave L.C., Haldane, Dunedin, Shaw, Phillimore, Blanesburgh, and Merrivale) was delivered by

LORD MERRIVALE: . . . The competency of the wife's suit for divorce depends, first, upon her power during her marriage to acquire

domicile in Alberta, her husband not being domiciled there, and, secondly, upon the jurisdiction of the Supreme Court of Alberta at her instance to change the matrimonial status of her husband. . . .

Propositions of law in respect of domicile were advanced on the respondent's behalf to this effect: that the identity of the domicile of a wife with that of her husband is a legal fiction or presumption of law; that domicile depends upon the capacity in law of individuals to choose a permanent home; and that when this capacity exists in a wife by reason of judicial separation, and has in fact been exercised, the rights arising from domicile result in her favour. The mode of giving effect to such rights must, it was argued, be matter of procedure for the tribunals of the State within which domicile has been gained. A separate contention was raised upon the construction of the statute, the Matrimonial Causes Act, 1857, under which the separation here in question was decreed.

The contention that husband and wife may be domiciled apart and may resort to different jurisdictions and different codes of law to seek thereunder dissolution of the marriage between them appears to challenge directly the rule laid down in *Le Mesurier* v. *Le Mesurier* (*post*, p. 100) in 1895, and affirmed in the House of Lords in *Lord Advocate* v. *Jaffrey* (*ante*, p. 49), that matrimonial status is governed by the law of domicile of the parties. In the former case the rule was stated by Lord Watson to be that 'the domicile for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage'. In the latter it was epitomized by Lord Haldane in these words: 'Nothing short of a full juridical domicile within its jurisdiction can justify a British Court in pronouncing a decree of divorce.' Both pronouncements are declaredly founded on a principle which was stated in the judgment of Lord Penzance in *Wilson* v. *Wilson* (1872), L.R. 2 P. & M. 435, 442: 'The differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws.' The decision in *Le Mesurier* v. *Le Mesurier* does not deal with the case of spouses judicially separated, and that case is expressly reserved for future decision in the opinions of the noble and learned Lords who decided *Lord Advocate* v. *Jaffrey*. The judgment delivered by Lord Watson in *Le Mesurier's Case*, however, brings inevitably into view the fact that divorce obtainable under different systems of municipal law by spouses living in separate jurisdictions is irreconcilable with the existence of any axiom in

A.-G. FOR ALBERTA v. COOK. — Lord Merrivale.

private international law that there is in the case of every marriage one sole jurisdiction in which dissolution of the marriage tie can be decreed.

It was common ground in this case that the rule propounded on behalf of the respondent has not been heretofore laid down by any express judicial decision which binds this Board. The decision under appeal was arrived at upon examination of conflicting opinions, some of them declared by distinguished judicial persons, and others expressed by eminent jurists. These opinions have received the consideration to which they are entitled. . . .

Underlying the English rule as to a wife's domicile is a principle of the common law, uniformly declared during six centuries before 1857, and not dependent upon any maxim of the civilians, whatever may have been its origin. Four citations may be made, which set forth this rule: 'Vir et uxor sunt quasi unica persona' (Bracton, De Legibus, lib. v, c. 25, s. 10); 'Le baron et sa feme ne sont forsque un person en ley' (Littleton, Tenures, s. X, 168, 291); 'The husband and wife are one person in the law' (Coke, Institutes I. 112a); 'By marriage husband and wife are one person in law' (Blackstone, Commentaries I. 442).

The rule thus declared was not a fiction or presumption which, within the competence of the tribunals concerned, might control procedure, but must be disregarded upon questions of substantive right. It was of unquestioned operation under the common law to an extent which is only partially indicated by the instances comprised under the title Baron and Feme in the 'Table' annexed to Coke's First Institute. By this rule the wife's property was disposed of and her jurisdictional status ascertained, and it determined her situation as to domicile. . . .

Singular anomalies must arise in respect of the causes for divorce—strictly limited and carefully defined in the Act of 1857—if upon the true construction of the clauses relating to judicial separation a wife who is judicially separated is thereby qualified to choose an independent domicile. A husband may be, and sometimes has been, a suitor for judicial separation for cruelty or for adultery. Assuming ss. 25 and 26 to have the suggested effect with regard to domicile, it would seem to follow that a guilty wife judicially separated may by virtue of domicile acquired in a foreign jurisdiction become entitled to cite her husband to answer there a suit for divorce upon grounds sufficient by the local law but unknown in the law of his domicile. The marriage

of British subjects would thus become liable to dissolution by authority to which they owe no obedience.

The contention that a wife judicially separated from her husband is given choice of a new domicile is contrary to the general principle on which the unity of domicile of the married pair depends; divorce a mensa et thoro gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose.

Under British law one of the effects of marriage is to give to the spouses a common domicile—the domicile of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases actor sequitur forum rei. This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier* v. *Le Mesurier*.

Appeal allowed.

NOTE B: THE DOMICILE OF MARRIED WOMEN

Lord Advocate v. *Jaffrey* (*ante*, p. 44) and *A.-G. for Alberta* v. *Cook* (*ante*, p. 48) have settled that in no circumstances can a married woman have a domicile different from that of her husband. The cases have been severely criticized, especially by Canadian writers: see Read, pp. 202–16; Willis, 14 Can. Bar Rev. 7; and Falconbridge, pp. 667–8. They seem to run counter to all modern ideas of sex equality and to be based on the notions of a past age (see the amazing citations from Bracton, Littleton, Coke, and Blackstone, *ante*, p. 50). In divorce they have produced a total denial of justice to deserted wives, and have had to be reversed by legislation (*post*, p. 103). Since the middle of the nineteenth century American courts have held that, at least for some purposes (and this includes divorce), a married woman may acquire or retain a domicile different from that of her husband.

Since the decision of the Court of Appeal in *De Reneville* v. *De Reneville*, [1948] P. 100 (*post*, p. 126), it has been possible to formulate more precise rules as to the domicile of women whose marriages are void or voidable. If the marriage is voidable, the domicile of the woman is, by operation of law, the same as that of the man until the marriage is annulled by the decree of a court of competent jurisdiction. This is quite logical, for until the marriage is annulled the marriage is valid and produces the usual legal consequences of marriage. On the other hand, if the marriage is void, the ceremony produces no legal consequences whatever, and therefore the woman does not as a matter of law acquire the domicile of the man. She may of course do so as a matter of fact if she lives with him for a substantial period in the country of his domicile (as in *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641, *post*, p. 109),

just as a mistress may acquire the domicile of the man with whom she lives (as in *Re Luck's Settlement Trusts*, [1940] Ch. 864, *post*, p. 166). But if the woman never lives with the man in the country of his domicile (as in *Ogden* v. *Ogden*, [1908] P. 46, *post*, p. 59), or only for a short period, (as in *Mehta* v. *Mehta*, [1945] 2 All E.R. 690, and *MacDougall* v. *Chitnavis*, [1937] S.C. 390), she does not acquire his domicile: and dicta to the contrary in *Ogden* v. *Ogden* (*post*, p. 59) and *Salvesen's Case* (*post*, p. 118) must now be regarded as overruled. It is not possible to specify for how long the woman must have lived with the man in the country of his domicile in order to acquire his domicile. In *Salvesen's Case*, 26 years' residence was held to have this effect; in *MacDougall* v. *Chitnavis*, 3 years' residence did not. It is, however, a question which depends on the facts of each particular case.

If the reason why the marriage is void is that the woman is already married to someone else, then so long as her first husband is alive she will not acquire the domicile of the man with whom she went through the second ceremony, no matter how long she lives with him in the country of his domicile: *Re Cooke's Trusts* (1887), 56 L.T. 737.

PART II
FAMILY LAW

CHAPTER I
MARRIAGE

Section A: FORMALITIES

The formalities of marriage are governed by the lex loci celebrationis.

SIMONIN *v.* MALLAC (1860), 2 Sw. & Tr. 67 (Divorce Court)

WOMAN'S petition for nullity of marriage.

The petitioner, Valérie Simonin, a French subject domiciled in France, then aged 22, was married to the respondent, Leon Mallac, a French subject domiciled in France, then aged 29, at the parish church of St. Martin-in-the-Fields, London, on 21 June 1854. Two days after the ceremony the petitioner and respondent returned to Paris, but the marriage was never consummated. On 1 December 1854 the Civil Tribunal of First Instance of the Seine, sitting at Paris, declared the marriage null and void at the suit of the petitioner on the ground that the parties did not have the consent of their parents as required by French law, and in particular by Articles 148, 151, 152, and 170 of the French Civil Code, which provided as follows:

Article 148: The son who has not attained the full age of 25 years, the daughter who has not attained the full age of 21 years, cannot contract marriage without the consent of their father and mother.

Article 151: Where the children of a family have attained the majority fixed by article 148, they are required previously to contracting marriage to demand by a respectful and formal act the consent of their father and mother.

Article 152: From the majority fixed by article 148 until the age of 30 years completed for sons, and until the age of 25 years completed for daughters, the respectful act required by the preceding article, and on which consent to marriage shall not have been obtained, shall be twice more renewed from month to month; and one month after the third act it shall be lawful to proceed with the celebration of the marriage.

Article 170: A marriage contracted in a foreign country between natives of France and between a native of France and a foreigner

SIMONIN v. MALLAC.

shall be valid if celebrated according to the forms used in that country, provided that it has been preceded by the publications prescribed in article 63, under the title 'Of acts of the civil power', and that the Frenchman has not infringed the regulations contained in the preceding chapter.

In May 1857 the petitioner and her mother came to England, and she stated that she had no intention of returning to France, and had no property there. The petition for nullity was dated 23 December 1858; it set out the facts stated above, including the French decree. The citation and copy petition were served personally on the respondent at Naples, but he put in no answer and did not appear.

THE JUDGE ORDINARY (Sir Cresswell Cresswell) (after stating the facts, continued):

This state of facts presented two very important questions for our consideration: first, whether the court has any jurisdiction over Leon Mallac, the party cited; and, secondly, assuming that such jurisdiction exists, whether, according to the law of this country, the marriage solemnized is to be held null and void. We had the advantage of a learned argument on the part of the petitioner, and feel that the responsibility cast upon the court is greatly increased by the want of any such assistance on the other side. The argument in favour of the jurisdiction was rested on the ground, first, that the contract was made in England, and that the court is called upon for its decision with regard to the effect of a civil and religious English contract, celebrated under an English statute, 4 Geo. IV. c. 76, and that the tribunals loci contractûs have, generally speaking, cognisance of the contract; secondly, that England is now the domicile of the petitioner, but that objection begs the main question in dispute, for if the marriage be valid it is not her domicile; thirdly, that the respondent was personally served with the citation and petition, and has not appeared to contest the jurisdiction of the court.

The 42nd section of the statute 20 & 21 Vict. c. 85, by which this court was established, removes all objection on the ground of the citation having been served without Her Majesty's dominions, but in our opinion would not of itself suffice to give to the court authority to decide upon the rights of a party not otherwise subject to its jurisdiction. This question therefore depends upon the first proposition, that the parties, by professing to enter into a contract in England, mutually gave to each other the right to have the force

and effect of that contract determined by an English tribunal. The Common Law Procedure Act, 1852, s. 19, which allows a writ of summons to be issued against a person residing out of the jurisdiction, and not being a British subject, and proceedings to be had thereon, notice of such writ having been served on the party, appears to have been founded on this principle; and sect. 42 of the Matrimonial Causes Act, 1857, already adverted to, removes all difficulty as to service of process, although the party cited is a foreigner by origin and domicile. There is nothing contrary to natural justice in calling upon him to have the validity or invalidity of a supposed contract ascertained and determined by the tribunal of the country where it was entered into by him; for according to Lord Stowell, in *Dalrymple* v. *Dalrymple* (1811), 2 Hagg. Con. 61, it is an indisputable rule of law, as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party.

We think, therefore, that this court is competent to entertain the present suit, and to adjudicate upon this petition presented by the party calling herself Valérie Simonin, which prays the court to decree that the pretended form or ceremony of marriage had between the petitioner and Leon Mallac was and is void, and of no effect in law whatsoever.

This, which is the second question to be determined, is no doubt of the gravest importance, and, as far as this court has been able to ascertain, primæ impressionis. No decision on the point was cited to us by the learned advocate for the petitioner, and we have not had the benefit of any other diligence save our own in the attempt to discover precedents for our guidance. The question is this—whether a marriage duly solemnized in England in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, is to be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged and in which they were domiciled. It was contended that, the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with

SIMONIN v. MALLAC. — Sir Cresswell Cresswell.

them everywhere, and rendered them incapable of making a valid contract in any other country. But, according to the evidence, such incapacity to contract was not absolute but conditional only, and a contract made by them would be good unless they came here with the intention to evade the law of France. So a contract made here would be unimpeachable if ratified by the subsequent assent of the parents; and a contract made here would be perfectly valid unless impeached within a certain time, and therefore a marriage contracted between a man and woman of the respective ages of twenty-five and twenty-two, without attending to the formalities prescribed by the Code Napoléon, arts. 151, 152, 153, and 154, may receive a different consideration from one absolutely prohibited by art. 148, by parties respectively under those ages. But taking the decree of the French court, in the suit there instituted, as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or the law of France? In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made. But it was and is contended that such rule does not extend to contracts of marriage; and that parties are, with reference to them, bound by the law of their domicile. This question, of so much importance in all civilized communities, has been largely discussed by jurists of all nations, but they all apply their observations to controversies arising, not in the countries where the marriage was celebrated, but in other countries where it is brought in dispute, and of which the parties were domiciled subjects. That a marriage, good by the law of the country where solemnized, should be held good in all other countries, and the converse, is strongly maintained as a general rule by nearly all writers on international law. But, according to the same authorities, it is subject to some few exceptions, viz. marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy, e.g. by our Royal Marriage Act. Story, on the Conflict of Laws, s. 113 a, mentions a third exception: 'Those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country.' In several instances, learned Judges presiding in our Ecclesiastical Courts have stated the general rule, without mentioning the exceptions, whence it has sometimes been contended that they meant to controvert their existence. But, inasmuch as none of the cases referred to fell within the exceptions

above-mentioned, it cannot justly be inferred that those learned persons intended their words to bear so extensive a meaning; for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention, without condescending to advert to it in terms, and assigning some reasons for dissenting from it.

In addition to the writings of jurists as to the existence of such a general rule by the law of all civilized nations, we find that in several cases it has been adopted by the courts of this country as the ground of their decisions. (After referring to *Scrimshire* v. *Scrimshire* (1752), 2 Hagg. Con. 395, and *Middleton* v. *Janverin* (1802), 2 Hagg. Con. 437, his Lordship continued:)

It is very remarkable that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed. No such argument has been advanced, even in the case of marriages deemed to be incestuous. . . .

In this country marriages have been solemnly recognized as valid, although celebrated in Scotland between English domiciled minors without the consent required by the Marriage Act, 1753, to which country they had resorted for the purpose of evading the operation of that Act. I allude to the case of *Compton* v. *Bearcroft*, in a note to the report of *Middleton* v. *Janverin* (1769), 2 Hagg. Con. 444. The libel in that case is set out, in which the minority of the lady, the want of consent, the English domicile, and the Marriage Act were pleaded, and it was alleged that the parties were married in Dumfries merely to evade the laws of this country, and returned to England the same day. The prayer was 'that the marriage might be declared null and void, pursuant to the said Act for clandestine marriages'. The libel was rejected; the court therefore must have held, that if all the matters alleged were proved, they would not supply a ground for declaring the marriage null.

It has been said that the parties did not in that case evade the Marriage Act, for that it contains an express exception of marriages solemnized in Scotland. It is true that marriages of minors in Scotland without consent are not prohibited by the Marriage Act, and

SIMONIN v. MALLAC.

Sir Cresswell Cresswell.

therefore they cannot be said to be contrary to the law of England; but there can be no doubt that the parties went to Scotland to evade the operation of the law which was established in England. *Compton* v. *Bearcroft* is therefore an authority to this extent, that a marriage contracted by English domiciled subjects abroad, where it is not prohibited by English law, will not be held bad because the parties have gone thither to evade the necessity of complying with certain conditions that would have been imposed upon them in England.

The French tribunal in this case appears to have held the marriage null and void, not because it was absolutely prohibited by the law of France, but because the parties contracted it in England with the formal intention of evading the prescriptions of the French law.

Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions, their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law 'to which all nations have consented, or to which they must be presumed to consent, for the common benefit and advantage'. Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now the law of France is equally stringent whether both parties are French, or one only. Assume then that a French subject comes to England, and there marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid, which law is to prevail? to which country is an English tribunal to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not then be more just, and therefore more for the interest of all, that the law of that country should prevail which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English: would not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before

SIMONIN v. MALLAC. — Sir Cresswell Cresswell.

the court both parties are French, and therefore no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognized, it must be followed out to all its consequences; the cases put are, therefore, a fair test as to the possibility of maintaining that by any comitas or jus gentium this court is bound to adopt the law of France as its guide. . . .

The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall in that country at least decide whether it is valid or invalid; the absence of any judicial decision or dictum, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects.

France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the comitas or jus gentium, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all. For these reasons we feel bound to dismiss this petition.

It may be unfortunate for the petitioner that she should be held a wife in England and not so in France. If she had remained in her own country, she might have enjoyed there the freedom conferred upon her by a French tribunal; having elected England as her residence, she must be contented to take English law as she finds it, and to be treated as bound by the contract which she there made. The novelty and importance of the question has cast upon the court much anxiety, but from some portion of it we are relieved by the consideration that, if our judgment is wrong, it may be corrected by the highest tribunal in this country.

Petition dismissed.

OGDEN v. OGDEN, [1908] P. 46 (Court of Appeal)

OGDEN v. OGDEN.

Appeal from a decision of Bargrave Deane J.

In September 1898 the appellant, an Englishwoman domiciled in England, married in England a man named Léon Philip, a Frenchman

OGDEN v. OGDEN.

domiciled in France, then aged 19 years. The marriage took place without the knowledge either of his parents or of her parents.

After a short time Philip's father came to hear of the marriage. He took his son back to France (where he has ever since remained) and instituted proceedings in France to have the marriage annulled in accordance with the following provisions of the French Civil Code:

Article 148. The son who has not attained the full age of 25 years, the daughter who has not attained the full age of 21 years, cannot contract marriage without the consent of their father and mother.

Article 170. A marriage contracted in a foreign country between natives of France and between a native of France and a foreigner shall be valid if celebrated according to the forms used in that country, provided that it has been preceded by the publications prescribed in article 63, under the title 'Of acts of the civil power', and that the Frenchman has not infringed the regulations contained in the preceding chapter.

Article 182. A marriage contracted without the consent of the father and mother in cases where such consent was necessary can be impeached only by those whose consent was necessary, or by such of the two married persons as stood in need of that consent.

In November 1901 a decree was pronounced by the Civil Tribunal of First Instance of the Seine annulling the marriage for lack of consent of parents in accordance with article 148. The appellant never went to France and did not appear personally in those proceedings.

After the decree Léon Philip married again in France, and in July 1903 the appellant instituted a suit in the High Court in England for a dissolution of her marriage on the ground of her husband's desertion and adultery. Her petition also asked for a declaration that her marriage was annulled. The petition was undefended, but was dismissed for want of jurisdiction, Léon Philip being domiciled in France.

In October 1904 the appellant went through a ceremony of marriage in England with the present petitioner, William Ogden. In July 1906 Ogden instituted the present suit against the appellant for a decree of nullity of marriage on the ground that at the time of the ceremony Léon Philip was still alive, and that the marriage of the appellant and Léon Philip had not been annulled or dissolved for any cause competent to the law of England.

The appellant by her answer denied that she was lawfully married

to Léon Philip and pleaded that her marriage with him was annulled by the French decree.

Bargrave Deane J. pronounced a decree nisi, declaring the marriage between the petitioner and the appellant null and void on the ground that the appellant had a husband living at the time of her marriage with the petitioner. From this decision the present appeal was brought.

The judgment of the court (Cozens-Hardy M.R., Sir Gorell Barnes P., and Kennedy L.J.) was delivered by

SIR GORELL BARNES P.: . . . Two points were made for the appellant by her counsel, Sir Edward Clarke; the first, that her marriage with Léon Philip was not valid, inasmuch as, although the marriage was celebrated according to the forms required by the law of England, it was invalid both in this country and in France because Léon Philip was, by the law of France, being the law of his country and his domicile, incapable of contracting the marriage; the second, that the effect of the French decree was to annul the marriage, both in France and in this country. If both or either of these points were established in favour of the appellant, the contention on her part which followed as a matter of course was that at the time of the ceremony of marriage between herself and Mr. Ogden she was free to contract a marriage with him, and that, therefore, her marriage with him was valid, and his petition should be dismissed. . . .

(After discussing the provisions of the French Civil Code set out above, and observing that they rendered the marriage voidable, not void, his Lordship continued:) The simple question for determination in the present case upon the first point is whether or not a marriage taking place in England between an English person domiciled in England with a foreigner temporarily residing in this country, which it was not disputed would be held in England to be a valid marriage if celebrated between two inhabitants of this country, ought to be held invalid on the ground that the foreigner was by the statute law of his country subjected to the necessity of complying with certain formalities in order to be at liberty to enter into the marriage. It is desirable to state this limited proposition very clearly, because, with regard to questions which may be raised as to the validity of marriages in England between persons domiciled abroad, certain cases have been decided (to which reference will be made further on in this judgment) which do not necessarily involve the consideration

OGDEN v. OGDEN. — Sir Gorell Barnes P.

of the particular point already indicated, or any decision thereupon; and it is desirable, therefore, to avoid the confusion which appears to have arisen sometimes between the consideration of the principles which have been laid down for determining the validity of a marriage where the ceremony alone was in question, and of those which have been considered, in determining whether it was lawful for the parties to intermarry at all.

Now, the argument for the appellant in the present case was that, although the marriage between her and Léon Philip was celebrated according to the forms required by the English law, it was invalid universally because Léon Philip was a minor in France, and under a disability by the law of France from contracting such marriage without the consent of his father, and without complying with the other formalities required by the law of France. In substance this contention amounted to this—that in regard to entering into a marriage in England with an inhabitant thereof, Léon Philip carried with him into this country an incapacity, which ought to be recognised by the law of England, to enter into matrimonial relationship with such inhabitant without complying with the provisions of the French code. It was urged that this principle had been recognised in this country, and cases were cited which it was said supported the contention. The cases cited, however, do not support it, and in truth the argument on behalf of the appellant appears to be based upon views which have been expressed by foreign jurists, but which have not been adopted in this country, where the English courts have not been very ready to admit a personal law of status and capacity dependent on domicile, and travelling with the person from country to country, although there has been, perhaps, less unwillingness in later years to give effect to the lex domicilii to some extent: see, for instance, *In re Goodman's Trusts* (*post*, p. 155).

It may be doubted whether there is much substantial difference of opinion between foreign and English jurists as to the general rule that between persons sui juris the validity of the marriage is to be decided by the law of the place where it is celebrated. There are certain exceptions, as, for instance, when the lex loci celebrationis violates the precepts of religion, or of public morals, as in the case of bigamy, or where the marriages are such as are generally recognised as incestuous. When, however, the competency of the parties to contract marriage is considered, there appears to be a diversity of opinion, not merely between foreign jurists and English jurists, but

amongst the foreign jurists themselves, certain foreign jurists, but not all, maintaining that a person who is in his minority by the law of his native or acquired domicile is to be deemed everywhere in the same state or condition. This appears to be based upon the conception that the laws which have for their object the regulation of the capacity of persons are to be treated as personal laws and of absolute obligation everywhere when they have once attached upon the person by the law of his domicile. This conception would appear to result from the application of principles derived from sources of law different from those from which the English common law has been derived, and from considerations which have not had the same force in this country as abroad.

. . . We are concerned in this case only with the question of a disability imposed by foreign law upon one of the parties to the marriage in respect only of want of parental consent, and compliance with certain formalities required by such foreign law.

There appears to be no case in this country (certainly no case was cited to us in argument on this appeal) in which in such a case as last mentioned the view has been expressed that such a marriage would be held invalid in this country. We know of no principle recognised by English law which would justify the court in coming to the conclusion that such a marriage ought to be held invalid; for, although to a certain extent the lex domicilii is recognised in this country, for instance, in the familiar case where it is held that mobilia sequuntur personam, yet such recognition appears never to have been extended to the case of a matrimonial engagement entered into in this country between an inhabitant of another country and an inhabitant of this country. In such a case, where there are two different systems of law, one may well ask, which is to prevail? Why should it be recognised that a person who comes over to this country and validly enters into a marriage with one of its inhabitants according to English law should be held unable to do so here because of the regulations of a foreign system of jurisprudence which places upon him a personal incapacity to contract unless he complies with formalities required by the foreign law? It may be observed here that the 3rd section of article 1 of the French Civil Code ordains that the French laws relating to the conditions and privileges of persons are to govern Frenchmen although residing in a foreign country, so that it would seem from this provision that the French rule as to competency by reason of minority is not based upon domicile, but upon nationality, and therefore that

OGDEN v. OGDEN. — Sir Gorell Barnes P.

even in the case of a Frenchman domiciled in England celebrating a marriage with a domiciled Englishwoman the French courts would be at liberty, if the question arose before them, to declare such a marriage null and void, on the ground that it was governed by the laws of France, although celebrated in this country; but it could hardly be contended in England, if both persons parties to a marriage were domiciled in this country, that our courts ought to hold such a marriage invalid because one of the parties by the laws of his or her nationality may not have adequate competency to enter into the contract. . . .

(After considering *Brook* v. *Brook* (*post*, p. 70), *Simonin* v. *Mallac* (*ante*, p. 53), and *Sottomayor* v. *De Barros* (*post*, p. 74) his Lordship continued:) Now this court hearing this appeal is bound by the decision of the Court of Appeal in the case of *Sottomayor* v. *De Barros*. It is not necessary, even if we were at liberty to do so, to consider whether that case was rightly decided, but it is permissible to point out that the commencement of the paragraph above set out could scarcely be considered correct in stating that 'it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile', for, if so, it would logically seem to follow that that part of the judgment which indicates that the opinion of the court was confined to cases where both the contracting parties were, at the time of their marriage, domiciled in a country, the laws of which prohibited their marriage, should not have expressed that limitation, and that the case of *Simonin* v. *Mallac* (ante, p. 53) should have been overruled, and yet that case, according to our reading of the judgment, is approved. The probability is that that sentence should be read with the context, and be confined to the case present to the minds of the court in relation to marriages which could not be contracted at all by the laws of the country of domicile. Even then it may be questioned whether that sentence is correct, and whether the question of capacity is really raised at all in such a case; that is to say, where both the parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity, and it may, perhaps, not be unreasonable for one country to refuse to recognise a marriage contracted in it between two persons by the laws of whose domicile a marriage between them is illegal, and yet it may be quite proper and reasonable for a country, in which a marriage takes place

between persons domiciled in another country, to recognise it as a valid marriage when it would be legal in such other country if contracted after compliance with all formalities required in such other country, and, further, to protect its citizens in all cases of marriages where one of the contracting parties is domiciled in the country first referred to—that is to say, where the marriage takes place—and the other is domiciled in a foreign country, and there is a conflict between the laws of the two countries as to the validity of the marriage.

. . . After very careful consideration of the present case we have come to the conclusion that the first point must be decided against the appellant, and that the marriage between her and Léon Philip must be declared valid in England.

(His Lordship proceeded (1) to hold that the French decree of nullity was not entitled to recognition in England: but as to this, see p. 143, *post*; (2) to suggest that the appellant's suit for divorce ought not to have been dismissed for want of jurisdiction: but as to this, see p. 104, *post*.)

Appeal dismissed.

APT *v.* APT, [1948] P. 83 (Court of Appeal)

Appeal from Lord Merriman P.

On 15 January, 1941, while the appellant was in this country, she being not only resident but domiciled here, a ceremony of marriage was celebrated at Buenos Aires between her and the respondent. She was represented by a person whom, by a power of attorney executed on 8 November 1940 in London, she had named as her representative to contract the marriage. The husband, as found by Lord Merriman P., was resident and domiciled in the Argentine at all material times. The wife gave evidence that she had at no material time any intention of revoking the power of attorney, that she was informed in due course of the performance of the ceremony, and that she was not merely ready and willing, but eager, to join her husband in Buenos Aires, but was prevented from doing so during the war. She further deposed that when, after the war, she renewed her efforts to join the husband, he took no steps to assist her and ignored her alternative suggestion of a meeting in the United States of America, and that it was this conduct on his part which decided her to present the petition in this matter.

A Dr. Palacios was called to give evidence as to the relevant

APT v. APT.

Argentine law, and the result of his evidence, so far as material, may be summarized as follows: (1) Argentine law recognizes proxy marriages. Accordingly by that law the ceremony was valid and effectual, and the marriage would be recognized as a valid marriage by the law of the intended matrimonial domicile. (2) The intending spouse could revoke the power of attorney at any time before the ceremony, but if the power had been acted on before either the other spouse or the proxy had notice of the revocation the marriage would be valid. (3) If, however, the spouse giving the power of attorney had meanwhile lost the capacity to contract the marriage, for example, by an intervening marriage, or by becoming of unsound mind, although the marriage certificate would be prima facie evidence of the ceremony's having been performed, the court would declare the marriage null and void. The wife's petition for a decree of nullity having been dismissed, she now appealed.

The judgment of the court (Tucker, Bucknill, and Cohen L.JJ.) was delivered by

COHEN L.J.: On this evidence counsel for the wife contended that, in the circumstances above stated, it would be contrary to public policy for the English courts to recognise the validity of the marriage, and that, accordingly, his client was entitled to the decree which she sought. The petition was undefended, but, having regard to the importance of the matter, the President invoked the assistance of the King's Proctor, and the case was fully argued. The President in a considered judgment dismissed the petition. After a careful review of all the authorities, English and American, to which his attention had been called, he summarized his conclusions as follows ([1947] P. 127, 147): 'My conclusions therefore are: that the contract of marriage in this case was celebrated in Buenos Aires; that the ceremony was performed strictly in accordance with the law of that country; that the celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage; that there is nothing abhorrent to Christian ideas in the adoption of that form; and that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage. For these reasons, whatever may be the petitioner's remedies as a wife, I am obliged to hold that this petition must be dismissed.'

With these conclusions and with the reasons which the President gives for them we so fully agree that it is only because of the importance of the matter, and out of respect to the arguments addressed to us by counsel on both sides, that we state shortly our reasons for rejecting the arguments addressed to us for the wife. These arguments may be summarized as follows: (1) It is contrary to the public policy of England to recognise any marriage by proxy; (2) it is not however necessary to reach a conclusion on the first point, since in any event it is contrary to the public policy of England to recognise a marriage by proxy if (*a*) the party giving the proxy is domiciled in England or (*b*) the power of attorney conferring authority on the proxy is executed in England or (*c*) the power of attorney authorises a marriage by proxy in a country where the law will recognise, as does Argentine law, the validity of a marriage contracted thereunder, notwithstanding the revocation of the proxy, if the revocation has not been communicated to the other spouse or the proxy before the ceremony takes place; and (3) the granting of a power of attorney in England is governed as to essential validity by English law, and it is contrary to English law to recognise powers of attorney given for the purpose of celebrating a marriage.

The first argument is, in our opinion, ill founded. Counsel was unable to suggest any statutory provision which was relevant to it. He referred us to s. 22 of the Marriage Act, 1823, which prohibits marriages otherwise than in a church or without banns or licence, but he admitted that this section only applies to marriages within the English jurisdiction: see s. 33 of the Act. A proxy marriage, such as we are considering, is clearly a Christian marriage within the definition given by Lord Penzance in *Hyde* v. *Hyde* (*post*, p. 81): 'the voluntary union for life of one man and one woman, to the exclusion of all others.' A proxy marriage was recognised as valid by the canon law: see Swinburne's Treatise of Spousals or Matrimonial Contracts (1686 edition, pp. 162, 163) where, as the President points out, the conditions of such a marriage are described. It is recognised as valid in a number of Christian countries beside the Argentine. The preponderance of the American authorities to which the President refers indicates that such a marriage is recognised as valid in many states of the United States of America: see especially *Ex parte Suzanna* (1924), 295 Federal Reporter, 713. It was argued that *Reg.* v. *Millis* (1844), 10 Cl. & F. 534, precluded us from holding that such a marriage would be recognised in England, but that case concerned

APT v. APT. — Cohen L.J.

only marriages celebrated in England or Ireland; it did not expressly cover the point, and is in any event no authority for the general proposition that all proxy marriages, wherever celebrated, are void. See *Wolfenden* v. *Wolfenden*, [1946] P. 61, where the President pointed out the limited operation of *Reg.* v. *Millis*.

Counsel for the wife invited us, none the less, to hold that proxy marriages were contrary to public policy since they would facilitate clandestine marriages, make easy the bestowal of British nationality on foreigners and the carrying on of the white-slave traffic, and make it possible for two minors to get married in, for example, Mexico, although they were both domiciled in England. So far as the argument is based on clandestine marriages, we have to bear in mind that the English courts have not regarded all such marriages as contrary to public policy; for example, Gretna Green marriages were held to be valid until they were prohibited by statute. Moreover, we have to bear in mind the frequent injunctions of the highest tribunal as to the danger of allowing judicial tribunals to roam unchecked in the field occupied by that unruly horse, public policy: see, for example, per Lord Atkin in *Fender* v. *Mildmay*, [1938] A.C. 1, 10. In any event, a consideration of what is 'public policy' in a case where the matter is not governed by statute or by clearly established principle must necessarily involve balancing advantages against disadvantages. As against the considerations advanced by counsel must be weighed the following factors: (1) The unsatisfactory position that would arise in that, if Mr. Foster is right, the parties would be married in the Argentine, the place of the intended matrimonial domicile, but not married in England; (2) the fact that, if Mr. Foster is right, any children that might result from the marriage would be bastards in the eye of English law; and, above all, (3) we should in effect be holding that the law of the Argentine was contrary to essential justice and morality, a conclusion to which we should hesitate to come. . . .

In all the circumstances, we are satisfied that we cannot properly extend public policy to invalidate all proxy marriages. . . .

Finally, on this point we would repeat the citation from Lord Dunedin's speech in *Berthiaume* v. *Dastous*, [1930] A.C. 79, 83, which was quoted by the President: 'If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or the other of the spouses.

If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage. These propositions are too well fixed to need much quotation.' In our opinion, the method of giving consent as distinct from the fact of consent is essentially a matter for the lex loci celebrationis, and does not raise a question of capacity, or, as Mr. Foster preferred to call it, essential validity.

It will be convenient next to consider Mr. Foster's third point, since it seems to us to founder on the same rock as his first. Counsel was constrained to admit that there was no question of incapacity in the donor of the power, or of any statutory invalidity, and that, if the power had related to a commercial transaction, its validity could not be challenged, since the act to be performed under it was valid by the law of the intended place of performance: see *Chatenay* v. *Brazilian Submarine Telegraph Co. Ltd.* (*post*, p. 179). . . . Counsel argued, however, that this power relates to a contract of marriage, and that this is not a mere matter of contract of marriage, but affects status. This is, if anything, an understatement, since the main element in the marriage contract is its effect on status; . . . but, as the status sought to be created by the proxy marriage now in question is, as we have already pointed out, that of a Christian marriage such as English law recognises and approves, the argument does not really assist counsel and he is driven to argue that the power of attorney is bad because proxy marriages are against the public policy of England, an argument which we have already given our reasons for rejecting.

We return to the second point. In our opinion, this also fails. As regards sub-division (*a*) thereof, we are unable to see any reason in public policy which would require the English courts, if they recognise the validity of proxy marriages celebrated outside the United Kingdom, to deny to a person domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has in other respects capacity to marry and does not infringe any provision of English law. (*b*) is really another way of stating the third argument presented for the wife. We think it impossible to hold that, in the absence of some statutory prohibition, it is contrary to public policy to execute in England a power of attorney which the same person could validly execute in the Argentine, the power of attorney being intended to authorize an act in the Argentine which is lawful by the law of that country. As regards (*c*), we agree with the President

APT v. APT. — Cohen L.J.

that this point does not arise. If a case occurs where the proxy is revoked before the ceremony takes place but the other spouse and the proxy are unaware of the revocation, it may be that the courts of this country would hold that the purported marriage was void; but that would not be because of any general objection to proxy marriages, but because, on the facts of the particular case, the court was satisfied that the marriage was not a voluntary union.

Appeal dismissed.

Section B: CAPACITY TO MARRY

Capacity to marry is governed by the lex domicilii of each party immediately before the marriage.

BROOK v. BROOK.

BROOK *v.* BROOK (1861), 9 H.L.C. 193 (House of Lords)

Appeal from a decision of Stuart V.-C.

William Charles Brook (hereinafter called the testator) married Charlotte Armitage in England in 1840. She died in 1847 and there were issue of that marriage one daughter and one son. In 1850 the testator married Emily Armitage, the sister of his deceased wife, in Holstein, Denmark. That marriage was valid by Danish law but void for consanguinity by English law. There were issue of that marriage one son and two daughters. The testator and Emily Armitage were British subjects domiciled in England and had merely gone over to Denmark on a temporary visit. In 1855 Emily Armitage died of cholera and two days later the testator died of the same complaint, leaving all five children him surviving.

By his will the testator gave all the residue of his property to his five children by name.

In 1856 Charles Armitage Brook, the son of the second marriage, died an infant and intestate. A bill was filed by his sisters and half-sister against his half-brother and the Attorney-General claiming that Charles Brook's share of the testator's real estate descended to his half-brother as heir at law and that his share of the testator's personal estate passed to his half-brother and the plaintiffs as next of kin. The Attorney-General alleged that the marriage of the testator and Emily Armitage was not valid, that Charles Brook therefore was a bastard without collateral relatives and that his share of the testator's property passed to the Crown.

Stuart V.-C. having consulted Cresswell J. held that the marriage

was not valid and that the real and personal estate of Charles Brook had become vested in the Crown.

LORD CAMPBELL L.C.: My Lords, the question which your Lordships are called upon to consider in the present appeal is, whether the marriage celebrated on the 9th June 1850 in the duchy of Holstein, in the kingdom of Denmark, between William Leigh Brook, a widower, and Emily Armitage, the sister of his deceased wife, they being British subjects then domiciled in England, and contemplating England as their place of matrimonial residence, is to be considered valid in England, marriage between a widower and the sister of his deceased wife being permitted by the law of Denmark?

I am of opinion that this depends upon the question whether such a marriage would have been held illegal, and might have been set aside in a suit commenced in England in the lifetime of the parties before the passing of statute 5 and 6 Will. 4, c. 54, commonly called Lord Lyndhurst's Act.

Before the Reformation the degrees of relationship by consanguinity and affinity, within which marriage was forbidden, were almost indefinitely multiplied; but the prohibition might have been dispensed with by the Pope, or those who represented him. At the Reformation, the prohibited degrees were confined within the limits supposed to be expressly defined by Holy Scripture, and all dispensations were abolished. The prohibited degrees were those within which intercourse between the sexes was supposed to be forbidden as incestuous, and no distinction was made between relationship by blood or by affinity. The marriage of a man with a sister of his deceased wife is expressly within this category. *Hill* v. *Good* (1674), Vaugh. 302, and *Reg.* v. *Chadwick* (1847), 11 Q.B. 173, 205, are solemn decisions that such a marriage was illegal; and if celebrated in England such a marriage unquestionably would now be void.

Indeed, this is not denied on the part of the appellants. They rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted.

There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend

BROOK v. BROOK. — Lord Campbell L.C.

'upon the lex domicilii, the law of the country in which the parties are domiciled at the time of marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.

This qualification upon the rule that 'a marriage valid where celebrated is good everywhere', is to be found in the writings of many eminent jurists who have discussed the subject.

Mr. Justice Story, in his valuable treatise on 'the Conflict of Laws', while he admits it to be the 'rule that a marriage valid where celebrated is good everywhere', says (s. 113 *a*) there are exceptions; those of marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country, he adds (s. 114), 'in respect to the first exception, that of marriages involving polygamy and incest, Christianity is understood to prohibit polygamy and incest, and, therefore, no Christian country would recognize polygamy or incestuous marriages; but when we speak of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous.' The conclusion of this sentence was strongly relied upon by Sir FitzRoy Kelly, who alleged that many in England approve of marriage between a widower and the sister of his deceased wife; and that such marriages are permitted in Protestant states on the Continent of Europe and in most of the States in America.

Sitting here as a judge to declare and enforce the law of England as fixed by King, Lords, and Commons, the supreme power of this realm, I do not feel myself at liberty to form any private opinion of my own on the subject, or to inquire into what may be the opinion of the majority of my fellow citizens at home, or to try to find out the opinion of all Christendom. I can as judge only look to what was the solemnly pronounced opinion of the legislature when the laws were passed which I am called upon to interpret. What means am I to resort to for the purpose of ascertaining the opinions of foreign nations? Is my interpretation of these laws to vary with the varia-

tion of opinion in foreign countries? Change of opinion on any great question, at home or abroad, may be a good reason for the legislature changing the law, but can be no reason for judges to vary their interpretation of the law.

Indeed, as Story allows marriages positively prohibited by the public law of a country, from motives of policy, to form an exception to the general rule as to the validity of marriage, he could hardly mean his qualification to apply to a country like England, in which the limits of marriages to be considered incestuous are exactly defined by public law.

That the Parliament of England in framing the prohibited degrees within which marriages were forbidden, believed and intimated the opinion, that all such marriages were incestuous and contrary to God's word, I cannot doubt. All the degrees prohibited are brought into one category, and although marriages within those degrees may be more or less revolting, they are placed on the same footing, and before English tribunals, till the law is altered, they are to be treated alike. . . .

It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions.

A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say, that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.

Sir FitzRoy Kelly argued that we could not hold this marriage to be invalid without being prepared to nullify the marriages of Danish

BROOK v. BROOK. — Lord Campbell L.C.

subjects who contracted such a marriage in Denmark while domiciled in their native country, if they should come to reside in England. But on the principles which I have laid down, such marriages, if examined, would be held valid in all English courts, as they are according to the law of the country in which the parties were domiciled when the marriages were celebrated.

I will now examine the authorities relied upon by the counsel for the appellants. They bring forward nothing from the writings of jurists except the general rule, that contracts are to be construed according to the lex loci contractus, and the saying of Story with regard to a marriage being contrary to the precepts of the Christian religion, upon which I have already commented. (His Lordship referred to *Compton* v. *Bearcroft* (1769), 2 Hagg. Con. 444, *Steele* v. *Braddell* (1838), Milw. Ecc. R. Ir. 1, and *Simonin* v. *Mallac* (*ante*, p. 53) and continued:) None of these cases can show the validity of a marriage which the law of the domicile of the parties condemns as incestuous, and which could not, by any forms or consents, have been rendered valid in the country in which the parties were domiciled.

(His Lordship referred to *Sutton* v. *Warren* (1845), 10 Met. Mass. Rep. 451, and continued:) If this case is to be considered well decided and an authority to be followed, a marriage contrary to the law of the state in which it was celebrated, and in which the parties were domiciled, is to be held valid in another state into which they emigrate, although by the law of this state, as well as of the state of celebration and domicile, such a marriage is prohibited and declared to be null and void. This decision, my Lords, may alarm us at the consequences which might follow from adopting foreign notions on such subjects, rather than adhering to the principles which have guided us and our fathers ever since the Reformation.

LORDS CRANWORTH, ST. LEONARDS, and WENSLEYDALE delivered judgment to the same effect.

Appeal dismissed.

SOTTOMAYOR v. DE BARROS.

SOTTOMAYOR *v.* DE BARROS (No. 1) (1877), 3 P.D. 1 (Court of Appeal)

Appeal by the petitioner from the decision of Sir R. Phillimore (2 P.D. 81) dismissing a petition to have her marriage declared null and void.

The judgment of the Court (James, Baggallay, and Cotton L.JJ.) was delivered by

COTTON L.J.: This is an appeal from an order of the Court of Divorce, dated the 17th of March, 1877, dismissing a petition presented by Ignacia Sottomayor, praying the court to declare her marriage with the respondent Gonzalo de Barros to be null and void. The respondent appeared to the petition, but did not file an answer or appear at the hearing; and by direction of the judge the Queen's proctor was served with the petition, and appeared by counsel to argue the case against the petition.

There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is that she and the respondent were under a personal incapacity to contract marriage. The facts are these: The petitioner and respondent are Portuguese subjects, and are and have always been domiciled in that country, where they both now reside. They are first cousins, and it was proved that by the law of Portugal first cousins are incapable of contracting marriage by reason of consanguinity, and that any marriage between parties so related is by the law of Portugal held to be incestuous and therefore null and void; but though not proved, it was admitted before us that such a marriage would be valid if solemnized under the authority of a Papal dispensation.

In the year 1858 the petitioner, her father and mother, and her uncle, De Barros, and his family, including the respondent, his eldest son, came to England, and the two families occupied a house jointly in Dorset Square, London. The petitioner's father came to this country for the benefit of his health, and De Barros for the education of his children and to superintend the sale of wine. De Barros subsequently, in 1861, became manager to a firm of wine merchants in London, carrying on business under the style of Caldos Brothers & Co., of which the petitioner's father was made a partner, and which stopped payment in 1865. On the 21st of June, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage, and although the parties lived together in the same house until the year 1872, they never slept together, and the marriage was never consummated. The petitioner stated that she went through the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business.

SOTTOMAYOR v. DE BARROS. — Cotton L.J.

Under these circumstances the petitioner, in November, 1874, presented her petition for the object above mentioned, and Sir R. Phillimore, before whom the case was heard, declined to declare the marriage invalid and dismissed the petition, but did so, as we understand, rather because he felt himself bound by the decision in the case of *Simonin* v. *Mallac* (*ante*, p. 53), than because he considered that on principle the marriage ought to be held good. If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid. But it is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised.

But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that, in the absence of Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous; but the law of Portugal does recognise the validity of such a dispensation, and it cannot in our opinion be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected,

or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnised between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid? It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

The counsel for the petitioner relied on the case of *Brook* v. *Brook* (*ante*, p. 70) as a decision in his favour. If, in our opinion, that case had been a decision on the question arising on this petition, we should have thought it sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that the English Courts must hold invalid a marriage between two English subjects domiciled in this country, who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider the case of *Simonin* v. *Mallac*. The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the

SOTTOMAYOR v. DE BARROS. — Cotton L.J.

personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* does not, we think, govern the present case. We are of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

Appeal allowed.

Note. The case was remitted to the Divorce Division in order that the questions of fact raised by the Queen's Proctor's pleas should be determined. On it appearing that the husband's domicile at the date of the marriage was not Portuguese but English, Sir James Hannen P. pronounced the marriage valid in reliance on the dictum of the Court of Appeal in *Sottomayor* v. *De Barros* (*No. 1*) (*ante*, p. 77) that 'our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage'. But this dictum, and the subsequent decision in *Sottomayor* v. *De Barros* (*No. 2*) (1879), 5 P.D. 94, which was founded on it, are extremely difficult to reconcile with the reasoning in *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416. In that case a ceremony of marriage took place in Frankfort between a domiciled Englishman and his deceased wife's sister, who was domiciled in Frankfort. The marriage was valid by the law of Frankfort but void for consanguinity by English law. Sir Cresswell Cresswell following *Brook* v. *Brook* pronounced the marriage void on the ground that 'there could be no valid contract unless each was competent to contract with the other' (1 Sw. & Tr. 423). Falconbridge (pp. 640–3) discusses six different methods of reconciling *Mette* v. *Mette* with *Sottomayor* v. *De Barros* (*No. 2*), all of which he rejects as untenable. The decision in the latter is based upon the grounds (1) that capacity to marry is governed by the law of the place of celebration, and (2) that an incapacity imposed by foreign law is less important than a capacity imposed by English law and can therefore be disregarded. The former ground is clearly untenable since *Brook* v. *Brook* (*ante*, p. 70). The latter ground is 'unworthy of a place in a respectable system of the conflict of laws' (Falconbridge, p. 640).

In re PAINE.

In re PAINE, [1940] Ch. 46 (Chancery Division)

By her will dated in 1883 a testatrix gave £250 upon trust for her daughter Ada Paine Toepfer for life and if she should leave any child or children her surviving in trust for her absolutely, with a gift over if she should not. The testatrix died in 1884.

In 1875 the testatrix's daughter married a domiciled German named Franz Robert Toepfer at Frankfurt. That marriage was valid by German law although the husband had previously married the wife's sister, his first wife having died in 1872. The marriage was void by English law.

Franz Toepfer and his second wife lived in England until their

respective deaths and had issue three children, of whom one only survived her parents. Franz Toepfer died in 1919.

The trustee of the testatrix's will took out a summons for the determination of the question whether the expression 'child or children' included a child or children of the marriage of Ada Paine and Franz Toepfer.

BENNETT J. (after stating the facts, continued): I think that, on the evidence, I must hold that the husband never lost his domicile of origin, but it is plain that, at the time of the marriage, Mrs. Ada Paine Toepfer was a domiciled English woman. There were three children of the marriage, of whom one survived Ada Paine Toepfer, and the question to be determined is whether Ada Paine Toepfer had a child or children living at her decease, in which case the sum of £250 is to be held by the trustees of the testatrix's will for her absolutely, or whether she died without leaving any child or children her surviving, in which case the sum of £250 would devolve as under an intestacy.

The first question is whether the English law will regard the marriage between Ada Paine Toepfer and Franz Robert Toepfer as a valid marriage.

In my judgment, according to English law, the marriage was invalid, because by English law the lady had not the capacity to contract it. In my view that point is settled by the decision of Sir Cresswell Cresswell in *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416. That was a case in which the husband was domiciled in England and he was without the capacity to contract the marriage in question. The learned judge says in the course of his judgment: 'If Bernard Mette was incapacitated from contracting such a marriage, this latter distinction cannot have any effect. There could be no valid contract unless each was competent to contract with the other. The question rests upon the effect of domicile and naturalization.'

That statement of the law has been recognized by text book writers. In particular I refer to Dicey's Conflict of Laws, 5th ed., p. 732,[1] where the following statement appears: 'Rule 182.[1] Subject to the exceptions hereinafter mentioned, a marriage is valid when (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other.'

In Westlake's Private International Law, 7th ed., p. 57, r. 21, this statement is to be found: 'A marriage is invalid . . . if either party is

[1] Rule 168, p. 758, in the sixth edition.

In re PAINE. — Bennett J.

by his personal law under an incapacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity.'

In Halsbury's Laws of England, 2nd ed., vol. vi, p. 286, it is stated: 'The marriage must be a good and legal marriage according to the law of the domicile of both contracting parties at the time of the marriage.'

On the authority of *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416, supported as it seems to be by the text book writers, in view of the fact that the domicile of the lady was English, I come to the conclusion that her marriage, in the year 1875 to a domiciled German, at Frankfurt on Main in Germany was invalid, because the husband had been the husband of the lady's deceased sister. The marriage was, therefore, a contract of marriage which, at that time, he was prohibited from making by English law.

It follows that the gift over takes effect. . . .

NOTE C: CAPACITY TO MARRY

THREE views have been suggested as to what law should govern capacity to marry.

(*a*) The law of the place of celebration. This was undoubtedly the rule of English law until *Brook* v. *Brook* (*ante*, p. 70), the earlier cases drawing no distinction between formality and capacity. The objection to it is that it provides insufficient safeguards against evasion of law. It is still apparently the prevailing rule in the United States (Goodrich, s. 113), but it is subject to exceptions so weighty (miscegenation, consanguinity, and lack of age) that in practice the American rule is not very different from the English.

(*b*) The law of the domicile of each party before the marriage. This is the orthodox English view.

(*c*) The law of the intended matrimonial home. This is Dr. Cheshire's view.

It is submitted that no unprejudiced person can read the English cases without concluding that, with one exception, they are consistent only with view (*b*). The authorities which Dr. Cheshire adduces in support of his view are (i) some inconclusive dicta of Lord Campbell in *Brook* v. *Brook* (*ante*, p. 70) which equally support view (*b*); and (ii) an ex post facto rationalization of *Sottomayor* v. *De Barros* (*No. 2*) (*ante*, p. 78), which was certainly not the ratio of that case, and is inconsistent with the way that case was dealt with in *Chetti* v. *Chetti*, [1909] P. 67. Moreover, Dr. Cheshire's view can only be reconciled with the latest decision (*Re Paine*, *ante*, p. 78) by disregarding the Judge's finding of fact that the husband never lost his German domicile of origin.

If bigamy cases fall under the head of capacity to marry (and there is high authority that they do, see *Shaw* v. *Gould* (*post*, p. 144) and *De Reneville* v. *De Reneville* (*post*, p. 126), then we have a decision of the House of Lords which rejects view (*c*) in the clearest terms. In *Shaw* v. *Gould*, a husband and wife

were domiciled in England; the wife obtained a divorce in Scotland and went through a ceremony of marriage with a domiciled Scotsman; it was held that this second marriage was void because the divorce was void in England. Yet on view (*c*) the marriage should have been valid, because Scotland was the intended matrimonial home. Compare *Baindail* v. *Baindail* (*post*, p. 87), where the second marriage was undoubtedly valid in India (the law of the matrimonial domicile), and yet it was held to be void. The question whether *De Reneville* v. *De Reneville* (*post*, p. 126) involves a modification of the orthodox view is discussed *post*, p. 142.

The exception referred to above is *Sottomayor* v. *De Barros* (*No. 2*) (*ante*, p. 78). Until that case is overruled it is necessary to make an exception to view (*b*), as to which, see Dicey, Rule 169, Exception 1. Dr. Cheshire (p. 285) says that the necessity of formulating this exception 'militates against the soundness of the doctrine of the dual domicile' (i.e. view (*b*)). This criticism seems unsound. The formulation of the exception is necessary because of a decision which ignored the doctrine of the dual domicile.

Simonin v. *Mallac* (*ante*, p. 53) and *Ogden* v. *Ogden* (*ante*, p. 59) have, it is submitted, no relevance to the problem under discussion, because the defects of the marriages in question were held, rightly or wrongly, to be defects of form, not capacity. In so far as *Ogden* v. *Ogden* purports to decide anything more than this, it is plainly inconsistent with *Brook* v. *Brook* (*ante*, p. 70) and *Sottomayor* v. *De Barros* (*No. 1*) (*ante*, p. 74).

Dr. Cheshire's theory that capacity to marry is governed by the law of the intended matrimonial home has (it is submitted) little to commend it on practical grounds. By making everything hinge on intention, it opens the door to evasion of law. If the validity of the marriage is to remain in suspense while we wait and see whether the parties have implemented their intention, serious administrative difficulties are likely to be encountered. The theory is based on the assumption that as the woman's domicile becomes that of the man on marriage, incapacities imposed by the law of her antenuptial domicile can be disregarded, because her domicile is 'evanescent' (Cheshire, p. 269; cf. p. 237). This assumption was open to argument in 1947, but is now demonstrably untenable. It is now settled that a void ceremony of marriage does not by operation of law confer on the woman the domicile of the man: *De Reneville* v. *De Reneville*, [1948] P. 100, *post*, p. 126; and see Note B, *ante*, p. 51.

Section C: POLYGAMOUS MARRIAGES

Marriage is the voluntary union for life of one man and one woman to the exclusion of all others. The matrimonial machinery of the English court will not be applied to a marriage not within this definition.

HYDE *v.* HYDE (1866), L.R. 1 P. & M. 130 (Divorce Court) HYDE *v.* HYDE.

This was a petition by a husband for a dissolution of marriage on the ground of adultery. There was no appearance by the respondent or the co-respondent.

The petitioner was an Englishman by birth, and in 1847, when he

HYDE v. HYDE.

was about 16 years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in the territory of Utah, in the United States; and in 1853 the petitioner, who had in the meantime been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April 1853, and it was celebrated by Brigham Young, the president of the Mormon church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children. In 1856 the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah. On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December 1856, and his wife was declared free to marry again. In 1857 a correspondence passed between the petitioner and his wife, who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon church without danger to his life. In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860 the respondent contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, and she has since cohabited with him as his wife, and has had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah. The petitioner and the respondent were both single, and the petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in Utah, if valid in Utah, would be recognized as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage. The Supreme Court, however, had no appellate juris-

diction over the courts of other States in matrimonial matters; and the matrimonial court of each State had exclusive jurisdiction within its own limits. Utah was a territory not within any State. There was a matrimonial court, having primary jurisdiction, in that territory, and the judge was nominated by the President of the United States, with the consent of the Senate. The judge was bound to recognize the laws which the people of Utah made for themselves, as long as they did not conflict with the laws of the United States. No evidence was given as to the law of that court respecting Mormon marriages.

THE JUDGE ORDINARY (Lord Penzance): The petitioner in this case claims a dissolution of his marriage on the ground of the adultery of his wife. Before the petitioner could obtain the relief he seeks, some matters would have to be made clear and others explained. The marriage, as it is called, would have to be established as binding by the lex loci, the divorce would have to be determined void, and the petitioner's conduct in wilfully separating himself from his wife would have to be accounted for. But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered 'husband' and 'wife' in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions.

Marriage has been well said to be something more than a contract, either religious or civil—to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

HYDE v. HYDE. — Lord Penzance.

There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together upon these terms—countries in which this institution and status are not known. In such parts the men take to themselves several women, whom they jealously guard from the rest of the world, and whose number is limited only by considerations of material means. But the status of these women in no way resembles that of the Christian 'wife'. In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things—laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word 'wife'. But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the word 'husband' or 'wife', but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer. . . .

Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce; and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage, or debauchery in face of the wife, her degradation in her home from social equality with the husband, and her displacement as the head of his household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured may claim a judicial separation and a permanent support from the husband under the name of alimony at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the court would be creating conjugal duties, not enforcing them, and furnishing remedies when there was no offence. For it would be quite unjust and almost absurd to

visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy. Nor would it be much more just or wise to attempt to enforce upon him that he should treat those with whom he had contracted marriages, in the polygamous sense of that term, with the consideration and according to the status which Christian marriage confers.

If, then, the provisions adapted to our matrimonial system are not applicable to such a union as the present, is there any other to which the court can resort? We have in England no law framed on the scale of polygamy, or adjusted to its requirements. And it may be well doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex.

This is hardly denied in argument, but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void; the first woman taken to wife as a 'wife' in the sense intended by the Divorce Act, and all the rest as concubines. The inconsistencies that would flow from an attempt of this sort are startling enough. Under the provisions of the Divorce Acts the duty of cohabitation is enforced on either party at the request of the other, in a suit for restitution of conjugal rights. But this duty is never enforced on one party if the other has committed adultery. A Mormon husband, therefore, who had married a second wife would be incapable of this remedy, and this court could in no way assist him towards procuring the society of his wife if she chose to withdraw from him. And yet, by the very terms of his marriage compact, this second marriage was a thing allowed to him, and no cause of complaint in her who had acquiesced in that compact. And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy

HYDE v. HYDE. — Lord Penzance.

as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain. These difficulties may be pursued further in the reflection that if a Mormon had married fifty women in succession, this court might be obliged to pick out the fortieth as his only wife, and reject the rest. For it might well be that after the thirty-ninth marriage the first wife should die, and the fortieth union would then be the only valid one, the thirty-eight intervening ceremonies creating no matrimonial bond during the first wife's life.

Is the court, then, justified in thus departing from the compact made by the parties themselves? Offences necessarily presuppose duties. There are no conjugal duties, but those which are expressed or implied in the contract of marriage. And if the compact of a polygamous union does not carry with it those duties which it is the office of the marriage law in this country to assert and enforce, such unions are not within the reach of that law. So much for the reason of the thing.

In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Petition dismissed.

But a polygamous marriage will be recognized as valid in England for certain purposes. Thus it constitutes a bar to a subsequent monogamous marriage by one of the parties.

BAINDAIL *v.* BAINDAIL, [1946] P. 122 (Court of Appeal)

In 1928 the respondent, a Hindu domiciled in India, married an Indian woman in India according to Hindu rites. This marriage was a polygamous marriage by the customs and laws of the Hindu race and was valid in India. In 1939, while his Indian wife was still living, the respondent went through a ceremony of marriage with the petitioner, an Englishwoman domiciled in England, at a registry office in London. In 1944 the petitioner, having discovered an invitation to the respondent's former Hindu marriage, presented a petition for nullity on the ground of bigamy. Barnard J. granted a decree. The respondent appealed.

LORD GREENE M.R.: The point raised by the appeal is a very short one. It was said that for the purposes of a claim to a decree of nullity the existence of the Hindu marriage must be disregarded by the courts of this country with the consequence that on May 5, 1939, the respondent was an unmarried man and was therefore not debarred by any existing union from marrying the petitioner. In support of that proposition a number of observations in decided cases have been cited. But it is to be observed that in no one of those cases was the question to which the court was addressing its observations in any way similar to the present question; it is not, in my opinion, legitimate to take those observations from their context and apply them to what is essentially a different question. I do not propose to go through all the cases cited to us but I will take what I think has been properly described as the high-water mark, the well-known decision of Lord Penzance in *Hyde* v. *Hyde* (*ante*, p. 81). The headnote starts with this general proposition: 'Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.' But that, of course, does not enable any general answer to be given to the question: 'What is to be understood by "marriage" for the purpose of the various branches of English law in which the question of marriage is relevant?' For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage, it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising

BAINDAIL v. BAINDAIL. — Lord Greene M.R.

jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. The word 'marriage' in the Matrimonial Causes Act, has to be construed for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union. If a man by the law of his domicile is entitled to have four wives and then becomes domiciled in this country and wishes to be divorced here, nice questions would necessarily arise as to whether in consorting with the other wives he had been guilty of adultery and various questions of that kind. At any rate, rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country. . . . Lord Penzance quite clearly saw how undesirable it would be to attempt to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the courts of this country for purposes different from that with which he was immediately concerned. I do not feel myself bound by anything said in *Hyde* v. *Hyde* or any of the other cases on which reliance was placed in this connexion to hold that, for the purposes of the present petition, the court is bound, or ought, to disregard the existence of the Hindu marriage.

The problem, as it seems to me, requires to be approached de novo and from quite a different angle; that was the view which the learned judge took and, if I may respectfully say so, I entirely agree with the decision to which he came. The question as it presents itself to my mind is simply this: On May 5, 1939, when the respondent took the petitioner to the registry office, was he, or was he not, a married man so as to be incapable of entering into another legitimate union? The proposition I think would not be disputed that in general the status of a person depends on his personal law, which is the law of his domicile. By the law of the respondent's domicile at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law; he was married for all the purposes of Hindu law, and he had imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage, if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the

time of his Hindu marriage; he was therefore a married man on May 5, 1939, according to Hindu law. Did that circumstance prevent him from entering into a valid marriage in this country? It is said that it did not because, whatever Hindu law may say and whatever his position may be in India, this country will not recognise the validity of the Hindu marriage. We are not considering in this case the question of construction of any words such as 'marriage', 'husband', 'wife', and so forth in the Divorce Acts. We are considering whether, according to what would have been the old ecclesiastical law, the existence of the Hindu marriage formed a bar. For the purpose of that consideration, what was his status on May 5, 1939? Unquestionably, as I have said, it was that of a married man. Will that status be recognised in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases.

Lord Maugham L.C., who delivered the leading opinion of the Committee of Privileges in *Lord Sinha's Case* (1939) said this: 'On the other hand it cannot, I think, be doubted now, notwithstanding some earlier dicta by eminent judges, that a Hindu marriage between persons domiciled in India is recognised by our courts, that issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I refer later'; that was the well-known exception of real estate. We have not been referred to the cases, if any, to which the learned Lord Chancellor was referring, and, in fact, I do not know of any English cases; there are cases no doubt in the Privy Council, but whether there are any purely English cases I do not know. But I do get assistance from that paragraph, quite apart from the question of authorities, as showing the way in which these problems were striking a great master of the law, and one particularly familiar with problems of private international law. If he was not asserting that the law had been settled by decisions of the English courts, he was at least expressing his own opinion and to that

BAINDAIL v. BAINDAIL. — Lord Greene M.R.

I would pay the greatest respect. But quite apart from that, it seems to me that the matter rests in this way: the courts of this country do for some purposes give effect to the law of the domicile as affixing or imposing a particular status on a given person. It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. There are some things which the courts of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicile may give him. The case of slavery, of course, is an obvious case. The status of slavery would not be recognised here, and a variety of other things involved in status will not be recognised here. In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the lex loci. I refer to the illustrations in order to show that there cannot be any hard and fast rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country.

The practical question in this case appears to be: Will the courts of this country, in deciding upon the validity of this English marriage, give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The learned judge set out in a striking manner some of the consequences which would flow from disregarding the Hindu marriage for present purposes. I think it is certainly a matter to bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when very little more than a mile away the Privy Council might be sitting and coming to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of very great practical importance in the everyday running of our Commonwealth and Empire.

If the marriage with the petitioner was a valid marriage it would have this consequence: that she is entitled to the consortium of her husband to the exclusion of any other woman, that he is entitled to the consortium of his wife, and that she is bound according to our

notions of law to live with him provided he gives her a suitable home. If he decided to go back to India it would be her duty as a wife to follow him to the home that he would provide. Assume that this takes place. Directly they land in India by the law of India he is a man married to the Indian lady, and assuming as I think we are bound to assume that Hindu law would be the same in this respect as English law, that Hindu lady is his lawful wife in India and as such would be entitled to his consortium, he would be entitled to insist that she should live with him and she would be entitled to insist that he should provide a home for her. The position therefore would be that this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife. What the position would be with regard to divorce in India I do not know, but if he had an Indian domicile she apparently could not divorce him in England. Whether or not she could divorce him in India because in India he was associating with a woman who under Indian law was his lawful wife I do not know and I do not stop to inquire. Is it right that the courts of this country should give effect to a ceremony of marriage, the result of which would be to put the petitioner into such a position? It seems to me that effect must be given to common sense and decency and that on a question which is not covered by authority considerations of that kind must carry very great weight. On principle it seems to me that the courts are for this purpose bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in this country.

Those are the short grounds on which I think this appeal should be decided. If we have not thought it necessary to reserve judgment in order to study more fully the cases which have been cited it is not that we have failed to appreciate them, but because at any rate so far as I am concerned I do not find it necessary to examine them very closely. The opinion which I have formed relates and relates solely to the facts of the present case which are connected with the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Mr. Pritt in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. I think it right therefore to say that so far as I am concerned nothing that I have said must be taken as having the slightest bearing on the law of bigamy. On the question of whether a person is

BAINDAIL v. BAINDAIL. — Lord Greene M.R.

'married' within the meaning of the statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question.

MORTON and BUCKNILL L.JJ. concurred.

Appeal dismissed.

NOTE D: POLYGAMOUS MARRIAGES

IT is now settled that although the matrimonial machinery of the English courts may not be applied to a polygamous marriage (*Hyde* v. *Hyde*, *ante*, p. 81), such a marriage, celebrated in a country where polygamy is permitted between persons there domiciled, may produce some of the usual consequences of marriage. For instance, it will be a bar to a subsequent monogamous marriage in England, though such a marriage will not necessarily involve criminal liability for bigamy (*Baindail* v. *Baindail*, *ante*, p. 91); and the children may be legitimate (per Lord Maugham in *The Sinha Peerage Claim* (1939), *ante*, p. 89). In *Re Bethell* (1887), 38 Ch.D. 220, Stirling J. decided that the child of a polygamous marriage was illegitimate, but that case can be distinguished on the ground that the father was domiciled in England and therefore had no capacity to contract a polygamous marriage. Apart from the above matters, there is no reliable English authority as to how far our courts are prepared to recognize polygamous marriages. But it is possible that they will recognize them for all purposes except (1) the application of the matrimonial machinery of the English court; (2) the application of the criminal law of bigamy; (3) the capacity of the issue to succeed to real estate in England or to English peerages; (4) the application of such rules of English law as are traceable to the doctrine that husband and wife are one (e.g. the domicile of married women). The matter would appear to be of diminishing importance, since polygamy is dying out in Eastern countries.

To come within Lord Penzance's definition in *Hyde* v. *Hyde*, the marriage need not necessarily be a Christian marriage (*Brinkley* v. *A.-G.* (1890), 15 P.D. 76), and it is immaterial that it may be dissolved by mutual consent under the law of the parties' domicile (*Nachimson* v. *Nachimson*, [1930] P. 217).

It is well settled that the lex loci celebrationis, and not the lex domicilii, determines whether a marriage is monogamous or polygamous. Thus, if a Mohammedan marries here in English form, his marriage is monogamous: *Chetti* v. *Chetti*, [1909] P. 67; *R.* v. *Hammersmith Registrar*, [1917] 1 K.B. 634; *Srini Vasan* v. *Srini Vasan*, [1946] P. 67; *Baindail* v. *Baindail* (*ante*, p. 87). Conversely, if a domiciled Englishman marries abroad according to polygamous rites, his marriage is polygamous: *Hyde* v. *Hyde* (*ante*, p. 81); *Re Bethell* (1887), 38 Ch. D. 220. The potentially polygamous character of the marriage is the decisive factor, not the intention of the parties. If the lex loci celebrationis permits the husband to take more than one wife, the marriage is polygamous even if he does not do so and swears that he never meant to. On the other hand, if

the marriage is monogamous at its inception by the lex loci celebrationis, it is immaterial that the husband may by changing his religion lawfully marry another wife: *Mehta* v. *Mehta*, [1945] 2 All E.R. 690.

It is submitted that a woman domiciled in England has no capacity to contract a polygamous marriage, even in a country where such marriages are permitted and with a man there domiciled. See, however, the contrary view expressed by Denning L.J. in *Kenward* v. *Kenward* (1950), 66 T.L.R. (Part 2), 157, 172.

On the whole question see an article by Beckett in 48 L.Q.R. 341 (1932).

CHAPTER II

MATRIMONIAL CAUSES

Section A: DIVORCE

Jurisdiction to pronounce a decree of divorce belongs (apart from statute) only to the courts of the country in which the parties are domiciled at the time of the commencement of the proceedings.

NIBOYET v. NIBOYET. — Brett L.J.

NIBOYET *v.* NIBOYET (1878), 4 P.D. 1 (Court of Appeal)

BRETT L.J.: In this case the wife filed a petition praying for a dissolution of her marriage on the ground of alleged adultery and desertion by her husband. The petition in form prayed for a dissolution of the marriage. It contained also in the usual general terms an alternative prayer 'for such other and further relief in the premises as to the court may seem meet'. The material facts stated in the different pleadings, as the facts on which the parties relied, were that the parties in 1856 married at Gibraltar according to English form, that the wife was English by birth, the husband French by birth, that the husband had from 1862 to 1869 acted as French vice-consul at Sunderland, and from 1875 to 1876 and until he was cited to appear in this suit, as French consul at Newcastle. The adultery was committed in England. The wife was resident in England. The petition was served in England. The husband was residing in England. But the husband had never been domiciled in England. The husband appeared under protest and pleaded to the jurisdiction. No one appeared for the husband at the hearing, but the Queen's proctor, by direction of the court, intervened and submitted for argument two propositions or questions: (1) Whether, it being admitted by the petitioner that the respondent has a French domicile, this court has any jurisdiction as a matter of general law? (2) If it has not jurisdiction as a matter of general law, whether the particular circumstances of this case give it jurisdiction? The arguments preferred in support of the appeal and in favour of the jurisdiction were: First, that the husband though not completely domiciled in England was bonâ fide and more than casually resident in England, and that such residence made him liable to the jurisdiction of any court exercising jurisdiction in matrimonial causes in England; secondly, that his mere presence in England when charged with a matrimonial offence gave jurisdiction to the English court; thirdly, that the mere applica-

tion to an English court of a person claiming its decree against another for an alleged matrimonial offence gives jurisdiction to the court. It was argued from these propositions that the mere fact of the statute constituting a court with power to grant divorce gave the court jurisdiction to entertain the prayer for divorce as against this respondent, if the case could be brought within any of these propositions. But it was further argued, fourthly, that upon the true construction of the terms of the statute it in terms enacts jurisdiction over all persons, English or foreign, and that an English court must obey the statute. The decision must in the end depend upon the construction of the statute, because before it no court in England had jurisdiction to grant divorce; but as preliminary to the decision it seems desirable to consider the matter according to some general principles. As has been frequently pointed out, a decree of dissolution of marriage cannot be the judicial declaration of a mere consequence agreed between the parties for the breach of a contract, as in ordinary cases of breach of contract, or a mere compensation or individual remedy for the breach of a private duty as in an action for damages, but can only be a judicial sentence of the law of the country in and for which the court is acting, by which such court assumes to alter not only the relation between the parties but the status of both. Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law. The limitations or conditions or effects of such relation and status are different in different countries. As that relation and status are imposed by law, the only law which can impose or define such a relation or status (i.e., relative position) so as to bind an individual, is the law to which such individual is subject. The power of a law which enacts restrictions on or grants relaxations of the personal condition of individuals is territorial, i.e., limited. The meaning of that is, that it is only binding on the natural born subjects of the lawgiver or on those who have otherwise become his subjects. By the universal comity of nations foreigners do not by their mere sojourn in a country make themselves subject to its personal laws, other than its police or

NIBOYET v. NIBOYET. — Brett L.J.

correctional law, or laws expressly enacted to bind all who are in fact within its territorial limits. By the universal independence of nations each binds by its personal laws its natural born subjects and all who may become its subjects. By the universal consent of nations every one who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it, as if he were a natural born subject of it. It follows then from the nature of the subject-matter, that laws which, for certain enacted or predicated causes, as distinguished from causes agreed upon between the parties, alter the personal relations of individuals to each other, or their relation to the community, can only bind the natural born subjects of the enacting country or foreigners who have become domiciled in it; but they may, consistently with principle and the universal consent of nations, bind both of these. The law then which enables a court to decree an alteration in the relation between husband and wife, or an alteration in the status of husband or wife as such, is as matter of principle the law of the country to which by birth or domicile they owe obedience. The only court which can decree by virtue of such law is a court of that country. Another mode of considering the subject, or another line of argument is this. A judgment or decree determining what is the status of an individual is a judgment or decree in rem. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits and by all parties. Such a judgment, where the jurisdiction of the court which made it is recognised, is treated as binding and final, not only by all the courts of the same country but by the courts of all countries. The jurisdiction of the courts of a country in which people have elected to be and are in fact domiciled is in all countries admitted, and the judgment or decree in rem of the courts of a country in which people are domiciled is therefore treated as binding in all countries. But the jurisdiction of a country exercised, whether by legislation or by its courts, over the personal status of the subjects of another country who are merely present in it, or are merely sojourning in it, or are merely cited to it, is not admitted by the country of which such people are subjects or by other foreign countries. If, therefore, the courts of any country should assume, by a decree of divorce or any other decree determining the relation or the status of a married person, to alter that relation or status of a foreigner not domiciled, the decree would not be recognised as binding by the courts of any other country. Then the relation or status of a married person, would

be one in the country of the court making the decree, and another in all other countries. That is to say, a man or woman would be treated as married in one country and not so in another; or married people might be enjoined to live together in one country and to live apart in another. No court ought to assume or presume to place people in so deplorable a position, unless forced to do so by the express law of the country whose law it is administering. Another general consideration seems to be as follows. The status of marriage is the legal position of the married person as such in the community or in relation to the community. Which community is it which is interested in such relation? None other than the community of which he is a member, that is the community with which he is living as a part of it. But that in fact is the community in which he is living so as to be one of the families of it. That is the community in which he is living at home with intent that among or in it should be the home of his married life. But that is the place of his domicile. It follows that upon principle the only law which should assume to alter his status as a married man is the law of the country of his domicile; the only court which should assume to decree such alteration is a court administering the law of that country. The country or society of his birth is not interested in his marriage status so long as he is domiciled elsewhere.

From all these considerations it seems that the only court, which on principle ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the court must be a court of the country in which the husband is at the time domiciled; because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is ex hypothesi—still a wife. The case of an adulterous husband deserting his wife by leaving the country of his domicile and assuming to domicile himself in another, might seem to raise an intolerable injustice; but we cannot help thinking that in such case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, i.e., for the purpose of that suit, of his domicile.[1] So much for the principle, if

[1] As to this, see Note E, *post*, p. 104.

NIBOYET v. NIBOYET. Brett L.J.

there were no authorities. It is very right, however, to consider the decisions of the courts of other countries, and very necessary to consider the decisions of the courts of our own country; the decisions in our own country before the statute being, it should be observed, necessarily decisions as to the extent to which English courts, or the English legislature acting as if judicially, recognised the decisions of foreign courts. Now the American authorities seem clear, and they are of great importance, because the American courts have been called upon oftener than any others to consider and deal with the subject. . . . In America the only court which can decree any alteration in the relations between married people or in the status of either of them as a married person, is the court of the country in which they are domiciled at the time of the institution of the suit. It is equally clear that the decisions in Scotland are to the contrary. The Scotch courts will entertain a suit for divorce, and decree a divorce at the instance of either party who has been resident for a certain period in Scotland, though neither party is Scotch and neither is domiciled in Scotland. This view of the courts of Scotland was, however, distinctly denied to be the law of England in *Rex* v. *Lolley* (1812), 2 Cl. & F. 567, n. Lolley and his wife were both English; the husband was domiciled in England; the marriage was in England; the husband committed adultery in England and Scotland; the wife instituted a suit against him in Scotland for a divorce; the Scotch court decreed a divorce; Lolley afterwards, and during the lifetime of the lady who had procured this decree, married another woman in England. He was tried in England for bigamy, and was convicted. The case was argued before all the judges, and the conviction was confirmed, because they held that the Scotch court had no jurisdiction recognised in England to grant the first divorce, which was therefore to be treated in England as null and void. This decision was treated by Lord Brougham in *McCarthy* v. *De Caix* (1831), 2 Cl. & F. 568 n., as a decision that no sentence of a foreign court can annul a marriage made in England. But it has since been shewn that it only amounts to a decision that the Scotch court had, in the view of the English law, no jurisdiction where the parties were not domiciled in Scotland, though they were for a time resident there. The elaborate judgment of Lord Brougham in *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, is a long criticism to shew that this was all that was necessary to be decided in *Lolley's Case*, that if it decided more it was wrong, and that the true and only condition of jurisdiction was domicile. In the case itself, Sir G.

Warrender was married in England; the adultery charged against his wife was abroad; the husband was domiciled in Scotland at the institution of the suit; the wife was not in Scotland; it was held by the House of Lords that the Scotch court had jurisdiction, on account of the domicile of the husband and because the domicile of the husband was the domicile of the wife. . . .

On the grounds, then, of the nature of the subject-matter of the suit, of the nature of the judgment given in such suit, of the interest of the country in which the dispute arises, of the comity due to other nations, of the immense mischief of a judgment of such a nature being given under circumstances which will prevent it from being recognised everywhere, and of the preponderance of authority in England, I am of opinion that, unless the statute has otherwise enacted, the domicile of the husband in England at the institution of the suit is, according to the true construction of the statute, the fact which gives jurisdiction to the English Divorce Court to decree divorce; that with such a domicile the Court has jurisdiction over a foreigner as well as over an English subject; that without such domicile the court has no jurisdiction, though the party is an English subject. The same rule, I confess, seems to me to apply, for the same reason, to its power to grant any relief which alters in any way that relation between the parties which arises by law from their marriage. It applies, therefore, as it seems to me, to suits for judicial separation and to suits for the restitution of conjugal rights.[1] I do not think it does apply to suits for a declaration of nullity of marriage or in respect of jactitation of marriage.[2] I do not think that the statute binds the court to entertain and exercise a jurisdiction in matters over which, according to the comity of nations, as interpreted by English judges, and acted upon by the English Parliament in its quasi judicial legislation, the English law ought not to assume authority. It is true that the words of the statute are general; but general words in a statute have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond the territorial authority of the legislature. All criminal statutes are in

[1] Jurisdiction to grant decrees of restitution of conjugal rights or judicial separation may be granted by the courts of the country of residence as well as by those of the domicile: *Thornton* v. *Thornton* (1886), 11 P.D. 176; *Armytage* v. *Armytage*, [1898] P. 178.

[2] This statement so far as it relates to nullity was disapproved by the House of Lords in *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641, 654 (*post*, p. 112).

NIBOYET v. NIBOYET. — Brett L.J.

their terms general; but they apply only to offences committed within the territory or by British subjects. When the legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute, as in the Merchant Shipping Act, and in some of the Admiralty Acts. If the legislature of England in express terms applies its legislation to matters beyond its legislatorial capacity, an English court must obey the English legislature, however contrary to international comity such legislation may be. But unless there be definite express terms to the contrary, a statute is to be interpreted as applicable and as intended to apply only to matters within the jurisdiction of the legislature by which it is enacted. In this statute there are no such definite express terms. It may be observed, moreover, that the preamble confines the purview of the statute to English matrimonial causes. It does not say to British causes, but to English causes. It thus limits the statute and the action of the court to a part only of her Majesty's dominions or subjects. It cannot be confined to matrimonial offences committed in England, or it would not reach the case of a matrimonial offence committed abroad by a domiciled English husband or wife. Yet it is confined to an English matrimonial cause. It seems to me to follow that it is confined to a matrimonial offence committed by persons domiciled in England. I am of opinion that, upon principles of law, irrespective of the terms used in the statute which are relied on, the court had no jurisdiction, and that the statute did not by any terms used in it give jurisdiction in this case. I am therefore of opinion that the judgment should be affirmed.

Note. In this case Brett L.J. delivered a dissenting judgment, the majority of the court (James and Cotton L.JJ.) deciding that it had jurisdiction to pronounce a decree of divorce though the respondent husband was domiciled abroad.

LE MESURIER v. LE MESURIER.

LE MESURIER *v.* LE MESURIER, [1895] A.C. 517 (Privy Council)

Appeal by the husband from a decree of the Supreme Court of Ceylon dismissing his petition for divorce on the ground of his wife's adultery.

The parties were married in England in 1883, the husband being domiciled in England and the wife before her marriage in France. From 1883 until the commencement of the suit the parties resided in Ceylon, the husband being a member of the Ceylon Civil Service; but

he retained his English domicile of origin. The adultery was alleged to have taken place at Paris, Marseilles, and on board various steamships on voyages between England and Ceylon.

The judgment of their Lordships (Lords Herschell L.C., Watson, Hobhouse, Macnaghten, Morris, and Sir Richard Couch) was delivered by

LORD WATSON: . . . In order to sustain the competency of the present suit it is necessary for the appellant to shew that the jurisdiction assumed by the district judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country. The opinions expressed by the English common law judges in *Lolley's Case* (1812), 2 Cl. & F. 567, gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould* (1868), L.R. 3 H.L. 85, in these terms: 'The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*.' On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country, to whose tribunals the spouses were amenable, claim extra-territorial authority. . . .

(After considering the authorities down to and including *Niboyet* v. *Niboyet* (*ante*, p. 94) his Lordship continued:) The main reason

LE MESURIER v. LE MESURIER. — Lord Watson.

assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a mensâ et thoro, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe sect. 27 of the Act of 1857 as giving the English court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court. . . .

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage. . . .

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 442, which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which

arises when a man and woman are held to be man and wife in one country and strangers in another.'

Appeal dismissed.

MATRIMONIAL CAUSES ACT, 1950, s. 18

18. (1) Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—

(*a*) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England;[1]

(*b*) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.[2]

(2) Without prejudice to the jurisdiction of the court to entertain proceedings under section sixteen of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings brought by a wife, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.[3]

(3) In any proceedings in which the court has jurisdiction by virtue

[1] This paragraph replaces s. 13 of the Matrimonial Causes Act, 1937, without change of substance.

[2] This paragraph replaces s. 1 sub-ss. (1) and (2) of the Law Reform (Miscellaneous Provisions) Act, 1949, without change of substance.

[3] Section 16 of the Act deals with the jurisdiction of the court to pronounce decrees of presumption of death and dissolution of marriage. Sub-s. (4) of s. 16 provides as follows: 'In determining for the purposes of this section whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.'

of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.[1]

NOTE E: DIVORCE FOR THE DESERTED WIFE

AFTER a period of hesitation (*Niboyet* v. *Niboyet*, *ante*, p. 94) it was finally decided that English courts have jurisdiction to dissolve a marriage only if the spouses are domiciled in England at the date of the commencement of the proceedings (*Le Mesurier* v. *Le Mesurier*, *ante*, p. 100). Although the *Niboyet* case was a decision of the Court of Appeal and has never been overruled, and the *Le Mesurier* case was a decision of the Privy Council on appeal from Ceylon, English courts have ever since 1895 acted on the assumption that the *Niboyet* case is wrong and the *Le Mesurier* case is right.

This rule, combined with the rule that a married woman cannot acquire a domicile separate from her husband (*ante*, p. 44), produces serious hardship and injustice in the case of the deserted wife. For if the husband deserts his wife and acquires or resumes a foreign domicile, the wife is at best put to the expense of petitioning for divorce in the foreign country, and at worst is denied a remedy altogether, for example if the husband is domiciled in some country like Eire where there is no divorce, or if the wife cannot discover where he is domiciled.

The hardship was so obvious that as early as 1878 suggestions were made obiter to the effect that the deserted wife might be allowed to petition for divorce in England although the husband was domiciled elsewhere (*Niboyet* v. *Niboyet*, *ante*, p. 97). The suggestions became more pointed in 1908 when the Court of Appeal in *Ogden* v. *Ogden* (*ante*, p. 65) intimated that the wife's petition for divorce in that case ought not to have been dismissed for want of jurisdiction. Effect was given to these dicta in two undefended cases decided in 1913 (*Stathatos* v. *Stathatos*, [1913] P. 46, and *De Montaigu* v. *De Montaigu*, [1913] P. 154). In each of these cases the situation was that a domiciled Englishwoman had married a domiciled foreigner in England, and that the husband then deserted the wife and obtained a decree of nullity from the courts of his domicile on the ground that the marriage ceremony was formally invalid by the lex domicilii. In each case the wife was allowed to petition for divorce. At that time the foreign decree of nullity would not have been recognized in England (*Ogden* v. *Ogden*, *ante*, p. 59). But since *Salvesen* v. *Administrator of Austrian Property* (1927) (*post*, p. 109), it seems clear that the foreign decree would be recognized in similar circumstances: see *post*, pp. 142–3.

After the rule that a married woman can in no circumstances acquire a separate domicile had been reasserted in *A.-G. for Alberta* v. *Cook* (1926) (*ante*, p. 48), it was held in two cases that if the husband, being domiciled in England, deserts his wife and acquires a foreign domicile, she cannot petition for divorce: *H.* v. *H.*, [1928] P. 206; *Herd* v. *Herd*, [1936] P. 205.

This injustice was partially met by s. 13 of the Matrimonial Causes Act, 1937

[1] This sub-section replaces s. 1 (4) of the Law Reform (Miscellaneous Provisions) Act, 1949, without change of substance.

(*ante*, p. 103). But this was only a limited measure, since it did not extend to the case where the husband had a foreign domicile before the desertion or deportation. The Matrimonial Causes (War Marriages) Act, 1944, also allows the wife to petition for divorce in England in certain circumstances, although the husband is domiciled abroad, provided that the marriage was celebrated between the 3rd of September 1939 and the 1st of June 1950. But this is only a temporary war-time measure. A more complete reform was effected by s. 1 of the Law Reform (Matrimonial Causes) Act, 1949 (now repealed and re-enacted by s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950, *ante*, p. 103), which allows the wife to petition for divorce or nullity if she has been ordinarily resident in England for three years before the petition. This section abandons the test of domicile altogether in favour of the test of 'ordinary residence'. Nevertheless it is to be welcomed on practical grounds, although it is regrettable that the Act contains no provision for the recognition in England of divorce decrees made by Dominion courts under parallel Dominion legislation, e.g. the Canadian Divorce Jurisdiction Act, 1930.

The statutes of 1937, 1944, and 1949 opened the door to a conflict of laws when the wife petitions for divorce in England and the husband is domiciled abroad: should the English court apply English domestic law or the law of the husband's domicile? The former was the better view, because the English court has no jurisdiction to grant a divorce except on grounds laid down by statute: Dicey, pp. 236–7. S. 18 (3) of the Matrimonial Causes Act, 1950 (*ante*, pp. 103–4) now confirms this by providing rather obscurely that in any proceedings in which the court has jurisdiction by virtue of that section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England. This seems to mean that in proceedings for divorce English law shall be applied, and that in proceedings for nullity the matter is left where it stands at present (*post*, p. 142). See Graveson, 3 Int. L.Q. 371 (1950).

In *Wall* v. *Wall*, [1950] P. 112, it was held that in proceedings under s. 8 of the Matrimonial Causes Act, 1937, for presumption of death and dissolution of marriage, it is unnecessary for the petitioner to prove that she is domiciled in England, it is sufficient if she is resident here. The reason is that the relief provided by that section is not primarily or in essence dissolution: dissolution was added as a safeguard to provide for cases where the presumption that the respondent was dead might prove to be incorrect.

Section B: JUDICIAL SEPARATION

The English court has jurisdiction to pronounce a decree of judicial separation if at the date of the commencement of the proceedings (*a*) *the respondent is resident in England though domiciled elsewhere, or* (*b*) *the respondent is domiciled in England though resident elsewhere.*

EUSTACE *v.* EUSTACE, [1924] P. 45 (Court of Appeal)

EUSTACE v. EUSTACE. — Duke P.

DUKE P.: This is an appeal from the Probate, Divorce and Admiralty Division against an order of Horridge J. dismissing for want

EUSTACE v. EUSTACE. — Duke P.

of jurisdiction a suit in which judicial separation was claimed by a wife on the ground of her husband's desertion of her by failure to comply with a decree of the court for restitution of conjugal rights, the wife's petition being framed in accordance with the provisions of the Matrimonial Causes Act, 1884, s. 5.

The parties were married in Scotland in 1915. The respondent was the son of parents living in England. There was cohabitation at various places in England until 1920, when the respondent, as was said, removed to Ireland with the wife of another man. The petitioner in 1922 filed her petition for, and obtained a decree of, restitution of conjugal rights, which was disobeyed, and in due course she filed her petition for judicial separation. Therein she alleged domicile of the parties in England. The petition was duly served, but the respondent did not appear. At the hearing some evidence as to domicile was given.

The petitioner's suit was dismissed by Horridge J. on the ground of want of jurisdiction. In the course of the hearing the learned judge summed up the view of the law on which he acted in this statement: Divorce depends upon domicile and not residence; judicial separation depends upon residence only. The learned judge held himself bound by his earlier decision in *Graham* v. *Graham*, [1923] P. 31.

The facts in the present case differ from those in *Graham* v. *Graham* in that there was there neither domicile nor residence of the parties on which to found jurisdiction, but the reasons of the judgment as reported are in effect those on which the learned judge declined jurisdiction here. Counsel for the petitioner pointed out upon the hearing of this appeal some anomalous consequences which would seem to follow from the rejection of the petitioner's suit for want of jurisdiction. Upon proof of the respondent's alleged adultery, as well as the alleged desertion, she would have been entitled at her choice, as was said, to a decree of dissolution of marriage or of judicial separation. She would certainly have been entitled to a decree of dissolution. The Matrimonial Causes Act, 1884, when construed with the Matrimonial Causes Act, 1857, empowers a wife deserted by her husband to claim judicial separation, and it does not appear that there is any other than an English forum in which she can obtain that relief, so that so long as the respondent remains abroad she cannot proceed. These are no doubt practical considerations, though they do not materially help in the decision of the petitioner's appeal. This depends in substance upon the construction of the clauses in the Matrimonial

Causes Act, 1857, which created the court for divorce and matrimonial causes and granted to it the jurisdiction which, under the Judicature Act, was transferred to the Probate, Divorce and Admiralty Division.

The argument in favour of the limitation of jurisdiction in respect of judicial separation to cases in which the respondent is resident in England is founded in the main upon two facts: first, that the Ecclesiastical Courts could only grant decrees of divorce a mensa et thoro in such cases; and, secondly, that this jurisdiction was transferred to the newly established court by the Act of 1857, with a direction that, in suits and proceedings other than proceedings for divorce, the principles and rules on which the Ecclesiastical Courts had acted should, subject to certain statutory qualifications, continue to be observed. To examine in detail the numerous cases which establish the limited nature of the jurisdiction of the Ecclesiastical Courts is unnecessary. Every Ecclesiastical Court in England was restricted by the common law to its prescribed area of operation. Moreover, by the Statute of Citations, 1531, it was enacted for the prevention of abuses, which, it was said, had grown up in usurpation of power in the provincial courts, that 'no manner of person shall be from henceforth cited or summoned . . . to appear before any . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . shall be inhabiting and dwelling at the time of awarding or giving forth of the same citation or summons'. No Ecclesiastical Court in England could have entertained a suit of the petitioner for a decree of divorce a mensa et thoro while her husband was resident in Ireland, and this is demonstrated in various decisions of dates before and since 1857, which were cited in *Graham* v. *Graham*. Apart from that case there was stated to us to be no direct authority for the proposition there enunciated, though the principles involved have been often discussed. It is advisable, however, before examining the cases cited in *Graham* v. *Graham* or the authorities bearing upon the matter, to see what are the express provisions of the Act of 1857.

The Matrimonial Causes Act, 1857, established in this country a new court of record to which it transferred the jurisdiction in matrimonial causes which had theretofore been exercised by the ecclesiastical tribunals, and to which it also gave certain other and new jurisdictions. The matters subject to the power of the court being thus determined, the statute states with absolute generality who are the persons over whom, in respect of the ascertained subjects, the court shall have authority. A decree of dissolution of marriage, under

EUSTACE v. EUSTACE. — Duke P.

s. 27, may be obtained by 'any husband' or 'any wife' having in fact the grounds of complaint upon which dissolution of marriage may be decreed. A sentence of judicial separation may, under ss. 16 and 17, be obtained by 'the husband' or 'the wife' having the statutory grounds of complaint, and by 'either husband or wife'. . . .

The Legislature having by the Act of 1857 invested the court in question with what is prima facie a general jurisdiction in certain matters of personal status and of personal relationship, what is there in the statute which confines the exercise of the jurisdiction within narrower bounds than those set by the application of the test of domicile? Sect. 22 of the Act of 1857[1] prescribes that in causes other than proceedings for divorce the court is to proceed and act and give relief on principles and rules which in the opinion of the court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions of the Act and of rules and orders thereunder. That this section restricts the jurisdiction of the court over persons to the jurisdiction which the Ecclesiastical Courts possessed is an impossible contention. Sect. 42 of the statute indeed excludes this idea by enacting that in matrimonial causes other than divorce the petition which commences a suit 'shall be served on the party to be affected thereby, either within or without Her Majesty's dominions'. It is worth while, too, to recall that relief by decree of judicial separation for desertion was a form of relief not known to the Ecclesiastical Courts. I think the change in the status of a woman for which ss. 25 and 26 of the Act provide was not only unknown to the Ecclesiastical Courts but was such as none of the courts of the realm could previously have decreed. Sect. 22 of the Act of 1857 is not in truth restrictive of the jurisdiction granted by the Act. It directs the mode in which the jurisdiction shall be exercised. To treat it as limiting the classes of causes with which the court is to deal is to disregard the effect of the Act as a whole. To treat it as imposing a condition of residence analogous to that of the Statute of Citations is to disregard the terms of s. 42.

There being created by the Act of 1857, in its prima facie meaning, a general jurisdiction in matrimonial causes over persons domiciled within the realm, it is necessary to see whether upon petition for judicial separation there is authority binding upon this court which narrows the jurisdiction so as to include only persons resident. I

[1] See now s. 32 of the Judicature Act, 1925.

know of none. There is, on the other hand, a series of judgments which seem to me to support the view that in such cases there is jurisdiction where there is domicile, and that there may be jurisdiction without domicile if there is residence. . . .

It is unquestionable that successive judges in the Probate, Divorce and Admiralty Division have from time to time in various cases other than suits for dissolution of marriage acted upon the view that domicile of the parties confers jurisdiction. But that this court should, upon an undefended petition for judicial separation, determine any wider questions than those which are necessarily raised would be manifestly inconvenient. I therefore refrain from expressing upon this occasion any concluded view as to the character and limits of the jurisdiction of the Probate, Divorce and Admiralty Division in causes other than those of divorce and judicial separation. What is in question here is a wife's claim for judicial separation. The true view of the Matrimonial Causes Act, 1857, with regard to proceedings for judicial separation, is, in my opinion, that which was acted upon by various learned judges to whose decisions I have referred. Domicile gives jurisdiction to decree judicial separation, and the jurisdiction also arises where there is residence of the respondent. There was in this case proof of domicile. There was therefore jurisdiction to entertain the suit and to grant to the petitioner the relief which she sought.

WARRINGTON and ATKIN L.JJ. concurred.

Appeal allowed.

Note. The English courts also have jurisdiction to pronounce decrees of judicial separation in the circumstances mentioned in s. 18 (1) (*a*) of the Matrimonial Causes Act, 1950 (*ante*, p. 103).

Section C: NULLITY OF MARRIAGE

A foreign decree of nullity of marriage pronounced by the Courts of the country in which the parties were domiciled will be recognized in England.

SALVESEN *v.* ADMINISTRATOR OF AUSTRIAN PROPERTY, [1927] A.C. 641 (House of Lords)

Appeal from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary in an action of multiplepoinding.

SALVESEN v. ADMINISTRATOR OF AUSTRIAN PROPERTY.

In June 1897 the appellant, formerly Miss Salvesen, a British subject domiciled in Scotland, went through a form of marriage in Paris with Herr von Lorang, an Austrian subject. The parties thereafter settled in Wiesbaden, in Germany, where they lived together as man and wife, except during the period of the war, when Herr von Lorang served with the Austrian army and the appellant lived in Switzerland, until 1923. In that year the respondent claimed the movable property of the appellant in Scotland, which was then in the hands of her agents and bankers, under the Treaty of Peace (Austrian) Order, 1920, and an amending Order of 1921, on the ground that she became an Austrian national by her marriage. The holders of the movable property brought an action of multiplepoinding to have it determined who was entitled to the property and to obtain their discharge. The property was claimed by the respondent and by the appellant, who averred that she had recently discovered that her marriage in Paris was null and void because certain formalities required by the law of France had not been observed, and intimated that she intended to bring a suit of nullity of marriage in the civil Court of Wiesbaden, the court of the domicile of Herr von Lorang and herself, and the action of multiplepoinding was sisted for this purpose. The nullity suit was brought (the respondent not intervening), and the Court of Wiesbaden in 1924 declared the marriage null and void on the ground that it was formally invalid by French law. Herr von Lorang appeared and was represented by an advocate, but took no active part in the proceedings. Thereupon the respondent raised several objections to the validity of the decree of the German court, and in particular averred that the decree was obtained by collusion, and that it proceeded upon a mistaken view of the law of France; but the jurisdiction of the German court was admitted. The question for determination was whether the decree of the German court should be held binding on the Scottish courts for the purpose of excluding the respondent's averments from inquiry.

The Lord Ordinary (Lord Morison) repelled the respondent's claim for a proof, and preferred the appellant to the property.

The First Division, by a majority (the Lord President, Lord Blackburn and Lord Ashmore; Lord Sands dissenting), recalled the interlocutor of the Lord Ordinary and remitted the case to him to allow the parties a proof of their respective averments.

LORD HALDANE (having stated the facts, and having found that

the appellant and Herr von Lorang were domiciled at Wiesbaden in 1923, continued): My Lords, I do not think that there are any materials before us on which exception can be taken to the judgment in Germany as having been obtained by what amounts in law to collusion. I will assume that both the husband and his wife had as their main motive to obtain that judgment in order, if possible, to avoid the application of the Austrian administrator's title to claim, but I think that, on the grounds assigned by the Lord Ordinary and Lord Sands, if they had the legal right to do this the motive for which they exercised it could make no difference in a case in which fraud practised on the German tribunal is not now alleged, and no collusion in any attempt to deceive that tribunal is established. The real question is simply whether the court of the domicile was competent to dispose conclusively and finally of the question before it. If so it does not matter in law whether it had an exclusive jurisdiction. Had the question been one of divorce for adultery there could to-day have been no controversy as to the binding effect of the German decree. The status of married persons as dependent on divorce is a matter for which the court of their domicile is the appropriate court, and its decision is treated by our courts as not only being valid but as conclusive. The case before us is, however, not one of dissolving an existing marriage but of deciding that no valid marriage ever took place. The marriage was declared by the court of the domicile to have been void by reason of non-compliance with the formalities required by the law of France, where it was celebrated. If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties as having been a judgment in rem. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which private international law recognizes as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes when within its boundaries the ceremony has taken place. This juridical result is more than any mere outcome of the agreement inter se to marry of the parties. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently by proceedings before a competent public authority, but

SALVESEN v. ADMINISTRATOR OF AUSTRIAN PROPERTY. — Lord Haldane.

which meantime carries with it rights and obligations as regards the general community until so got rid of. There is nothing unusual in this doctrine.

I cannot see how, for instance, a husband could plead as a good answer to a claim for necessaries supplied to his wife that the marriage which had been publicly celebrated was one which he was entitled if he took proceedings to have declared void for either impotency or for want of compliance with formalities which the public authority which had celebrated the marriage had assumed to have been complied with. For the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities. The disability of monastic celibacy, for example, or that of a minor, or that of consanguinity, may be binding by the law of one country so as to invalidate the married status, while not binding by that of another. When, therefore, it is necessary to determine what married status implies and how far rights or acts are affected by it, it is necessary to determine the law by which they are fixed. It may be going too far to assert that these are all recognized in this country as referable only to the law of the domicile. But at least it is now established, since the decisions in *Le Mesurier* v. *Le Mesurier* (*ante*, p. 100); *Lord Advocate* v. *Jaffrey* (*ante*, p. 44); and *Attorney-General for Alberta* v. *Cook* (*ante*, p. 48), that for a decree of dissolution of a marriage the court of the domicile is the true court of jurisdiction. That jurisdiction ought on principle to be regarded as exclusive. But for the purposes of the present case it is not necessary to refer to the point, for if the German court was competent to pronounce the judgment it did in the case before us the judgment, being that of the court of the domicile, was conclusive in our courts here, so far as competency is concerned, unless there is something in the decree of dissolution for nullity which distinguishes such a proceeding from one for divorce for adultery. In *Niboyet* v. *Niboyet* (*ante*, p. 99), in which the judgment of the majority of the court is no longer law, Brett L.J., in the dissenting judgment which he delivered, observed that the court of the domicile was the only court that was entitled to alter the status of married people; but he went on to indicate that the principle, while it applies so as to include suits for judicial separation and for restitution of conjugal rights, did not apply to suits for a declaration of nullity. He gives no reasons for saying this. Whether there cannot be jurisdiction which is not that

of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German court was competent as against all other courts conclusively to declare the marriage in the present case void. I am unable as matter of principle to see how its competence as the court of the domicile can be successfully challenged, and if it was competent the decree brought the claim, even of the respondent who was not a party before it, to an end. For the decree did undoubtedly alter the status of the husband and wife. They ceased retrospectively to have been married people in the community of their country. For the purpose of the question raised that status must be taken to have been a res and the judgment was therefore one in rem.

My Lords, if the status in question was a res within the meaning of the principle, the duty of our courts is clear. In *Castrique* v. *Imrie* (*post*, p. 362) this House, adopting the language of Blackburn J., who was one of the judges who advised it, laid down that the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide on the disposition of the thing, and the court has acted within its jurisdiction.

In the careful judgment he delivered in the First Division the Lord President holds that the principle so laid down applies to a decree of divorce, making it conclusive of the dissolution of the marriage, at all events if the ground of the divorce was one or other of those recognized by the law of Scotland—namely, adultery or desertion. But he limits the application of the principle. It applies, in his view, to a decree of judicial separation, for this alters the married status; it applies also to a decree of declaration of marriage. He thinks, too, that a decree of nullity founded on the impediment of impotency also falls within the principle. This is, indeed, in his view, not a bar to the constitution of marriage, but only a resolutive condition of the contract, invalidating by non-performance a marriage that was complete, and assimilating the case to divorce. But the Lord President goes on to say that, as in other instances, nullity proceedings on certain grounds may be instituted by third parties having interest, the principle under discussion cannot be one of universal application. He therefore thinks that a sentence of nullity on the ground of insanity, propinquity, prior marriage, or non-compliance with the

SALVESEN v. ADMINISTRATOR OF AUSTRIAN PROPERTY. — Lord Haldane.

lex loci, is not a judgment disposing of married status and so a judgment in rem, notwithstanding that the sentence, if obtained in an action in which the pretended spouses are the parties, may be res judicata as between themselves. It seems, he says, plain that the competency of such actions by third parties having interest, such as the respondent here, cannot spring from the intention of the persons who were parties to the pretended marriage; nor does the force of the decree pronounced in them necessarily depend on its being given by the court of the pretended husband's domicile. Even accepting this, I do not think that the proposition is at all conclusive on the particular question before us.

My Lords, I do not find the judgment of the Lord President convincing, and am compelled to prefer the other view worked out by Lord Sands. There does not appear to be any reason why a judgment of nullity, even on such restricted grounds as the Lord President mentions, should not be regarded as disposing of the status of married persons. It does not do so the less because third parties may have it open to them to litigate elsewhere questions of validity in certain restricted instances before such questions have been disposed of in the court of the domicile. Such status is not dependent only on the contract of the parties to the marriage. Before Lord Lyndhurst's Act, for example, a man and woman in England standing in an affinity within the prohibited degrees might marry, and the marriage, though voidable, could only be got rid of by the sentence of an Ecclesiastical Court pronounced within the lifetime of the parties. But the status though voidable was not the less a status, a res with which the court could deal. That shows that though voidable and not void, it was that as to which the sentence of the appropriate court was essential for its dissolution.

My Lords, for these reasons I am unable to agree with the view of the Lord President that the foreign judgment in the case before us did not as soon as given establish conclusively against the respondent and every one else that the appellant, at the relevant date in the multiplepoinding proceedings, was not an Austrian national qua wife of an Austrian subject. If so, the claim of the administrator in the multiplepoinding became inept on March 28, 1924, the date of the decree of the Wiesbaden Court, which was made final on May 4 in that year. The interlocutor of the Lord Ordinary repelling the claim for the administrator was not pronounced until April 21, 1925, and ought accordingly to receive effect.

There were cited numerous authorities for the contention of the respondent in the Court of Session. These I have examined, but they do not appear to me to modify the conclusion at which I have arrived as to the principle which must be applied. In considering them it should be borne in mind that some of the dicta in the older cases have been affected by the English Divorce Act of 1857, which for the first time enabled divorce a vinculo to be granted by a court of general law in England. Before that year it was the prevalent view that a marriage duly celebrated in England could not be got rid of (except by Act of Parliament) validly so far as England was concerned, even by a foreign decree, at least when the domicile at the time of the marriage was English. In the report of *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488, 567, *Lolley's Case* (1812), 2 Cl. & F. 567, which had been decided by eminent English judges, is explained, and it is yet more precisely explained by Lord Westbury in *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55, 85, and by Lord Selborne in *Harvey* v. *Farnie* (1882), 8 App. Cas. 43, 54. *Lolley's Case* appears in reality to have turned on domicile as much as on the indissoluble character of an 'English marriage'. After 1857 the indissoluble character of an English marriage disappeared, and the effect of this disappearance is noticeable in the later decisions. In the judgment in *Le Mesurier* v. *Le Mesurier* (*ante*, p. 100) the modern doctrine of domicile as the true test prevails unrestrainedly. . . .

In considering the application of other authorities cited to us it is essential to bear in mind the limited scope of the only question before us. It is simply whether, when the court of the domicile of both the parties has pronounced their marriage to be invalid on the ground of nullity for want of formalities, a court here where they are not domiciled can review that decision. The reasons given by Lindley M.R. in *Pemberton* v. *Hughes* (*post*, p. 386) are, in my opinion, conclusive against any attempt to reopen any such case on the footing of supposed irregularity of procedure. Our courts, as he says, never inquire whether a competent foreign court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed. In the present case the question was not divorce by way of dissolution for any offence but because of nullity for want of essentials required for the contract. It is said that this makes a difference, inasmuch as the marriage if a nullity could not change the domicile of the supposed wife. That is possibly true, on the grounds assigned by the then President of the Divorce Court,

SALVESEN v. ADMINISTRATOR OF AUSTRIAN PROPERTY. — Lord Haldane.

Sir Gorell Barnes, in his elaborate judgment in *Ogden* v. *Ogden* (*ante*, p. 59). But it does not affect the litigation before us, in which the decree of nullity in the court of the husband's domicile was pronounced with retrospective effect before the claim of the Administrator of Austrian Property could be established. None of the cases cited to us seem to me to affect this simple point.

My Lords, for the reason that the judgment of the Wiesbaden Court was both competent and binding upon us, I think that we ought to recall the interlocutor of the First Division and to restore that of the Lord Ordinary. The appellant should have her costs in the Inner House and here. I move accordingly.

VISCOUNT DUNEDIN: My Lords, although I had made up my mind as to what, according to my opinion, the judgment of the House ought to be in this case, yet before I had penned a single sentence of the opinion which I should deliver, I had the advantage of reading the opinions of the noble Viscount on the Woolsack and of Lord Phillimore. Agreeing as I do with these opinions and also with every word of what I may without offence term the exceedingly able judgment of Lord Sands, if this were an ordinary case I should simply announce my concurrence. But the case is so important to the law that I need not apologize for adding some remarks of my own; only, as it would be useless to retrace the ground so thoroughly explored in the opinions mentioned, these remarks will be necessarily discursive, but I hope may serve some purpose.

First I would like to say that I thoroughly endorse the view of Lord Phillimore that the outlook of the English courts was necessarily different before and after 1857. I would like to add that I think there is another date of great moment, namely, the date of the decision of *Warrender* v. *Warrender* in this House, namely, 1835. Now I venture to say this: that before that judgment, without my considering whether it really was the law or not, any English lawyer would have said that the law of England is, that an English marriage is indissoluble by any court; it is something that cannot be broken, indissoluble in essence, and looking to *Lolley's Case*, who could say he was wrong? I think satisfactory proof of this may be found in the argument of Sir John Campbell A.-G., afterwards Lord Chancellor, in the *Warrender* case, wherein he says: 'It may be considered as absolutely certain that the bar of England could not have furnished a single counsel who would have set his name to the opinion, that

judicial indissolubility was not a legal quality of every English marriage.' But when *Warrender's Case* was decided, that, as an abstract proposition, could no longer hold, though I doubt whether the majority of English lawyers appreciated it. They did not in those days pay much attention to Scotch cases. Besides, as a decision it did not necessarily say *Lolley's Case* was wrong, because Lolley was an Englishman and only went to Scotland for the purpose of obtaining a divorce, while Warrender was a Scotchman. In other words, if the law of *Le Mesurier* had then been fully known, Lolley's divorce in Scotland was no divorce at all. No one can read Lord Brougham's judgment without coming to the conclusion that he thought *Lolley's Case* was wrong in what it laid down, and when Lord Lyndhurst twitted him with having gone out of his way to approve *Lolley's Case* in *M'Carthy* v. *De Caix* (1831), 2 Cl. & F. 568, when he was Chancellor, Lord Brougham retorted that he was then only sitting in Chancery, and was bound by *Lolley's Case*, but now he was in the House of Lords and was not. My Lords, I do not think it necessary to consider whether I should follow the iconoclastic tendencies of my fellow-countryman. All I want to point out is that I think all early English decisions, certainly up to 1835, and I think up to 1857, must be read in the light of the general opinion of the indissolubility of an English marriage.

The other point on which I want to say a few words is the question of what is a judgment in rem. All are agreed that a judgment of divorce is a judgment in rem, but the whole argument of the majority of the judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a 'res', as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the court, such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res, but it, to borrow a phrase, savours of a res, and has all along been treated as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no res. Now it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford dictionary the word 'status' is defined (inter alia) as 'The legal standing or position of a person . . . condition in respect, e.g., of liberty or servitude, marriage

SALVESEN v. ADMINISTRATOR OF AUSTRIAN PROPERTY. — Viscount Dunedin.

or celibacy, infancy or majority.' The judgment in a nullity case decrees either a status of marriage or a status of celibacy.

The learned judges rest strongly on what was said on the subject in *Ogden* v. *Ogden*, but, first, I am not bound by *Ogden* v. *Ogden*, and so far as the dicta contradict what I have just said, I do not agree with them. And, further, a close perusal of the judgment in *Ogden* v. *Ogden* will show that it is very much wrapped up with the question of jurisdiction, and if the first marriage was null, there was no jurisdiction in the French court against the so-called wife defending.[1] But here the jurisdiction is undoubted. On this point I would cite the words of Sir James Hannen in the case of *Turner* v. *Thompson* (1888), 13 P.D. 37, 41: 'A woman when she marries a man, not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband, if she lives with him in the country of his domicile. There is no ground here for contending that she did not take up that domicile. She had the intention of taking up her permanent abode with him, and of making his country her permanent home.' These words exactly fit this case. I am therefore of opinion that a decree of nullity savours of a res just as much as a decree of divorce. I accept the conditions laid down by Lord Lindley when he was Master of the Rolls in *Pemberton* v. *Hughes*. In order for a foreign decree to be immune from disturbance by an English court—and in my opinion Scottish may with perfect justice be substituted for English—it must be pronounced between persons subject to the foreign jurisdiction, and deal with a matter with which the court is competent to deal, and it must not offend against English ideas of substantial justice.

Although, as I said before, these remarks are discursive, and I do not wish to retrace traversed ground, yet I would put in the form of short propositions the points I hold proved, the proof of several of them being worked out, not by me, but by the opinions of my noble and learned friends.

1. The German court had jurisdiction over the parties, they being domiciled in Germany equally whether there was marriage or no marriage.

2. This was a genuine action, and there was no collusion or fraud used to deceive the German court.

[1] See, however, Note B, *ante*, p. 52. The first marriage in *Ogden* v. *Ogden* was voidable, not void, and therefore the woman acquired the domicile of the man by operation of law: *De Reneville* v. *De Reneville*, *post*, p. 126.

3. The validity of the marriage depended on French law, that being the law of the locus celebrationis.

4. The German court took proper steps to inform itself of the French law, and gave judgment according to the law proved before it.

5. That judgment is a judgment which is equivalent to a judgment in rem, and is therefore binding on the Scotch court without further inquiry.

It follows that I agree with the motion made from the Woolsack.

LORDS PHILLIMORE, BLANESBURGH, and WARRINGTON delivered judgments to the same effect.

Appeal allowed.

DE MASSA *v.* DE MASSA, [1931] (Probate, Divorce and Admiralty Division)

Woman's petition for nullity of marriage.

The petitioner, Claire Marie Lucie Horveno, was born in France on the 10th of June 1909, of French parents. She was of French nationality and domicile. She met the respondent, Raoul Hillebron Hildebrand De Massa, for the first time in 1926 at her parents' house in Cannes. The respondent told her that though born in Sweden he was a Frenchman by nationality. In June 1927 the respondent persuaded the petitioner to join him at Ostend, and accordingly she left her father's house clandestinely and without his knowledge or consent, and journeyed to Paris and thence to Ostend, where she met the respondent. The petitioner and respondent journeyed to London early in July 1927. In order to procure a passport for the petitioner the respondent altered the date of her birth in her birth certificate, making it appear that she was three years older than she was.

The petitioner and respondent were married at the Paddington Registry Office on the 28th of July 1927, and they went to live in Kensington. The marriage was duly consummated. On the 16th of August 1927 the respondent was detained by the police and charged under the Aliens Act with failing to notify his marriage, and was sentenced to one month's imprisonment and ordered to be deported.

In November 1927 the petitioner filed her petition for nullity in the High Court of Justice on the ground that she had not acquired the consent of her father as required by French law, and that by that law the ceremony was void. On the 19th of April 1929 an order was

DE MASSA v. DE MASSA.

made for service on the respondent by advertisement in the *Continental Daily Mail*. The respondent did not enter an appearance.

On the 4th of July 1930, the petitioner obtained a decree from the Civil Tribunal of First Instance of the Department of the Seine on the grounds (1) that it had not been preceded by publication of banns as required by Article 170 of the French Civil Code, and (2) that the petitioner had not obtained the consent of her father as required by Article 148. The respondent was served with notice of these proceedings but did not appear.

On the 18th of February 1931, the petitioner filed a supplemental petition in the High Court of Justice in which she set out the French nullity decree.

When the petition came on for hearing evidence of French law was given by M. Frederick Allemes, a French advocate practising in London, and legal adviser to the French Embassy and Consulate-General in London. He referred to the following Articles of the French Code Civil in support of his opinion that by French law the marriage was invalid:

Art. 3: 'The law as to the personal status and capacity binds French citizens even when living abroad.'

Art. 148: 'Minors cannot marry without the consent of their father and mother; and disagreement between father and mother shall be construed as consent.'

Art. 170: 'A marriage contracted in a foreign country between French citizens and between a French citizen and a foreigner shall be valid if it has been performed according to the forms customary in such country, provided that it has been preceded by the publication of the banns required by Article 63 under the title of Civil Status Records, and that the French citizen has not violated the provisions contained in the preceding chapter.'

M. Allemes stated that a minor in French law is a person under the age of 21 years.

LORD MERRIVALE P.: The petitioner is a young French woman who, by French law, could not be married without the consent of her parents. That consent never was obtained. The ceremony of marriage was performed at an English Registry office. Later the man with whom the ceremony was performed disappeared from the scene. The case came on for hearing here for a decree of nullity, but it seemed to me that nullity in such a case where the respondent was

a French subject and the domicile, I took it, by reason of the marriage was a French domicile, was necessarily for a French tribunal. That view has been taken but the case had not proceeded on that footing up to the time that it came into court and therefore it became necessary to adjourn it. A French tribunal of competent jurisdiction has annulled the marriage and that declaration of nullity comes into operation. All that is necessary for me to do now, is to declare the marriage to have been null and void, citing the judgment of the French tribunal as a judgment between the parties.

[His Lordship intimated that if the King's Proctor saw no objection application might be made early in the next sittings to have the decree nisi made absolute.]

The English court has (apart from statute) jurisdiction to pronounce a decree of nullity in the case of a voidable marriage only if the parties are domiciled in England at the date of the commencement of the proceedings.

INVERCLYDE *v.* INVERCLYDE, [1931] P. 29 (Probate, Divorce and Admiralty Division)

Woman's petition for nullity of marriage on the ground of the impotence of the man.

BATESON J.: In my judgment the respondent succeeds. The petition in this case dated August 1, 1930, states that the petitioner went through a form or ceremony of marriage with the respondent on March 21, 1929, in London, that the respondent was and has ever since been incapable of consummating the said marriage, that the respondent is domiciled in Scotland and resides in London and Castle Wemyss in the County of Renfrew; that the petitioner is domiciled in Scotland and resides in Hampstead. To that petition the respondent entered an appearance on August 20, 1930, under protest on the ground that this court has no jurisdiction.

Assuming the facts stated in the petition to be true the question I then have to determine is this. Has this court jurisdiction to try a suit for nullity on the ground of impotence when the parties are domiciled abroad? The respondent says that the court of the domicile has exclusive jurisdiction. The petitioner says that the parties reside in England and were married in England and that in such cases this court and the Ecclesiastical Courts before it have always exercised jurisdiction.

INVERCLYDE v. INVERCLYDE. — Bateson J.

The argument for the petitioner is this:—

Inasmuch as the Ecclesiastical Courts always had jurisdiction in nullity cases where the parties were resident within their jurisdiction and the old jurisdiction was transferred to the High Court by the Act of 1857, now re-enacted by the Judicature (Consolidation) Act, 1925, and as since 1857 this court has always exercised jurisdiction over nullity cases when the parties were resident or married here, it follows that there is jurisdiction in this case. It is further argued that the Ecclesiastical Courts made no distinction in the kind of nullity, whether it was on the ground of impotence or that of want of formality or illegality; the only essential to jurisdiction was residence in the jurisdiction, and after the Act of 1857 residence or marriage in the jurisdiction. The text-books and cases are said to support this argument, with the exception of the case of *Salvesen or von Lorang* v. *Administrator of Austrian Property* (*ante*, p. 109), which does not decide the point, and though it may contain dicta against the argument, these dicta are merely obiter. Counsel for the petitioner, however, has to admit that no case can be found in which the present question has been raised either before or since 1857.

The argument for the respondent was this:—

A suit for nullity on the ground of impotence is quite different from other suits for nullity, e.g., on the ground of informality or illegality, such as bigamy, absence of parental consent, or some requirement in the ceremony. Nullity on the ground of impotence is a suit to avoid a marriage and is in essence a suit to dissolve it. The marriage is voidable and not void, as in other cases of nullity. The marriage remains a marriage until one of the spouses seeks to get rid of the tie. In other cases such as bigamy there has never been a marriage at all. Domicile of the parties, at any rate since 1895, has been an essential of jurisdiction in a suit to dissolve a marriage in divorce and must equally be so in a nullity suit to dissolve a marriage on the ground of impotence. Further the decree in a nullity suit on the ground of impotence is a decree affecting the status of the parties and is a judgment in rem just as a decree in a divorce suit affects their status and is a judgment in rem. The court of the domicile is the only competent court to grant a decree affecting status. No case can be found before 1857 or since in which the court has been held to have jurisdiction in a suit for nullity on the ground of impotence when the parties are domiciled abroad. Further it has to be remembered that impotence is not always a ground for a decree of nullity. There may

be cases where the impotence is curable or the parties estopped by conduct from setting it up: *G.* v. *M.* (1885), 10 A.C. 171. In the case of curable impotence the period between marriage and cure, although one of impotence, is not enough on which to obtain a decree. Again the marriage cannot be impeached after the death of one of the spouses. Nullity for impotence is a matter in which the spouses alone are concerned. In other forms of nullity other parties are concerned, and may obtain the assistance of the court for a finding of nullity.

This is the argument for the respondent, and in my judgment it is sound.

The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country. It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicile it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution. That is a mere difference in form, as Sir James Hannen said in *Turner* v. *Thompson* (1888), 13 P.D. 37, 40. The usual relief in the United States I understand from that case is dissolution and not nullity. The Lord President (Lord Clyde) in the court below (*Administrator of Austrian Property* v. *Salvesen or von Lorang*, [1926] S.C. 598, 616) says 'impotency' may be justly described even in the law of Scotland 'not as a bar to the constitution of marriage but only as a means of setting it aside or as a resolutive condition of the contract'. Originally in a suit for dissolution for divorce it was thought that residence was enough: *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259. In 1872 the question as to the essentiality of domicile was raised in *Wilson* v. *Wilson* (1872), L.R. 2 P. & M. 435, but not determined, as it was held that the parties were in fact domiciled here. It was not until 1895 that the principle was established by a decision of the Privy Council that the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage: *Le Mesurier* v. *Le Mesurier* (*ante*, p. 100).

But apart from principle it seems to me that the House of Lords in *Salvesen* v. *Administrator of Austrian Property* have put the matter beyond doubt. . . . Lord Phillimore says: 'If the court is a competent court, still more if it is the only competent court—and in my opinion the Wiesbaden Court was the only competent court for these parties

INVERCLYDE v. INVERCLYDE. — Bateson J.

—its judgment must for the very reason of the thing be such a judgment as that described in *A.* v. *B.* (1868), L.R. 1 P. & M. 559, 561, a definitive decree declaring a marriage void which should be universally binding and which should ascertain and determine the status of the parties once for all.' That passage in Lord Phillimore's speech covers this case precisely. It is quite true that in *Salvesen* v. *Administrator of Austrian Property* the question they were discussing was whether a judgment in a foreign court was binding here, but it was necessary for the decision that they should find that it was a judgment in rem, and that it did affect status for the purpose of their conclusion. The whole court decided that it was a judgment in rem, that status was affected, and that the judgment of the court of the domicile was conclusive. Lord Phillimore went further and said that it was the only competent court for those parties; that was the court of their domicile. It is to be noted that Lord Dunedin and Lord Warrington expressly agree with Lord Phillimore's speech. They said so in terms.

I ought to refer to the authorities which were cited in argument. I can get no assistance from those before 1857. . . .

As to the authorities since the Act of 1857, still I find no case on the point. The best cases which counsel for the petitioner can find refer to questions as to the marriage in question being a marriage at all by our own or foreign law or the jurisdiction has not been questioned or the cases have been undefended. The cases most relied on have not always been received in the highest tribunals with enthusiasm, and their reputation has not increased with age. *Simonin* v. *Mallac* (*ante*, p. 53) was a case where the parties were domiciled French people who were married in England, but there was an absence of some formality required by French law. The woman sued for nullity in the French court, where it was undefended, and she got a decree for nullity in the court of the domicile. Then the woman came to England and petitioned for nullity here. The citation being served upon the husband in Naples, he did not appear or contest the suit. Sir Cresswell Cresswell said: 'The responsibility cast upon the court is greatly increased by want of assistance in the argument on the (respondent's) side.' It was held that there was jurisdiction to determine the validity of the contract, because the contract was entered into in this country. The contract was a valid marriage by our law. If this case purports to decide more than that it is contrary to the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property*. It is true that

the status of the parties as affecting the making of the contract of marriage is referred to there, but not the status of the parties as affected by the marriage. That was a case not of impotence, nor was the question of jurisdiction fought, so it cannot be of very much assistance. . . . *Linke* v. *Van Aerde* (1894), 10 T.L.R. 426, was a case of nullity for bigamy. The judgment was fortified by *Simonin* v. *Mallac*; *Sottomayor* v. *de Barros* (*ante*, p. 74); and *Niboyet* v. *Niboyet* (*ante*, p. 94), a case since overruled. *Roberts* v. *Brennan*, [1902] P. 143, was an undefended case of nullity for bigamy, and residence was held sufficient to found jurisdiction. The marriage was in the Isle of Man and the domicile Irish. The decision does not assist me in an impotence case. In *Ogden* v. *Ogden* (*ante*, p. 59) the marriage was English. The domicile of the man was French, that of the wife originally English. The French court annulled the marriage for irregularity and the man married again in France. The woman petitioned for divorce in England and Sir Francis Jeune held that there was no jurisdiction, presumably on the ground that she was a domiciled Frenchwoman. The woman married again in England, and her second husband petitioned for nullity for bigamy. The marriage was held bigamous following *Simonin* v. *Mallac* and *Sottomayor* v. *de Barros*. It is difficult to reconcile this case with *Salvesen* v. *Administrator of Austrian Property*, as the French decree of nullity was conclusive and the decision of Sir Francis Jeune on the question of jurisdiction was more wrong than was suggested even in the Court of Appeal. In truth bigamy cases help very little, as in them as distinct from this there never has been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to me untenable. . . .

Counsel for the petitioner contends that there is no ground for distinguishing one class of nullity from another, but I think that I have pointed out several distinctions, the greatest of which is the one being void and the other being voidable and not always voidable. He says that the former courts always tried cases of nullity for impotence. That is true. The cases of nullity which the Ecclesiastical Courts always tried no doubt included cases of impotence, and the impossibility of dissolving a marriage by them was got over by calling it nullity when in essence it was dissolution, but a case involving aliens cannot be found. With the argument that I am bound by *Simonin* v. *Mallac*; *Mitford* v. *Mitford*, [1923] P. 130; and *Ogden* v. *Ogden* I do not agree, especially after what has been said about these cases in the

INVERCLYDE v. INVERCLYDE. — Bateson J.

decision in *Salvesen* v. *Administrator of Austrian Property* quite apart from the dicta in that case. It is further contended that in divorce decrees the children are legitimate, but in nullity cases on the ground of informality illegitimate. In the one case the marriage is dissolved at the date of the decree absolute, in the other it is annulled ab initio. This leaves the case of nullity for impotence in a class by itself. In my view it is also much more expedient to have the certainty of one court and one court only giving judgments in rem deciding the question of status of married persons.

In *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 442, Lord Penzance said: 'It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.'

Petition dismissed.

The law of the husband's domicile determines whether the marriage is void or voidable.

The wife acquires the husband's domicile by operation of law if the marriage is voidable, but not if it is void.

DE RENEVILLE v. DE RENEVILLE.

DE RENEVILLE *v.* DE RENEVILLE, [1948] P. 100 (Court of Appeal)

The wife petitioner, Comtesse Mary Margaret Motley de Reneville, was born in England of English parents, and was domiciled in England until her marriage. In 1935 she married the respondent, a domiciled Frenchman, in Paris, and lived with him there, at Brazzaville in the French Congo, and at Biskra in Algeria. In 1940 the petitioner left the respondent and returned to England, where she had since remained. She petitioned for nullity on the ground that the marriage had not been consummated owing to the incapacity or wilful refusal of the respondent. The respondent entered appearance under protest on the ground that the court had no jurisdiction to entertain the petition. He was at all material times resident as well as domiciled in France. An issue was directed to be tried between the respondent as plaintiff and the petitioner as defendant, to determine the question of jurisdiction. Jones J. held that there was no jurisdiction, and the petitioner appealed.

LORD GREENE M.R.: . . . Before the argument before us had proceeded very far, it appeared that the procedure adopted of trying the question of jurisdiction on a preliminary issue, although no doubt a proper one, did in the special circumstances of the case lead to certain inconveniences. Two alternative matters of fact are alleged in the petition as grounds for a decree of nullity; neither of which was or could be proved or admitted on the trial of the issue. On one view of the law it appeared possible that our decision might be different according as the one or the other of these alternative allegations might be established. Thus, in so far as the answer to the issue as to jurisdiction might depend on domicile the question what was the domicile of the petitioner at the institution of the suit might, as it seemed to us, depend on whether the marriage was a void or voidable one, a question which, in its turn, might fall to be determined by the law of France on the ground either that the marriage was celebrated in that country, or that the matrimonial domicile contemplated by the parties was French. If under French law the marriage was void the result, as it then appeared to us, might well be that the domicile of the petitioner was English at the institution of the suit, a fact which, if established, would, according to some authority, give the English court jurisdiction to pronounce a decree of nullity. When these various possibilities and complications were adumbrated, the further difficulty emerged that so far as the trial of the issue was concerned no question of French law had been pleaded or raised in any way and that in so far as any question has to be decided by reference to French law, that law must on ordinary principles in the absence of proof to the contrary be assumed to be the same as English law. On this basis the question whether the marriage was void or voidable would ultimately have to be decided in accordance with provisions identical with those of English law.

As the result of some discussion, counsel on both sides were anxious, as was the court itself, to avoid the waste of money which would have been involved if the whole matter including the issue of jurisdiction had been sent back for trial. Accordingly, with the consent of counsel for both parties, we decided that the appeal should proceed on the basis that we would decide the question of jurisdiction on two alternative hypotheses, one that the marriage was void and the other that the marriage was voidable.

Various grounds have been suggested as forming foundations for the exercise of jurisdiction in nullity cases by the courts of this

DE RENEVILLE v. DE RENEVILLE. — Lord Greene M.R.

country. They may be listed as follows: (1) English domicile of both parties. (2) English domicile of the petitioner alone. (3) English residence of both parties. (4) English residence of the petitioner alone. (5) The fact that the marriage took place here. (6) Hardship. We are not concerned here to consider cases (3), (5) or (6). 'Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination', said Lord Haldane in *Salvesen* v. *Administrator of Austrian Property* (*ante*, pp. 112–13). This doubtful question remains to be answered by the House of Lords, and there is no need for us to attempt to answer it for the purposes of this appeal. I shall endeavour to confine myself to the questions actually raised.

The case presented on behalf of the petitioner was to the following effect. (A) It was said that in so far as the basis of jurisdiction is to be sought in domicile alone, the domicile of the petitioner is sufficient: that if the marriage was a void marriage, the petitioner had never lost or alternatively had resumed her English domicile of origin before the institution of the cause; that even if the marriage was only voidable, the effect of a decree of nullity would be to render it void ab initio, with the result that for the purposes of jurisdiction the petitioner ought to be regarded as already possessing the status of spinsterhood which, it was said, a decree would give her by its retroactive operation; and that accordingly, the fact that the respondent was domiciled in France is irrelevant on the question of jurisdiction.

(B) Alternatively, it was said that if the petitioner's case as to jurisdiction based on domicile cannot be supported, the court has jurisdiction by reason of the fact that at the inception of the suit she was resident in England and notwithstanding the fact that the respondent was then, as he still is, resident in France. I will deal with these two alternatives in the order in which I have stated them.

(A) That the courts of the country in which the parties are domiciled have jurisdiction to pronounce a decree of nullity whether the parties were or were not married in that country is set beyond doubt by the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property*. It will be noticed that I have said 'the parties' since in that case as in most other cases in which domicile as a basis of jurisdiction has been discussed the domicile of the parties was the same. In nullity cases the parties will have the same domicile at the date of the institution of the suit in one of two events, namely (1) if the marriage is by the proper law voidable and not void, in which

case the wife will have acquired the same domicile as the husband by the mere fact of marriage and retains that domicile until the marriage is annulled. (2) If the marriage is void but nevertheless the wife on the facts acquired a domicile of choice in the country contemplated as that of the matrimonial domicile and has not subsequently changed that domicile. This occurred in the *Salvesen* case, where the wife acquired in fact the husband's German domicile and therefore it was unnecessary to consider what the position would have been if the marriage had been a void marriage and the domiciles of the parties had been different. Throughout the opinions delivered in that case the word 'parties' in the plural is used and it is right to point out that Lord Phillimore said ([1927] A.C. 670) that as to matters of status 'the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively'. I do not, however, read this as an expression of opinion on a point which did not arise and was not for consideration, namely, has such a court jurisdiction where one only of the parties is subject to its law, that is, domiciled in its country. I will return to this later.

So far as English law is concerned there is a clear distinction between void and voidable marriages. 'Wilful refusal' is by s. 7 of the Matrimonial Causes Act, 1937, a ground for treating the marriage as voidable, not for treating it as void. . . .

In what, for present purposes, does the distinction consist? It is argued that there is no real distinction by reason of the fact that in each case the form of the decree is the same and pronounces the marriage 'to have been and to be absolutely null and void to all intents and purposes in the law whatsoever'. It is perhaps unfortunate that a form of decree which was appropriate when a marriage was regarded as indissoluble and could only be got rid of by decreeing that it had never taken place is still used indiscriminately in the cases of both void and voidable marriages. It is particularly anomalous in the case of the new grounds of nullity laid down by the Act of 1937. In *Inverclyde* v. *Inverclyde* (*ante*, p. 123) Bateson J., rightly in my opinion, insisted on the necessity of looking behind the form and regarding the substance of the matter. The substance, in my view, may be thus expressed: a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid

DE RENEVILLE v. DE RENEVILLE. — Lord Greene M.R.

subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. In England only the Divorce Court has this jurisdiction. The fact that in both cases the form of the decree is the same cannot alter the fact that the two cases are in this respect quite different. . . .

In the present case the question whether at the relevant date the petitioner had an English domicile cannot, in my view, be answered until two other questions are answered, namely (*a*) was the marriage a void or voidable one, and (*b*) by reference to what law will the English court decide whether it was void or voidable?

The importance for present purposes of the distinction between 'void' and 'voidable' lies in this. If the marriage was voidable it must, in my opinion, be regarded as having had the effect of giving to the petitioner, as a matter of law, the French domicile of her husband and as precluding her from casting off that domicile before a decree of annulment is actually pronounced. It appears to me quite impossible to suggest that she is to be treated as having resumed, proleptically, so to speak, her English domicile, merely because she has presented a petition for a decree of nullity to which, in point of substance, she might or might not be able to establish her claim. To hold otherwise would be to allow oneself to be misled by the mere wording of a form of decree which was adopted in the past for reasons which are no longer appropriate. The fact that a domicile has been acquired by reason of a voidable marriage is a fact the existence of which cannot be undone by a declaration of nullity. Such a declaration sets the wife free to change her domicile in the future; it cannot in my opinion change it retrospectively in the manner here claimed.

If, however, the marriage is by its proper law a void marriage no decree of any court is required to avoid it. The petitioner in that case did not acquire the French domicile of the respondent by operation of law; she was free to acquire it or not as she chose and, if she acquired it, to abandon it or change it for a different domicile of choice. It is clear on the facts that if she was competent to do so she did abandon her French domicile (which I am assuming she had acquired) and that she thereby resumed her domicile of origin, which was English. Her domicile, therefore, on the hypothesis that the marriage was void, was English. This at once raises a question as to the jurisdiction of the English courts to entertain a petition for nullity by a supposed wife who is in a position to prove that her supposed marriage was void and that her domicile on that basis is English at the date of the

presentation of the petition. This situation seems never to have arisen before the case of *White* v. *White*, [1937] P. 111, which was decided by my brother Bucknill when a judge of first instance. Before I examine that case I must point out that we are not on this hypothesis concerned to do what I have declined to do in the case of a voidable marriage, namely, to give to a decree of nullity which it is assumed will be obtained what I have called a proleptic operation in conferring on a wife a domicile, which, until she obtains the decree she is seeking, she is incapable in law of possessing. In the present case, if the marriage was void, the domicile of the petitioner is English: it would be held to be English by any court in the country before whom the relevant facts were established, for example, in matters of succession no decree of the Divorce Court would have to be produced in order to show that she had possessed that freedom in the choice of a domicile which the law denies to a woman so long as her status is that of a married woman. The fact that she has an English domicile can be established in the nullity proceedings themselves, as she attempted to establish it here, on a preliminary issue, whereas if all she could show was a voidable marriage, the trial of a preliminary issue could only result in a finding that at the date of the presentation of the petition she was domiciled in France.

In *White* v. *White*, [1937] P. 111, 125, 126, my brother Bucknill used words which (save as regards the reference to residence which was in my opinion unnecessary) I respectfully agree. He said: 'It seems to me just to the petitioner and also in the public interest that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this court.' This view does, of course, theoretically at least, open up the possibility of conflicting judgments by the courts of the respective domiciles. But if it be not the right view, and if the only court with jurisdiction is a court in a country where both are domiciled, the problem of jurisdiction based on domicile in the case of a void marriage where the domiciles are different would appear to be insoluble. Bucknill J. attached importance to the fact that the respondent in *White* v. *White* had not objected to the jurisdiction. With great respect, I cannot agree with this. In the case before him the English domicile of the petitioner did, in my opinion, give the court jurisdiction whether or not the respondent objected. Moreover, I should have thought that on principle the exercise of jurisdiction in matrimonial causes affecting status could not depend on the

DE RENEVILLE v. DE RENEVILLE. — Lord Greene M.R.

submission of the respondent or his refusal to submit to the jurisdiction. In the present case, if the marriage was void and not merely voidable, the fact that the respondent has protested cannot, in my opinion, deprive the English court of jurisdiction to declare the status of a domiciled English woman. Conversely, if the marriage is voidable only, no such jurisdiction exists and could not be created by the fact, if fact it had been, that the respondent had not protested.

But the problem remains, by what law ought the question whether the marriage was void or merely voidable to be determined? If by English municipal law alone, the answer to the present appeal is, in my opinion, a clear one. Whichever of the grounds on which the petition is based is made good the marriage is a voidable marriage and the English court, as Jones J. rightly held, has no jurisdiction. That marriages governed by English law are, on the ground of incapacity, voidable and not void must now, I think, be accepted (see *Turner* v. *Thompson* (1887), 13 P.D. 37, *Inverclyde* v. *Inverclyde* (*ante*, p. 121) and *Adams* v. *Adams*, [1941] 1 K.B. 536, 542). Wilful refusal, as I have said, makes the marriage voidable only. Neither in the pleadings nor on the trial of the issue was any reference made to any law other than English law. If the true view be that the question into which class the marriage falls is for French law to decide, either because the marriage was celebrated in France or because the husband's (or the matrimonial) domicile was French, then the court has not been put into possession of what, in my view, would be a crucial matter of fact.

In my opinion, the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the lex loci celebrationis. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage. In *Brook* v. *Brook* (*ante*, p. 71), a case in which the marriage in Denmark (by the law of which country, assuming it applied, it was valid) of two persons domiciled in England was held to be void on the ground that although the lex loci governed the forms of marriage, its essential validity depended on the lex domicilii of the parties, Lord Campbell L.C. said

this: 'But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.' In the case of a void marriage, the matrimonial domicile contemplated will clearly be the same as that contemplated in the case of a voidable or non-voidable marriage, since the parties presumably intend to live together. In the present case, the matrimonial domicile was clearly French and it is, in my opinion, to French law that the question whether the marriage was void or voidable on the grounds alleged must be referred. In the *Salvesen* case, the provision of French law by reference to which the German court had annulled the marriage was one which was regarded, apparently, as relating to form and not to substance. 'The validity of the marriage depended on French law, that being the law of the locus celebrationis', per Lord Dunedin (*ante*, p. 119).

I may summarize my conclusions on the question of jurisdiction as based on domicile in the following manner: (I) If (contrary to my view) English municipal law applies as such, or if that law is applicable on the basis that French law is or must be deemed to be the same as English law (*a*) the marriage was voidable only and not void whichever ground put forward for annulling the marriage be taken. (*b*) The domicile of the petitioner was French at the date when the suit was instituted. (*c*) The domicile of the petitioner cannot be notionally regarded as other than French: it remains French until a decree of nullity is pronounced by a court of competent jurisdiction. (*d*) The only competent courts are the courts of France.

(II) If, as in my opinion is the case, the question whether the marriage is void or voidable is to be determined by reference to French law then (*a*) if by that law (as theoretically, at least, is possible) it is void on both the grounds put forward, the English court has jurisdiction to pronounce a decree whichever of those grounds is established, (*b*) if by that law the marriage is void on one ground (for example, impotence) but voidable on the other (for example, wilful refusal) the English court has jurisdiction to pronounce a decree on the ground of impotence, but if that is not established, it has no jurisdiction to pronounce a decree on the ground of wilful refusal, (*c*) if by French law the marriage is in both cases voidable and not void the English court has no jurisdiction.

DE RENEVILLE v. DE RENEVILLE. — Lord Greene M.R.

I have pointed out the difficulty which arises by reason of the applicability of French law and the omission to appreciate its applicability. But I think that in the circumstances the petitioner ought to have an opportunity of submitting (if she be so advised) that the issue should be sent back to the judge to ascertain whether by French law the marriage is void or voidable for either and if so for which of the two reasons put forward in the petition. The decision of the judge on this question, should we consider that the petitioner ought to be allowed to raise it, would carry the consequences which I have indicated. We will hear argument on this matter when my brethren have delivered their judgments. I may add that it would be for the English court, after hearing evidence of French law, to decide whether in French law the marriage was void or voidable not merely in a verbal sense but in the sense of the words as understood in this country, that is, as indicating or not indicating as the case might be, that the marriage would be regarded in France as a nullity without the necessity of a decree annulling it.

So much for the question of domicile. I turn now to (B), the alternative ground of residence. I will assume that residence of both parties (a matter left open, as I think, by the House of Lords in the *Salvesen* case) is sufficient to found jurisdiction. Is the residence of the petitioner alone sufficient? I agree with Jones J. that it is not.

Mr. Karminski, for the petitioner, placed in the forefront of his argument the decision of Jeune P. in the case of *Roberts* v. *Brennan*, [1902] P. 143. This was a case of bigamy and the wife was petitioning for a decree of nullity. The ceremony was performed in the Isle of Man. The domicile of the man was Irish; the woman was born in Wales. . . . I am quite unable to accept *Roberts* v. *Brennan* as an authority for the proposition that the mere residence of a petitioning wife in England is sufficient to give the court jurisdiction to entertain a nullity suit when the respondent husband is not resident here. If it be thought that *Roberts* v. *Brennan* does so decide, I am unable to agree with it.

On the question of residence as a basis for jurisdiction, reliance was also placed on *White* v. *White*, [1937] P. 111. That again was a case of bigamy. The ceremony took place in Australia when the man had a wife alive. The petitioner was 'domiciled and resident' in England and the respondent was 'domiciled and resident' in Australia or Malta. These statements in the report I read as referring to the time of the Australian ceremony. The respondent did not appear. As the

marriage was a void marriage, Bucknill J. had no difficulty in finding on the facts that the woman petitioner was domiciled in England at the date of the petition. This circumstance, in my opinion, as I have said, was sufficient to give to the English court jurisdiction to determine her status by a decree in a nullity suit, that court being the court of her domicile and thereby a court competent to determine her status. The judgment refers to the fact that the petitioner was both domiciled and resident here, but the reference to residence was, as I have said, in my view unnecessary for the decision. I cannot read this decision as meaning that residence of the petitioning wife alone is sufficient to found jurisdiction on the ground of residence even in the case of a void marriage.

In *Hutter* v. *Hutter*, [1944] P. 95, 103, Pilcher J. had to deal with a petition by a husband for nullity of a marriage celebrated in England which had never been consummated owing to the wilful refusal of the wife. The husband was domiciled in the U.S.A. Wilful refusal was proved. Both parties were resident in England at the date of the petition. The actual decision was that the court had jurisdiction, the short ground being stated as follows: 'It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court.' This case is no authority for the view that residence of the petitioner alone is sufficient.

In *Robert* v. *Robert*, [1947] P. 164, the parties were domiciled and the respondent husband was resident in Guernsey. The wife, who was petitioning for a decree on the ground of wilful refusal by her husband, was resident in England. Barnard J. held that the residence of the wife was sufficient to give him jurisdiction to entertain the suit. In so holding, Barnard J. was, in my respectful opinion, in error, and the case of *White* v. *White*, [1937] P. 111, which he relied on does not support his decision.

These are the only authorities which appear to touch upon the point of residence of the petitioner alone, and without expressing an opinion upon the question whether residence of both parties within the jurisdiction is sufficient, I am clearly of opinion that they cannot be accepted as establishing the proposition contended for. That a wife who is resident but, ex hypothesi, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this

DE RENEVILLE v. DE RENEVILLE.

country appears to me to be contrary both to principle and to convenience.

Bucknill L.J.

BUCKNILL L.J.: . . . On appeal this court during the hearing intimated to counsel that if the marriage was not consummated owing to the impotence of the husband it might be argued that the marriage was void ab initio by French law and that the question of jurisdiction in such a case might not turn on the same considerations as would apply if the marriage was merely voidable. The court therefore could not decide whether it had jurisdiction until the cause of the non-consummation of the marriage had been established and also until it had been decided what law would be applicable in each case. With the consent of both counsel and in order to avoid costs being thrown away the court agreed to deal with the question of jurisdiction on two alternative hypotheses: (1) that the husband was incurably impotent, and (2) that the husband had wilfully refused to consummate the marriage, and on two further hypotheses, namely, that (*a*) English law or (*b*) French law applied to the case.

The main questions for the consideration of the court seem to me to be these: (1) According to English law does incurable impotence render the marriage void ab initio, in the same way for instance that a marriage is void ab initio if one of the parties is already married? (2) According to French law does incurable impotence render the marriage absolutely void ab initio in the same sense as in question 1? (3) Assuming that by English law incurable impotence renders the marriage voidable and not void, but that French law renders the marriage void ab initio in the same sense as in question 1, ought this court, when deciding whether it has jurisdiction to make a decree of nullity on the ground of incurable impotence, to apply English or French law as to the legal effect of impotence on the validity of the marriage? (4) If the marriage is not void but voidable either by French or English law, ought the English court to exercise jurisdiction in this case?

In my opinion the right answer to the first question is that such a marriage is not void ab initio but voidable, notwithstanding the form of the decree which declares that 'the marriage was null and void ab initio'. This form was used by the House of Lords in *Lewis* v. *Hayward* (1866), 35 L.J. (P.) 105. The form of decree in use in the Divorce Division is somewhat different and is that 'the marriage in fact had and solemnized be pronounced and declared to have been

and to be absolutely null and void to all intents and purposes in the law whatsoever . . . and that the petitioner be pronounced to have been and to be free from all bond of marriage with the respondent unless sufficient cause be shown to the court why this decree should not be made absolute'. Notwithstanding the retrospective nature of the decree there are several decided cases to the effect that if the parties to the marriage ceremony are legally competent to enter into it and the ceremony is legally performed, the law regards it as a valid marriage until a decree is made annulling it on the ground of impotence. On the other hand the decree of nullity is retrospective in some respects, and the decided cases are not easy to reconcile on the point as to how far the decree makes invalid past acts. The matter is thoroughly examined by Andrews C.J. in his considered and helpful judgment in *Mason* v. *Mason*, [1944] N.I. 134, 159. In my opinion incurable impotence is a physical defect which may not be established as a fact until after the lapse of years of trial and medical treatment. Thus, in *Lewis* v. *Hayward* already cited, the parties lived together for fourteen years and during nearly the whole of the time occupied the same bed. During those years the parties should surely be regarded in the eyes of the law as man and wife. To hold otherwise would be in my opinion contrary to public policy and to common sense.

The statute of 1937 makes wilful refusal to consummate the marriage a ground for avoiding the marriage, together with other grounds on which a marriage may be voidable. Such refusal and the physical or mental incapacity to tolerate sexual intercourse, which may be taken as evidence of impotence, are so closely allied, that in my opinion it would be an error to make one a ground for saying that the marriage is void ab initio, and the other a ground for saying that the marriage is voidable.

An authority on the point is the decision of Bateson J. in *Inverclyde* v. *Inverclyde*. In that case the wife petitioned for nullity of marriage on the ground of the impotence of her husband. . . . It was argued on behalf of the husband that the petition was akin to one for divorce and that the only forum was that of the domicile. Bateson J. in his judgment said that the question for his determination was whether the court had jurisdiction to try a suit for nullity on the ground of impotence when the parties were domiciled abroad. He said that: 'The marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem

DE RENEVILLE v. DE RENEVILLE. — Bucknill L.J.

binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country. . . . To call it a suit for nullity does not alter its essential and real character of a suit for dissolution.'

Question No. 2. The answer to the question whether by French law incurable impotence renders the marriage void ab initio, cannot be given until the evidence has been tendered on the point to the court. In the absence of any evidence to the contrary this court presumes that French law is the same as English law on the point.

As regards question 3: In my view the English court should be guided by French law. The wife consented to marry her husband in France and intended to live with him there and also impliedly intended to take her husband's French domicile on the assumption that the marriage was valid. Under these circumstances it seems to me that the question as to the validity of the marriage should be decided by French law. I do not see any good reason why it should be decided by English law. True, the wife's domicile before marriage was English, but on the other hand, her husband's domicile was French; and, the two parties to the marriage having different domiciles, it seems to me that the law of France should prevail. To hold that the law of the country where each spouse is domiciled before marriage must decide as to the validity of the marriage in this case might lead to the deplorable result, if the laws happened to differ, that the marriage would be held valid in one country and void in the other country. For this reason I think it essential that the law of one country should prevail and that it is reasonable that the law of the country where the ceremony of marriage took place and where the parties intended to live together and where they in fact lived together, should be regarded as the law which controls the validity of their marriage. Assuming, therefore, that by French law the marriage is void ab initio, in the sense that a marriage is void ab initio because one of the parties is incapable of entering into a valid marriage, the petitioner then would not be the respondent's wife, and has not lost her English domicile, unless she has done so in fact by making France her permanent home.

In such a case I think this court should exercise jurisdiction. I do not know of any authority directly in point. In *White* v. *White*, [1937] P. 111, the court assumed jurisdiction to make a decree of nullity in the case of a void marriage on the ground of bigamy, because the petitioner wife was domiciled and resident in England.

In *Mehta* v. *Mehta* (1945), 174 L.T. 63, Barnard J. exercised jurisdiction and declared void a so-called marriage which had taken place in Bombay. The petitioner wife was at all material times domiciled in England, the respondent was an Indian, and the case made by the petitioner was that she had no intention of marrying the respondent and misunderstood the nature of the ceremony which the judge held was a fraud perpetrated upon the petitioner.

The only other court, in cases of nullity ab initio, and where there is no common or matrimonial domicile in fact, seems to be the court of the country where the marriage was celebrated. But such a court might be extremely inconvenient to both parties and if neither party were domiciled or resident in the country, it is difficult to see what interest that country would have in their matrimonial status.

As regards question 4. If the marriage is merely voidable by French or English law, either for impotence or wilful refusal, the marriage in my view is a valid marriage until a decree is made annulling it. Therefore the wife has the domicile of her husband by operation of law and the court should regard that as the test when considering whether it has jurisdiction. It is not necessary to decide in the present case the question whether the court will exercise jurisdiction over voidable marriages where both parties have merely a permanent residence within the jurisdiction, or where the marriage has taken place within the jurisdiction, because, as I have already said, the husband did not at any time have such a residence in England, and certainly was not residing in this country and was not even present in it when the petition was filed. The marriage in this case was celebrated in Paris. I do not think the fact that the wife before marriage was domiciled within the jurisdiction, and is resident here at the time when the petition is filed, is sufficient in a voidable marriage to confer jurisdiction on this court where the husband is domiciled and at all material times resident abroad.

For these reasons the appeal, in my opinion, should be dismissed, unless the petitioner asks that the case be remitted to the trial judge for evidence to be taken as to French law on the question of the effect of impotence upon the validity of the marriage.

SOMERVELL L.J. concurred.

(Counsel then addressed the court on whether the case should be remitted to the court below to enable the petitioner to prove that by French law the marriage was void on either of the grounds alleged in the petition. The Court of Appeal refused to remit the

DE RENEVILLE v. DE RENEVILLE.

case on the ground that the petitioner had relied throughout on English law.)

Appeal dismissed.

NOTE F: JURISDICTION TO ANNUL A MARRIAGE

THIS is one of the most complicated subjects in the English conflict of laws, and only an outline can be presented here. For a full discussion, see Graveson, pp. 319–33; Dicey, pp. 244–68, 381–5. Everything written on this subject before 1948 is out of date in view of the decision in *De Reneville* v. *De Reneville* (*ante*, p. 126). It is convenient to treat the matter under three heads: (1) jurisdiction of the English court; (2) choice of law to be applied by the English court; (3) jurisdiction of foreign courts.

(1) *Jurisdiction of the English court*

Void and voidable marriages. The importance to be attached to this distinction has varied. It was treated as crucial in *Inverclyde* v. *Inverclyde* (*ante*, p. 121) but as irrelevant in *Easterbrook* v. *Easterbrook*, [1944] P. 10, and *Hutter* v. *Hutter*, [1944] P. 95. It is not mentioned in s. 13 of the Matrimonial Causes Act, 1937 (*ante*, p. 103), in the Matrimonial Causes (War Marriages) Act, 1944, or in s. 18 (1) (*a*) or (*b*) of the Matrimonial Causes Act, 1950 (*ante*, p. 103). Nevertheless, the recent decision in *De Reneville* v. *De Reneville* obliges us to treat the distinction as crucial, if only because it has an important bearing on the domicile of the woman. If the marriage is voidable the woman acquires the domicile of the man by operation of law, but not if the marriage is void (*ante*, p. 51). The nature of the distinction is clearly stated by Lord Greene M.R. in *De Reneville* v. *De Reneville* (*ante*, pp. 129–30).

Voidable marriages. On principle, jurisdiction to annul a voidable marriage should belong (apart from statute) only to the courts of the domicile, because the substance of the matter is that the decree changes the status of the parties, and the decree is therefore analogous to a decree of divorce. This has been held to be so in Australia (*Lougheed* v. *Clark*, [1948] St. R. Qd. 157), and English courts might have reached a similar conclusion but for s. 18 of the Matrimonial Causes Act, 1950. As the law now stands, however, the following propositions seem to be justified:

(*a*) The court has jurisdiction if:

(i) Both parties are domiciled in England at the date of the commencement of the proceedings. Oddly enough, no case decides this, but it is a legitimate inference from *De Reneville* v *De Reneville* and *Salvesen* v. *Administrator of Austrian Property* (*ante*, p. 109). We need not consider cases where the parties have separate domiciles, for that is legally impossible.

(ii) (Semble) both parties are resident in England at the date of the commencement of the proceedings. Here there is a conflict of authority, *Inverclyde* v. *Inverclyde* holding that there is no jurisdiction in such circumstances, while *Easterbrook* v. *Easterbrook* and *Hutter* v. *Hutter* hold that there is jurisdiction. The point is expressly

left open in *De Reneville* v. *De Reneville*, where both the *Inverclyde* case and the *Hutter* case are cited without adverse comment. But dicta in *Casey* v. *Casey*, [1949] P. 420, incline to the view that jurisdiction exists. The conflict of authority is unlikely to be resolved now in view of s. 18 (1) (*b*) of the Matrimonial Causes Act, 1950 (*ante*, p. 103).

(iii) The circumstances fall within s. 18 (1) of the Matrimonial Causes Act, 1950 (*ante*, p. 103) or the Matrimonial Causes (War Marriages) Act, 1944.

(*b*) The court has no jurisdiction merely because:

(i) The petitioner is resident in England at the date of the commencement of the proceedings: *De Reneville* v. *De Reneville*.

(ii) The marriage was celebrated in England: *Casey* v. *Casey*, [1949] P.420. In this case the facts were on all fours with those in *De Reneville* v. *De Reneville*, except that the marriage was celebrated in England, and the Court of Appeal held that it had no jurisdiction. The Matrimonial Causes (War Marriages) Act, 1944, did not apply because the woman had lived with the man in the country of his domicile.

(iii) The respondent does not contest the jurisdiction: *De Reneville* v. *De Reneville*.

Void marriages. On principle there should be no restrictions on the jurisdiction of the English court to annul a void marriage. Ex hypothesi the marriage can be treated as void by the parties without the necessity for any decree; and can be treated as void by any court before which the question may incidentally arise, although the marriage may have been celebrated abroad and the parties may be domiciled and resident abroad or may be dead. The cases justify the following propositions:

(*a*) The court has jurisdiction if:

(i) The petitioner is domiciled in England at the date of the commencement of the proceedings: *White* v. *White*, [1937] P. 111, as explained in *De Reneville* v. *De Reneville*; *Mehta* v. *Mehta*, [1945] 2 All E.R. 690; *Apt* v. *Apt* (*ante*, p. 65).

(ii) The respondent is domiciled in England at the date of the commencement of the proceedings: *Johnson* v. *Cooke*, [1898] 2 Ir. R. 130.

(iii) Both parties are resident in England at the date of the commencement of the proceedings: *Mason* v. *Mason*, [1944] N.I. 134.

(iv) (Semble) the petitioner is resident in England at the date of the commencement of the proceedings. This was another ground for the decision in *White* v. *White*; it was disapproved by Lord Greene M.R., but not by Bucknill L.J., in *De Reneville* v. *De Reneville*.

(v) The marriage was celebrated in England. There is a wealth of authority for this proposition, but in no case except the first were any reasons given: *Simonin* v. *Mallac* (*ante*, p. 53); *Linke* v. *Van Aerdre* (1894), 10 T.L.R. 426; *Sottomayor* v. *De Barros* (*ante*, p. 74); *Hussein* v. *Hussein*, [1938] P. 159; *Baindail* v. *Baindail* (*ante*, p. 87).

(vi) The circumstances fall within s. 18 (1) of the Matrimonial Causes Act, 1950 (*ante*, p. 103) or the Matrimonial Causes (War Marriages) Act, 1944.

(*b*) A marriage which was originally voidable, but which has been annulled by the court of the parties' domicile, may be treated as a void marriage for the purposes of the jurisdiction of the English court: *De Massa* v. *De Massa* (*ante*, p. 119); *Galene* v. *Galene*, [1939] P. 237 (where the facts were on all fours).

(*c*) In no case has the English court declined jurisdiction to annul a void marriage.

(2) *Choice of law*

In *De Reneville* v. *De Reneville* Lord Greene M.R. (*ante*, p. 132) and Bucknill L.J. (*ante*, p. 138) said that the question whether a marriage is void or voidable (which, as we have seen, may have a crucial effect on the jurisdiction of the English court) must be determined by the law of the husband's domicile. The reasons of the learned Judges differ, and the problem is how their statements can be reconciled with the orthodox view that capacity to marry is governed by the law of the antenuptial domicile of each party (*ante*, p. 80). It is submitted that the two questions are quite distinct. The question whether a marriage is *valid or void* for reasons like consanguinity, affinity, lack of age, lack of consent, or bigamy is a matter for the law of the antenuptial domicile of each party. If the marriage is valid according to this test, then the further question whether the marriage is *void or voidable* for reasons like impotence or wilful refusal to consummate is a matter for the law of the husband's domicile. This is quite logical, for ex hypothesi the marriage is not void by the law of the wife's antenuptial domicile, and therefore her domicile is merged in her husband's by operation of law, so that there is only one law of the domicile to consider. It is inconceivable that Lord Greene M.R. and Bucknill L.J. intended to overrule the orthodox view of the law governing capacity to marry without even mentioning it, even if they had power to do so. The question does not appear to be affected by s. 18 (3) of the Matrimonial Causes Act, 1950.

In *Easterbrook* v. *Easterbrook* and again in *Hutter* v. *Hutter* the court annulled a marriage on the ground of the respondent wife's refusal to consummate, although the husband was domiciled abroad and there was no evidence as to what the effect of wilful refusal was by the law of his domicile. These decisions are only reconcilable with *De Reneville* v. *De Reneville* on the basis that foreign law is presumed to be the same as English law until the contrary is proved.

(3) *Jurisdiction of foreign courts*

The distinction between void and voidable marriages has not been stressed in this connexion, but it seems that English courts will recognize foreign decrees of nullity in two situations:

(*a*) If the marriage was celebrated in the foreign country and both parties were resident there at the date of the commencement of the proceedings: *Mitford* v. *Mitford*, [1923] P. 130. In this case the marriage was voidable. It is impossible to collect from Lord Merrivale's judgment whether he relied more strongly on the one circumstance or the other.

(*b*) If the parties were domiciled in the foreign country at the date of the commencement of the proceedings: *Salvesen* v. *Administrator of Austrian Property* (*ante*, p. 109). In this case the marriage was void. It follows that many earlier cases are overruled so far as failure to recognize the foreign decree is concerned: *Simonin* v. *Mallac* (*ante*, p. 53); *Hay* v. *Northcote*, [1900] 2 Ch. 262;

Ogden v. *Ogden* (*ante*, p. 59); *Stathatos* v. *Stathatos*, [1913] P. 46; *De Montaigu* v. *De Montaigu*, [1913] P. 154. On a number of points the decision is open both to a wide and to a narrow interpretation, but the tendency is to interpret it widely. It is clear for instance that it applies to marriages celebrated in England which are perfectly valid by English law, if they are subsequently annulled by the court of the domicile on some ground which is inadequate by English law, and even if the foreign court applies its own law to the formal validity of the marriage: *De Massa* v. *De Massa* (*ante*, p. 119); *Galene* v. *Galene*, [1939] P. 237. It is not yet clear, however, whether a foreign decree annulling a void marriage would be recognized in England if only one party was domiciled in the foreign country. On principle it is submitted that it ought to be recognized. However, Willmer J. took a different view in *Chapelle* v. *Chapelle*, [1950] P. 134. In that case H, domiciled in Malta, married W, domiciled in England, at an English registry office in 1931. In 1944 the marriage was annulled by a Maltese court (the court of H's domicile) on H's petition on the ground that no Catholic priest was present at the ceremony. Willmer J. declined to recognize this decree on the ground that the Maltese court by its own act in pronouncing a decree of nullity destroyed the very ground on which its jurisdiction over W was based. One would have thought that, the marriage being valid by English law, W acquired H's Maltese domicile by operation of law, and therefore that the Maltese decree, being rendered in the common domicile of the parties, should have been recognized in England on the principles laid down in *Salvesen's Case*. Even if this is not so, and W was at the date of the Maltese proceedings domiciled in England, one would have thought that the Maltese decree, being rendered in the domicile of a petitioner who alleged that the marriage was not voidable but void, should have been recognized in England. *De Reneville* v. *De Reneville* (*ante*, p. 126) settles that English courts have jurisdiction to annul a void marriage if the petitioner is domiciled in England: why should a different rule apply to the recognition of foreign decrees?

It is submitted that *Chapelle* v. *Chapelle* is wrong on both points. It is in direct conflict with the South African case of *De Bono* v. *De Bono*, [1948] 2 S.A.L.R. 802, and is effectively criticized by Cross in 3 Int. L.Q. 247 (1950).

CHAPTER III

LEGITIMACY AND LEGITIMATION

Section A: LEGITIMACY

A child not born or conceived in lawful wedlock (that is, a marriage valid by English conflict of laws rules) is in general illegitimate in England.

BROOK *v.* BROOK (1861), 9 H.L.C. 193 (*ante*, p. 70)

SHAW *v.* GOULD.

SHAW *v.* GOULD (1868), L.R. 3 H.L. 55 (House of Lords)

Appeal from a decision of Kindersley V.-C. (L.R. 1 Eq. 247).

John Wilson by his will dated the 27th of February 1832 bequeathed his personal estate upon certain trusts for the benefit of the child, children, or issue of his great-niece Elizabeth Hickson and devised his real estate to the first and other sons of the body of his said great-niece lawfully begotten. The testator died in 1835 domiciled in England.

On the 10th of June 1828 Elizabeth Hickson, being then about 16 years of age and domiciled in England, was induced by the fraud of a person named Buxton, also domiciled in England, to contract a marriage with him. The marriage was never consummated, and for his fraudful act Buxton was indicted, and convicted, and sentenced to three years' imprisonment. No formal dissolution of this fraudulently procured marriage ever took place in England.

In November 1844 Buxton was induced for a pecuniary consideration to go to Scotland so that Elizabeth Hickson, or Buxton, could divorce him. A suit was begun in the Court of Session in November 1845, and that court pronounced a decree of divorce in March 1846 on the ground of Buxton's adultery. Buxton thereupon returned to England.

In June 1846 Elizabeth Hickson went through a ceremony of marriage in Scotland with John Shaw, who was domiciled in Scotland. There were three children of that marriage, the present appellants. John Shaw died in 1852 (a few months after the death of Buxton). Mrs. Shaw died in 1863.

In 1865 the appellants petitioned for maintenance out of the trust funds, which had been paid into court under the Trustee Relief Act, 1859. The respondents, claiming to be interested in these funds in

case the appellants should be declared not entitled to them, presented a cross-petition alleging that the appellants were not the children lawfully begotten of Elizabeth Hickson, because she still continued the wife of Buxton, the divorce from him having been obtained by collusion, and being in itself invalid for the purpose of dissolving an English marriage.

Kindersley V.-C. made an order refusing the petition of the appellants, and directing that the funds in court should be applied for the benefit of the respondents. That was the order appealed against.

LORD CRANWORTH: My Lords, the question to be decided in this case is one of a class which not unfrequently gives rise to great difficulties—the question, namely, how far the status of legitimacy or illegitimacy attaching on a subject of this country may or ought to be modified by the laws of another country. There is no dispute as to the facts material for the decision of this case:—[His Lordship stated them.]

If the law of Scotland on the subject of marriage and divorce was the same as that of England, the case would not have admitted of doubt. As Elizabeth Hickson was married to Thomas Buxton in 1828, and as she gave birth to three children during his lifetime, those children must, by the law of England, supposing that law alone to be in question, either be his children or be bastards. The former conclusion is that which in bygone days would possibly have been adopted, so reluctant were the Courts to receive any evidence of non-access by the husband while he was intra quatuor maria. Adopting, however, the more reasonable views on this subject by which the courts of this country are now guided, we may safely act on the hypothesis adopted by all parties in the argument of the case, that the children of Elizabeth are either her lawful children by John Shaw, or are illegitimate. That they are illegitimate, if we are to look only to the laws of England, is certain; for ex hypothesi they are not the children of Buxton, who was the husband of Elizabeth when they were born. This, therefore, brings us to consider whether, in order to help us in deciding this question, we are warranted in looking at any other law than that of England—whether we may to any extent be guided by the law of Scotland.

If the parties in this case had been Scotch, and not English, and if all which occurred had occurred not in England but in Scotland, there would, I presume, have been no question on the subject. If

SHAW v. GOULD. — Lord Cranworth.

Thomas Buxton, being a domiciled Scotchman, had married in Edinburgh, Elizabeth Hickson, being a domiciled Scotchwoman, and afterwards, while their Scotch domicile continued, she had obtained a decree of divorce in the Court of Session, and then had married John Shaw, the issue of that marriage would certainly have been legitimate. The argument of the appellants is, that the consequence must be the same, though the parties were at the time of the first marriage domiciled in England, and were married there. The question, it is contended, is whether, when the second marriage was contracted, the parties to it had the capacity to contract marriage; in other words, whether the effect of the divorce was to enable them to enter into a valid contract of marriage, which, but for the divorce, they certainly could not have entered into. The whole, therefore, turns on the validity of the divorce. Now, the law of Scotland seems clear that a residence in Scotland for forty days makes that country the domicilium fori of any person so residing in the country, in which, for the purposes of litigation, he is to be treated as being domiciled. And it is assumed that this is true whatever be the nature of the litigation; that it holds equally in cases the decision in which may involve the personal status of those who may claim through the litigant parties; as also where it is a mere dispute between the litigant parties themselves. Taking this, however, to be the undoubted law of Scotland, the question is, whether that principle is one which this country is bound to recognize. I think it is not.

The facts of this case do not raise the question as to what would have been the status of these children if Buxton and Elizabeth Hickson, though married at Manchester, had always been Scotch persons, and had always lived in Scotland; or even what it would have been if, before the proceedings for the divorce, Buxton had actually bonâ fide quitted England permanently, and established himself in Scotland, so as to have acquired a Scotch domicile for all intents and purposes. It may be that in these circumstances the courts of this country would recognize the status of these children, so as to entitle them, after the death of their mother, to the fund given to her children; which, no doubt, must be construed as meaning her legitimate children. But on that point I express no opinion. The decision in *Doe* v. *Vardill* (1839), 7 Cl. & F. 895, though the case did not turn on any question depending on the validity of a divorce, yet rests on principles hardly, to my mind, distinguishable from it; and it may certainly be assumed that these children could not, in any circum-

stances, claim real estate in England by descent.[1] But the opinions of the Judges in that case, and of the noble Lords who spoke in the House, left untouched the question of legitimacy, except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the Statute of Merton, the law of the domicile would decide the question of status. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to shew a strong bias towards the doctrine that the question of status must, for all purposes unaffected by the feudal law, as adopted and acted on in this country, be decided by the law of the domicile. Even, however, if that had been expressly so decided, it would not affect this case. The domicile to produce that result must be a bonâ fide domicile for all purposes, not, that which alone existed in this case, a mere residence of forty days, so as to give jurisdiction to the Scotch courts.

The important differences on the subject of marriage and divorce which exist in the different parts of the United Kingdom often give rise to perplexing difficulties, and exhibit a state of our law little creditable to us. But these difficulties make it more than usually incumbent on those who have to administer the law to take care that wherever a clear line has been drawn by judicial decision the course which it has marked out should be rigidly followed. Now, whatever be the difficulties in such cases as the present, I think the doctrine that no divorce in Scotland resting merely on a forum domicilii had, at all events before the passing of our English Divorce Act in 1857, any effect in England on the validity of an English marriage, is established on the highest authority.

It is impossible to have a stronger authority for this than the case of *Lolley* (1812), 2 Cl. & F. 567, for it was decided there by the twelve Judges that by the second marriage he was guilty of bigamy, though on general principles every leaning in a criminal case would be in favour of the party accused.

That case was followed by Dr. Lushington in *Conway* v. *Beazley* (1831), 3 Hag. Ecc. Rep. 639. There, as in the present case, the second marriage was had in Scotland, not, as in *Lolley's Case*, in England; and it was attempted on that ground to distinguish the two cases. But Dr. Lushington held that the principle was the same wherever the second marriage was solemnized, for that as neither of

[1] That is, as heirs under an intestacy: see Note G, *post*, p. 174.

SHAW v. GOULD. — Lord Cranworth.

the parties to the first marriage had been, at any time, bonâ fide domiciled in Scotland the principle of *Lolley's Case* must prevail.

The same question arose in this House in *Dolphin* v. *Robins* (1859), 7 H.L.C. 390. The case was very fully considered, and the conclusion at which your Lordships arrived unanimously was, that the Scotch courts have no power to dissolve an English marriage where the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch courts, gives them jurisdiction in the matter.

These cases clearly decide the one now before the House, for if the first marriage here was not dissolved there could not have been a second marriage. Till the first was dissolved there was no capacity to contract a second. If after the second marriage Buxton and Elizabeth had again cohabited, and there had been an issue, that issue would certainly have been legitimate by the law of England, and it cannot be argued that the issue of both unions could share together.

The view which I take of this case relieves me from the necessity of considering whether the resort to Scotland for the purpose of the divorce, and the arrangements made among the parties for bringing about that object, were or were not of such a character as to taint the whole of the proceedings with fraud; I am not at all satisfied that they were, but I am glad to be relieved from the necessity of deciding on such a ground.

There is only one further observation which I desire to make; it is this: In saying that the Scotch courts have no power to dissolve an English marriage where the parties have only gone to Scotland for the purpose of obtaining there a domicilium fori, I do not mean to express any opinion as to what might be the effect of a divorce so obtained considered merely as a Scotch question. In the anomalous state of our laws relating to marriage and divorce, it may be that such a proceeding may be valid to the north of the Tweed, but invalid to the south. And I am painfully sensible of the inconveniences which may result from such a state of the law. But it must be for the Legislature to set it right. The authorities seem to me to shew clearly that whatever may be the just decision of the Scotch courts in such a case as the present, on this subject of divorce according to Scotch law, it is one in which this country cannot admit any right in them to interfere with the inviolability of an English marriage, or with any of its incidents. To do so would be to allow a prejudice to English law to be created by the decisions of what, for this purpose, we must call a

foreign law, thus going beyond what any country is called on to do. SHAW v. GOULD. — Lord Cranworth.

On these short grounds I am of opinion that there was no foundation for this appeal, and I move your Lordships that it may be dismissed.

LORD CHELMSFORD: Whether the appellants answer the descriptions respectively of 'sons lawfully begotten' and of 'children', depends upon whether their parents were lawfully married; and this again depends upon the effect of a divorce in Scotland dissolving the marriage of their mother with Thomas Buxton in England. (His Lordship proceeded to hold that the divorce was invalid in England, and therefore that the appellants were illegitimate and could not take under the will.)

LORDS WESTBURY and COLONSAY delivered judgment to the same effect.

Appeal dismissed.

In re PAINE, [1940] Ch. 46 (*ante*, p. 78)

But a child may be legitimate in England if it is legitimate by the law of the domicile of each of its parents at the date of its birth.

In re BISCHOFFSHEIM, [1948] Ch. 79 (Chancery Division) *In re* BISCHOFFSHEIM.

Henri Louis Bischoffsheim by his will, dated 26 August 1903, devised and bequeathed his residuary real and personal estate to his trustees on the usual trusts for sale, conversion, and investment. He directed his trustees to hold a share of his residuary estate (subject to certain prior interests) upon trust for his grand-daughter Nesta Pamela Fitzgerald for life, with remainder to such her child or children as being male should attain the age of twenty-one years or being female should attain that age or marry.

The testator died on 11 March 1908. On 30 April 1908 his grand-daughter, Nesta Pamela Fitzgerald, married Lord Richard Wellesley. There were two children of that marriage, namely, the first and second defendants. On 29 October 1914 Lord Richard Wellesley was killed in action. On 12 March 1917 Nesta Pamela Wellesley married in New York, Lord George Wellesley, the brother of her first husband. There was one child of this marriage, namely, the third defendant, Richard Wellesley. Nesta Pamela Wellesley died on 21 February 1946.

In re BISCHOFFSHEIM.

The domicile of origin of Nesta Pamela Wellesley and of Lord George Wellesley was English. Accordingly, in 1917, a marriage between them in this country would have been void under the Marriage Act, 1835. It was their intention, however, prior to their marriage to acquire a domicile of choice in the State of New York, where their marriage would be valid. It was questioned whether in fact they had succeeded in establishing such a domicile of choice at the date of the marriage but it was not disputed that they had established a domicile of choice in the State of New York in 1920, at the date when the third defendant, Richard Wellesley, was born.

This summons was taken out by the trustees of the testator's will for the determination of the question whether the defendant Richard Wellesley was entitled to share as a child of Nesta Pamela Wellesley in the share of the testator's residuary estate settled by his will on her for life, with remainder to her children.

ROMER J.: The domicile of origin both of Lord George Wellesley and his wife was English, and by the law of England a marriage between them would have been void under the Marriage Act, 1835. Such a marriage was, on the other hand, unimpeachable by the law of New York, and the evidence plainly discloses that it was the definite aim both of Lord George and his bride to relinquish their domicile of origin and acquire an American domicile of choice before the marriage was celebrated. Whether or not they succeeded in doing so was one of the subjects discussed before me. Whatever be the truth of that matter, however, it was fairly and rightly conceded by Mr. Gray, on behalf of the first two defendants, that Lord George and his wife had unquestionably acquired a domicile of choice in New York by the time that their son was born there in June, 1920. From this fact sprang a different way of founding Mr. Richard Wellesley's claim to share in the testator's estate, and I propose to consider this aspect of the matter first.

The argument on his behalf was briefly as follows: Admitting that only a legitimate child could take under the gift to Nesta Pamela Fitzgerald's children, legitimacy is a question of status. That status is conferred or withheld, as the case may be, by the law of the domicile of origin, which is the law of the domicile of the parents at the time when the person whose legitimacy is in question was born. The status, once conferred, remains with the person concerned throughout his or her life and will be recognised and given effect to by our courts, save

only in cases where that person claims to succeed to real estate in England. It is established by the evidence that Richard Wellesley received at birth the status of legitimacy by the law of New York and accordingly, it was contended, his claim, as a child of his parents, to a fund of English personalty will be recognised by the courts of this country.

There can be no doubt as to the general criterion of a person's legitimacy. 'In most cases', said Lord Brougham in *Fenton* v. *Livingstone* (1859), 3 Macq. 497, 532, 'the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicile.' Richard Wellesley undoubtedly received at birth the status of legitimacy from the law of his domicile of origin, and such status is, in general, accorded international recognition. It is said, however, on behalf of the first and second defendants, that our courts will not accord universal recognition to a status of legitimacy conferred by a foreign domicile of origin. The acceptance by our law of the status so conferred is, it is contended, subject to exceptions: and the particular exception relied on in the present case is this: that an English court will not recognise as legitimate the child of a marriage which is incestuous, or which is otherwise contrary to religion or sound morality, notwithstanding that the child is legitimate according to the law of his domicile at birth. In such cases, it is said, our courts are not content to act merely on the fact that the status of legitimacy was bestowed by the law of the birthplace; they will, on the contrary, fasten their attention on the marriage of the parents and, finding that incestuous, treat the issue as bastards here, however full the measure of legitimacy that may be conferred upon them in the foreign land of their birth.

So far, at all events, as a court of first instance is concerned, I am of opinion that on the authorities, and especially having regard to the majority judgments in *In re Goodman's Trusts* (*post*, p. 155), the contentions which were advanced on behalf of Richard Wellesley, and which I have already summarized, must prevail.

(His Lordship discussed the cases of *In re Goodman's Trusts* and *In re Andros* (1883), 24 Ch.D. 637, and continued:) It is quite clear that in *In re Goodman's Trusts* both Cotton and James L.JJ. recognised only one exception to the general rule that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin; and that exception relates to claims to succession to real estate (a term which would, of course, include titles of

In re BISCHOFFSHEIM. — Romer J.

honour and dignity) in England. That, also, was the only exception referred to by Kay J. in *In re Andros*. I was referred to no authority which, in my judgment, compels me to entertain the further exception which was contended for in the present case. In *Fenton* v. *Livingstone* (1859), 3 Macq. 497, the House of Lords held that a person born of an English marriage between a man and his deceased wife's sister was not legitimate in Scotland as to the succession of real estate. Lord Brougham said (at p. 531) 'Now it must be granted that the general rule is to determine the validity of a marriage by the law of the country where the parties were domiciled, and in most cases the legitimacy of a party is to be determined by the law of his birthplace and of his parents' domicile. But to this application of the lex loci contractus there are exceptions, from the nature of the case in which the question arises.' It is true that Lord Brougham there uses the word 'exceptions' in the plural. He proceeds, however: 'Thus, in deciding upon the title to real estate, the lex loci rei sitae must always prevail', and then discusses the principles on which that exception is founded. The noble Lord did not, however, in the course of his speech, refer to any other exception to the general rule apart from claims to real estate. The other speeches in *Fenton* v. *Livingstone* were consonant with the views expressed by Cotton and James L.JJ. in *In re Goodman's Trusts*, except that Lord Chelmsford did not wish to commit himself without further consideration. 'It seems to have been assumed', he said (at p. 557) 'throughout the argument before your Lordships, that if the claim in this case had been to movable property, the respondent would have succeeded; but I am not disposed, without further consideration, to concede that if the marriage is regarded in Scotland as an incestuous marriage, and it had become necessary, in order to make out the title to be next of kin, to prove such a marriage, that result would have followed. It is, however, unnecessary to consider that question, as we are dealing with a different description of property.' At what conclusion Lord Chelmsford would have arrived on this question had he given it further consideration, I cannot, of course, say. But in *In re Goodman's Trusts* the matter was amply considered by the Court of Appeal, to whom *Fenton* v. *Livingstone* was cited. The case of *Brook* v. *Brook* (*ante*, p. 70) does not really bear on the point which I am now considering. The question before the House was (as stated by Lord Wensleydale (at p. 239)) whether a marriage celebrated in 1850 in Denmark between a widower and the sister of his deceased wife, both

being then, and subsequently, British subjects domiciled in England, and contemplating England as their future matrimonial residence, was valid in England, such a marriage being permitted by the law of Denmark. The right of the children of that marriage to succeed to property (apparently consisting of, or at least including, real estate in England (per Lord St. Leonards)), was in issue, but obviously their case could not be, nor was it, founded upon a status of legitimacy conferred upon them by a foreign domicile of origin, for their domicile at birth was English. Their right to succeed to property here, in the capacity of children of their parents, accordingly depended, and depended solely, on their being able to establish the validity of their parents' Danish marriage, and in this attempt they failed.

I should next, I think, refer to the much debated case of *Shaw* v. *Gould* (*ante*, p. 144). (After stating the facts in that case His Lordship continued:) The case came before Kindersley V.-C. (1865), L.R. 1 Eq. 247, and he dismissed the children's claim. He held that at the time of the Scottish divorce (which was some eleven years prior to the passing of the Divorce Act, 1857), the marriage between Buxton and Elizabeth Hickson was not only indissoluble by an English court but was indissoluble by any court at all; and that accordingly the Scottish decree was wholly inoperative to bring that marriage to an end. He also considered and rejected an alternative argument advanced on their behalf that they were entitled at all events to be treated under the law of Scotland as legitimate children of a putative marriage. When the case came before the House of Lords on appeal, the main point which was argued and debated was as to the validity of the Scottish proceedings and decree. 'The whole', said Lord Cranworth (*ante*, p. 146), 'turns on the validity of the divorce.' He held that it was invalid on the ground that Buxton was a domiciled Englishman at the time of the divorce, and that accordingly the Court of Session had no jurisdiction to grant it. Lord Chelmsford also addressed himself primarily (for he also considered the 'putative marriage' point, which is irrelevant for present purposes) to inquiring into the validity of the proceedings in Scotland (*ante*, p. 149). 'Whether', he said, 'the appellants answer the descriptions respectively of "sons lawfully begotten", and of "children", depends upon whether their parents were lawfully married; and this again depends upon the effect of a divorce in Scotland dissolving the marriage of their mother with Thomas Buxton in England.'... Lord Colonsay, with some reluctance, accepted the view that the validity of the divorce was a relevant

In re BISCHOFFSHEIM. — Romer J.

subject for enquiry, notwithstanding that the legitimacy of the appellants might be recognised in the land of their birth. The other noble Lords, however, expressed no views of their own on this aspect of the matter. They approached the case, as also had Kindersley V.-C., on the footing that the legitimacy of the appellants depended on the validity of their parents' marriage, which, in its turn, depended on the validity of the Scottish divorce. If the validity of the divorce was regarded as a legitimate subject for inquiry, and if it was invalid, as the Lords held it to be, it necessarily followed as a result of those considerations, when taken by themselves, that the appellants' domicile of origin was English, as their mother's domicile remained that of her lawful husband, Buxton. Accordingly, on the sequence of reasoning which was adopted by the House in their approach to the case as a whole, a claim founded on international acceptance of a status conferred by what was certainly the domicile of origin, if the validity of the divorce was disregarded as irrelevant, namely: by the law of Scotland, could not succeed or, indeed, arise; it was, so to speak, still-born. It is not altogether surprising that, having regard to the very peculiar circumstances of the case, and to the fact that the important Divorce Act of 1857 had so recently been passed, the attention of the Lords (except, perhaps, Lord Colonsay) was attracted primarily to a consideration of the proceedings in Scotland. These proceedings were clearly relevant to the question whether John Shaw and Elizabeth were lawfully married, but this was not the question before the House; the point in issue was not as to the status of the parents but as to the status of the children, and that, as it seems to me, gave rise to different considerations. The relevance of the Scottish proceedings and of the decree which resulted therefrom appears to me to have been a matter rather of assumption by the House than one of direct decision. It is, however, to be noted that the claims under consideration were not confined to personal estate in England, for there was a claim to English real estate as well; and this may have had some effect on the line which was adopted both in the argument and in their Lordships' opinions.

In view of the very special circumstances affecting *Shaw* v. *Gould*, I do not regard it as necessarily opposed to the majority view in *In re Goodman's Trusts*, nor did Cotton L.J. so regard it. I accordingly propose to follow the view which prevailed in *In re Goodman's Trusts*, namely, that where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him

by his domicile of origin (i.e. the domicile of his parents at his birth) will be recognised by our courts; and that, if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation. It is true that in *Shaw* v. *Gould* (as in the present case) the status in question was that of original legitimacy, whereas in *In re Goodman's Trusts* and *In re Andros* (1883), 24 Ch. D. 637, were cases of legitimation (i.e., original bastardy converted into legitimacy through the subsequent marriage of the parents) but, in my judgment, there is no real distinction between the two classes of case. If in fact the status of legitimacy is conferred by the law of the domicile of origin the time of, as also the reason for, its conferment are surely immaterial.

In re BISCHOFFSHEIM. — Romer J.

The conclusion which I have formed and expressed on the legitimacy at birth of Richard Wellesley relieves me of the necessity of inquiring into the domicile of his parents at the time of their marriage in New York. The question is one which is not altogether easy of solution, and I will express no concluded opinion on it.

I will declare, in answer to question 1 of the summons, that upon the true construction of the will of the testator, and in the events which have happened, the defendant Richard Wellesley is entitled to share as a child of Nesta Pamela Wellesley in the share of the residuary estate of the testator settled by his will on his granddaughter, Nesta Pamela Wellesley, for her life with remainder to her children.

Section B: LEGITIMATION

Legitimation by subsequent marriage is not recognized at common law unless the father is domiciled both at the date of the child's birth and at the date of the subsequent marriage in a country where the marriage legitimates the child.

In re GOODMAN'S TRUSTS (1881), 17 Ch. D. 266 (Court of Appeal)

In re GOODMAN'S TRUSTS.

This was an appeal by Hannah Pieret from a decision of Jessel M.R., disallowing her claim as one of the next of kin of Rachel Goodman.

Rachel Goodman died unmarried in 1878, domiciled in England, and a legacy given by her will having lapsed to her next of kin, was paid into Court under the Trustee Relief Act, and the question for decision was who were her next of kin at the time of her death.

It appeared that her sole next of kin were the children of her two

In re GOODMAN'S TRUSTS.

deceased brothers. One of these brothers, Leyon Goodman, had three illegitimate children in England by Charlotte Smith, and in 1820 went to Holland with the intention of permanently residing there. While in Amsterdam he had another illegitimate child by Charlotte Smith, Hannah Pieret, the present appellant. In 1822, while still in Amsterdam, he married Charlotte Smith, and thereby the previously born children became legitimate according to the law of Holland. They afterwards had another child, Anne Denis, who claimed to be the only legitimate child according to the English law. The Master of the Rolls decided that Hannah Pieret was illegitimate according to English law, and she appealed from this decision.

JAMES L.J.: According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognise legitimation of issue by the subsequent marriage of the parents, and possibly our peculiarity in this respect may deserve all that was said in its favour by Professor, afterwards Mr. Justice, Blackstone, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws. But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world,

and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard? Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can any one doubt that the courts of this country would recognise his paternal right and guardianship, and order the child to be delivered to any person authorized by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, Nolumus leges Angliæ mutare? Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, and a bastard, filius nullius?

It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognised, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicile. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognized as such by every court in the kingdom, being minded at last to make this country his permanent domicile, should thereby bastardize his children; and that he could re-legitimate them by another change of domicile from London to Edinburgh? And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing.

In re GOODMAN'S TRUSTS. — James L.J.

But it is not merely on principle, but on authority, to my mind conclusive, that this question ought to be determined in favour of the appellant. I will not go through the roll of authorities which the Lord Justice Cotton has cited. But I content myself with the one case of *Doe* v. *Vardill* (1840), 7 Cl. & F. 895. In that case we have the careful and elaborate judgment of the Judges summoned to advise the House of Lords. And in that judgment, or advice, there are two distinct propositions clearly and distinctly enunciated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. The first proposition was accepted by the law lords without any doubt or question; the second was questioned. After further reference to the Judges and further hearing, the case was at last determined in accordance with the second proposition. But the first proposition has never been really questioned. No doubt it may be said that the only decision was against the heirship in that case. But the weight of such an authority, particularly of advice tendered by the assembled Judges to the House of Lords, is not affected by that consideration. It is the ratio decidendi, the rules, maxims, and principles of law which are to be found there, by which we are to guide ourselves. In fact, as is well known, the House has frequently put hypothetical states of fact, and abstract questions of law, for the advice and opinion of the Judges, of which I recollect one notable instance in the *D'Este Case* (*Sussex Peerage Case* (1844), 11 Cl. & F. 85). What the assembled Judges said in *Doe* v. *Vardill*, and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both Judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, pace Professor Blackstone, were precious absurdities in the English law of real property. But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were porphyro-genitus, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of

the particular property itself, the forma doni. Kinship is an incident of the person, and universal. It appears to me that a statement of the law so given, and so accepted nearly fifty years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them. There is only one authority to the contrary, the case of *Boyes* v. *Bedale* (1863), 1 H. & M. 798, on which I will say a few words. The decision there was on the ground that, in an Englishman's will, the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in England, and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction? In that case, by way of obiter dictum, the learned Judge goes on to say that the same construction would be applied to kindred under the Statute of Distributions. This point was never argued and never considered, I believe, by counsel, and must, I think, have been hastily uttered by the Vice-Chancellor at the close of an oral judgment. It must be borne in mind that the Statute of Distributions is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in England, and not for any Englishman dying domiciled abroad. And it was to provide for what was thought an equitable distribution of the assets, as to which a man had, through inadvertence, not expressed his testamentary intentions. And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of states. The child of a man would be his child so ascertained and so determined, and, in the next degree, the lawful child of his brother or sister would be his nephew or niece.

The real importance of the case of *Dalrymple* v. *Dalrymple* (1811), 2 Hagg. Const. 54, has not been sufficiently appreciated. There must have been hundreds of cases in which a Scotchman or a foreigner with legitimated children, or other kindred, elected to domicile himself for business, or health, or pleasure, in London or elsewhere in England. Can it be doubted that the English Court of Probate, of

In re GOODMAN'S TRUSTS. — James L.J.

whose conception of the law the case of *Dalrymple* v. *Dalrymple* is an authoritative exponent, would, without question, have admitted the right of some child or next of kin to take out administration? And if such right had ever been questioned, would not the fact of such a question, viz., whether a man by changing his domicile had bastardized his child, have created a sensation which would have vibrated throughout the civilized world, wherever there was a writer on international law and comity? The fact that no such case is to be found shews the universal consensus of all persons conversant with the Court of Probate's administration (the appropriate court in that behalf) that no such question in fact existed.

That consensus goes back not only to the year in which the judgment in *Dalrymple* v. *Dalrymple* was pronounced, 1811, but to the furthest limit to which the knowledge and experience of the learned Judge who pronounced it extended. Moreover, if such a question had ever been raised in the distribution of assets by the Court of Chancery, the Chief Baron Alexander must, in his long experience in that court, have been aware of it, and would not have omitted to refer to it in the advice which, on behalf of the Judges, he tendered to the House of Lords.

COTTON L.J. delivered judgment to the same effect. LUSH L.J. dissented.

Appeal allowed.

In re GROVE.

In re GROVE (1888), 40 Ch.D. 216 (Court of Appeal)

This was an action for the administration of the estate of Caroline Emilia Grove, a domiciled Englishwoman, who died on the 29th of October 1866, at the age of eighty-eight, a lunatic and intestate, and possessed of considerable personal estate.

In October 1867, as no next of kin appeared to claim her estate, letters of administration were granted to the Solicitor to the Treasury; and the Treasury shortly afterwards took possession of the estate.

Two sets of persons subsequently set up conflicting claims to the estate as next of kin of the intestate, i.e. the Vaucher family and the Falquet family, and this action was brought by a member of the former family in 1884.

In the course of the proceedings an inquiry was directed as to who were the next of kin of the intestate, and evidence was gone into from which it appeared that both the Vaucher family and the Falquet

family claimed through the same man, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances:—

Marc Thomegay, who was the grandfather of the intestate, was born in Geneva of Swiss parents, in the year 1712, and there was no question that his domicile of origin was Genevese. In 1734 he came to England and remained here until his death in 1779. Some time after his arrival in England he cohabited with an Englishwoman named Martha Powis, and had by her three illegitimate children, of whom the eldest, Sarah Thomegay, born in 1744, was the ancestress of the Vaucher family.

In May 1749 Marc Thomegay was married to an Englishwoman named Elizabeth Woodhouse; of this marriage there was issue one child, Margaret Thomegay, born in December 1749, who was the mother of the intestate Caroline Emilia Grove.

Elizabeth Woodhouse died in 1752, and in 1755 Marc Thomegay married Martha Powis; of this marriage there was issue four children, of whom one, Sophie Martha, born in 1764, was the ancestress of the Falquet family.

There was evidence that according to the laws of the canton of Geneva illegitimate children are legitimated by the subsequent marriage of their father and mother, notwithstanding the intervening marriage of their father with another woman.

The Chief Clerk found that if Sarah Thomegay ought to be treated as legitimate, then the next of kin of the intestate were the descendants of the said Sarah, who were represented by the plaintiff, and that if not, such next of kin was the Falquet family.

Stirling J. decided that Marc Thomegay had acquired an English domicile in 1744, that therefore Sarah was illegitimate; and that the Falquet family were entitled to a declaration that they were the next of kin of the intestate.

The Vaucher family appealed.

COTTON L.J.: This is an appeal by the plaintiff, who represents the Vaucher family, from a decision of Mr. Justice Stirling in favour of the Falquet family. Both the appellant and the Falquet family claim through the same man, Marc Thomegay, and through the same woman, Martha Powis, with this distinction, that the appellant claims descent from Sarah Thomegay, the eldest child of Marc Thomegay and Martha Powis, who was born before the marriage of her father and mother, and the Falquet family claim descent through

In re GROVE. — Cotton L.J.

a child of the same parents, but born after the marriage of the father with the mother. The question we have to decide is as to the legitimacy of Sarah Thomegay.

Now, if the matter is to be decided by the law of England, Sarah Thomegay must of course be considered as illegitimate, but the question really depends on the law of the domicile, for there are many countries—Scotland and Geneva, for instance—where a child born previous to the marriage of its parents may be made legitimate by the subsequent marriage of those parents: and we must consider whether Marc Thomegay had lost his Genevese domicile of origin and acquired an English domicile, so that the English law has to determine the question of Sarah Thomegay's legitimacy, or whether that question is to be decided by the law of Geneva. As I have said, the question of legitimacy or illegitimacy depends on the law of domicile, but there is the further question as to the time at which the father must be domiciled in the country where the law allows the legitimation by subsequent marriage of a child born before marriage; and it was contended that Mr. Justice Stirling had laid down that the only time to be considered was the time of the birth of the child, and that he had done so on the authority of a decision of the Court of Appeal in *In re Goodman's Trusts* (*ante*, p. 155) and particularly in reliance on my judgment in that case. On reading his judgment carefully, I do not think he decided the question, but he did look at what was the domicile of the father at the time of the birth of the child, and coming to the conclusion that at that time the father was domiciled in England, he decided that the child Sarah must be considered as illegitimate. I think, however, that although it may not be necessary to enter into the question, I ought to say something upon the law as to the time when it is necessary that the domicile of the father should be that of a country whose laws allow legitimation by subsequent marriage; because the expressions which Mr. Justice Stirling quoted from my judgment in *In re Goodman's Trusts* might seem to bear the construction that the only time to be considered is the time of the birth of the child. That was a question which had not really to be considered, or in any way decided, in *In re Goodman's Trusts*, because the real question there was, whether the fact of the father going to Holland, and in our view acquiring a domicile there before the birth of the child, had the effect of making that child legitimate, according to the law of England, and entitled to participate in the personal estate of the intestate. If the father there was domiciled in Holland at the

time of the birth of the child, undoubtedly he was domiciled there also at the time of the marriage, because he continued to live in Holland from the time of the birth of the child, and a short time afterwards he married in Holland. Therefore the question had not to be considered, and I think it is the first case which decided, contrary to the dictum of Lord Hatherley, when Vice-Chancellor, in *Boyes* v. *Bedale* (1863), 1 H. & M. 798, that in considering who were the next of kin in England of an intestate dying in England, if the law of the domicile said that the child was legitimate, that, except as regards real estate in England, ought to determine its status, for all purposes in England. What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicile the capacity of being made legitimate by a subsequent marriage.

Where then must that marriage be? It is singular that there is, as far as I am aware, no express decision on that point. But this is probably because as a rule when the parties have been domiciled at the time of the birth in a country allowing legitimation of a child born before marriage, that same country has been their domicile at the time of their marriage. As I said before, the place of birth and the place of marriage is immaterial to the question of domicile. In the absence of authority the incidents and the effects of a marriage must, in my opinion, depend on the domicile of the parties at the time of the marriage; and it will be strange if a marriage in England, between persons domiciled in England, could produce an effect which by English law is not attributed in any way to marriage. As I have said, there is no authority on this point, but there are Scotch cases in the House of Lords which have dealt with the question. In *Munro* v. *Munro* (1840), 7 Cl. & F. 842, the domicile at both periods was considered, and so I think it was in *Udny* v. *Udny* (*ante*, p. 33). In *Udny* v. *Udny* the Lord Chancellor, Lord Hatherley, in dealing with this matter, used expressions which clearly shew his view to have been that the domicile must be, both at the time of the marriage and at the time of the birth, in a country the law of which allows legitimation by subsequent marriage. What he says is this: 'If his domicile be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father (as in *Munro* v.

In re GROVE. — Cotton L.J.

Munro) is capable of legitimating the child. The foreign law, though deeming the child to be filius nullius at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in France, or by marriage only, as in Scotland. I do not think that the English law can recognise a capacity in any Englishman, by a change of domicile, to cause his paternity and consequent power of legitimation to be recognised.' There he intimates that a subsequent marriage, with the incidents which the law of the domicile allows to marriage, must give to the child born before marriage, born of the father whose domicile is of the country which gives it, a capacity of legitimation. That, I think, is the reasonable conclusion. I think Lord Justice Fry rather takes a different view from mine as to the time when the domicile in this case became English, and therefore I thought it right, especially as my own judgment in *In re Goodman's Trusts* has been probably misunderstood, to express my view as to what is the law applicable where there was a different domicile at the birth, from that which there was at the time of the marriage. In my opinion, the domicile at birth must give a capacity to the child of being made legitimate, but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect.

(His Lordship held that Marc Thomegay was domiciled in England at the date of Sarah's birth in 1744 and also at the date of the subsequent marriage in 1755, and that Sarah was therefore illegitimate.)

LOPES L.J. concurred.

FRY L.J. held that Marc Thomegay retained his Genevese domicile of origin in 1744; but as he held that he had acquired an English domicile in 1755, he agreed in the result.

Appeal dismissed.

LEGITIMACY ACT, 1926

Legitimation by subsequent marriage of parents.

1.—(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.

(2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

(3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.

Rights of legitimated persons, &c., to take interests in property.

3.—(1) Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest—

(*a*) in the estate of an intestate dying after the date of legitimation;

(*b*) under any disposition coming into operation after the date of legitimation;

(*c*) by descent under an entailed interest created after the date of legitimation;

in like manner as if the legitimated person had been born legitimate.

(2) Where the right to any property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons shall rank as if he or they had been born on the day when he or they became legitimated by virtue of this Act, and if more than one such legitimated person became legitimated at the same time, they shall rank as between themselves in order of seniority.

(3) Where property real or personal or any interest therein is limited in such a way that, if this Act had not been passed, it would (subject or not to any preceding limitations or charges) have devolved (as nearly as the law permits) along with a dignity or title of honour, then nothing in this Act shall operate to sever the property or any interest therein from such dignity, but the same shall go and devolve (without prejudice to the preceding limitations or charges aforesaid) in like manner as if this Act had not been passed. This subsection applies, whether or not there is any express reference to the dignity or title of honour and notwithstanding that in some events the property, or some interest therein, may become severed therefrom.

(4) This section applies only if and so far as a contrary intention is not expressed in the disposition, and shall have effect subject to the terms of the disposition and to the provisions therein contained.

Provisions as to persons legitimated by extraneous law.

8.—(1) Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or

Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.

(2) All the provisions of this Act relating to legitimated persons and to the taking of interests in property by or in succession to a legitimated person and the spouse, children and remoter issue of a legitimated person (including those relating to the rate of death duties) shall apply in the case of a person recognised as having been legitimated under this section, or who would, had he survived the marriage of his parents, have been so recognised; and, accordingly, this Act shall have effect as if references therein to a legitimated person included a person so recognised as having been legitimated.

(3) For the purposes of this section, the expression 'country' includes Scotland and any other part of His Majesty's Dominions, as well as a foreign country.

10.—(1) Nothing in this Act shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title.

(2) Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or affect any rights under the intestacy of a person dying before the commencement of this Act.

In re ASKEW, [1930] 2 Ch. 259 (*ante*, p. 10)

Legitimation by recognition is not recognized unless the father is domiciled both at the date of the child's birth and at the date of the act of recognition in a country by the law of which the act of recognition legitimates the child.

In re LUCK'S SETTLEMENT TRUSTS. *In re* LUCK'S SETTLEMENT TRUSTS, [1940] Ch. 864 (Court of Appeal)

Appeal from Farwell J.

Under the marriage settlement and will of a testator domiciled at all material times in England, investments were held by trustees upon trust for Frederick Charles Luck for life and after his death for his children in equal shares.

In re LUCK'S SETTLEMENT TRUSTS.

In 1893 Frederick Charles Luck, whose domicile of origin was English, married his first wife and had two children by her. In 1905 he left them and went to the United States of America. From 1905 till 1918 one Martha Croft lived with him as his wife and in 1906 she bore him a son in California, David Luck.

In 1922 Frederick Luck's first marriage was dissolved by a Californian court and he married Alma Hyam. There was no issue of this marriage. In 1925 he made a declaration in writing publicly acknowledging David Luck as his child. The effect of this was that by s. 230 of the California Civil Code, David Luck became the legitimate son of his father as from the date of his birth.

David Luck having claimed to be entitled to share in the trust funds settled by the marriage settlement and will, the trustees thereof took out a summons to determine whether he was so entitled.

Farwell J. found that Frederick Luck acquired a domicile of choice in California some time after 1906 (the date of David's birth) and before 1925 (the date of the declaration of recognition). The Court of Appeal agreed with this finding. There was no evidence as to the domicile of Martha Croft, but the Court of Appeal assumed that her domicile of origin was English and that she had acquired a domicile of choice in California some time between 1906 and 1925.

Farwell J. held that David Luck was legitimate and was entitled to share in the trust funds, although his father was not domiciled in California when David Luck was born. The two children of Frederick Charles Luck by his first marriage appealed.

LUXMOORE L.J. read the judgment of himself and LORD GREENE M.R. prepared by LORD GREENE: . . . Apart from the principles of private international law which form part of the law of England, that law did not recognise legitimation of a child born illegitimate until the passing of the Legitimacy Act, 1926. In this respect the law of England differed from the civil and the canon law and from the law of Scotland and that of many continental countries all of which recognised one particular form—and so far as we know one form only—of legitimation, namely, legitimation by subsequent marriage of the parents. Under the law of France (and possibly in other countries) it appears that in addition to the marriage of the parents a formal recognition of the child by both of them was required: see *In re Wright's Will Trusts* (1856), 2 K. & J. 595, 613. But in the eye of English law in the narrower sense legitimation was impossible.

In re LUCK'S SETTLEMENT TRUSTS. — Luxmoore L.J.

except, of course, by Act of Parliament. A child born illegitimate remained illegitimate until his death with all the consequences which that status implied. These consequences affected not merely the child itself, but its mother and its natural father whose rights and duties towards the child were governed accordingly. This rigid rule of English municipal law has been qualified to meet the case of legitimation by subsequent marriage of the parents in cases where the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage recognise such legitimation. In these cases the English courts recognise the legitimation as effective: but where the law of the father's domicile at either of the two times stated did not recognise such legitimation the marriage was regarded as inoperative to effect legitimation notwithstanding that the law of the father's domicile at the other of the two times recognised legitimation by subsequent marriage: see *In re Wright's Will Trusts* (1856), 2 K. & J. 595, 613; *Udny* v. *Udny* (*ante*, p. 33); *In re Grove* (*ante*, p. 160). The special case of heirship to land in England need not be considered.

An alteration of the law has been effected by s. 8 of the Legitimacy Act, 1926, which enables legitimation to take place where the law of the father's domicile (not being English) at the date of the marriage recognises the marriage as effective to legitimate the child. In such cases legitimation takes place as from the date of the commencement of the Act or the date of the marriage, notwithstanding that the law of the country where the father was domiciled at the date of the birth did not recognise legitimation by subsequent marriage. It is to be noticed that legitimation under the section is not retrospective and in none of the cases which were decided before the Act did any question of retrospective legitimation arise.

It so happens that the only form of legitimation which has hitherto come up for consideration by the English courts has been legitimation per subsequens matrimonium. This was the method of legitimation commonly found in systems of law other than our own and it was in relation to this method that the rules adopted by the English courts came to be formulated.

So far as we are aware this is the first case which has arisen in the English courts where a different method of legitimation, namely, by adoption, has had to be considered. The next point which arises is whether the requirements with regard to the domicile of the father which exist in the case of legitimation per subsequens matrimonium

must be complied with in such a case, or whether, as Farwell J. held, the matter falls to be decided by reference only to the law of the country in which the child was domiciled at the date when the legitimation is said to have taken place.

It is useful at the outset to consider certain consequences which flow from the view adopted by Farwell J. The law of California provides for legitimation per subsequens matrimonium as well as for legitimation by adoption by the natural father. Accordingly, if Frederick Charles Luck had on July 27, 1922, married Martha Anne Croft instead of Alma Hyam and had not in addition adopted David Luck, the English courts would not (apart from the operation of s. 8 of the Legitimacy Act, 1926) have regarded David Luck as legitimate, since Frederick Charles Luck was domiciled in England at the date of the birth. If, however, in addition to marrying Martha Anne Croft, Frederick Charles Luck had adopted David Luck with her consent, the English courts would have recognised the legitimation. This result would, to say the least of it, be anomalous. A result even more anomalous would follow in a case where a man had two illegitimate children by two different women. If he subsequently married one of them but did not trouble to adopt her child and then adopted with her consent the child of the other woman, the former child would (apart always from the Legitimacy Act, 1926) be regarded in this country as illegitimate, the latter as legitimated. These considerations in our view afford some reason for adopting, upon grounds of convenience, a uniform principle applicable to both cases. But this by itself is not sufficient and it becomes necessary to examine the authorities in which the rules applicable to cases of legitimation per subsequens matrimonium have been laid down.

. . . In our judgment the principles laid down in the authorities which we have cited are not limited to the one case of legitimation per subsequens matrimonium. It is natural that references to that form of legitimation should have found a place in the statements of the law since that was the particular form that was relevant in those cases. But the language used is, we think, of wider import. In particular, Lord Hatherley in *In re Wright's Will Trusts* (1856), 2 K. & J. 595, lays down the principle in quite general terms which clearly cover the present case. He regards the law of the father's domicile as 'fastening on' the child at its birth and as determining the nature of their relationship. If by the law of that domicile the relationship is immutably that of putative father and illegitimate child, nothing

In re LUCK'S SETTLEMENT TRUSTS. — Luxmoore L.J.

thereafter can change it. If, on the other hand, by the law of that domicile such relationship is not immutable but is capable of becoming that of father and legitimate child, that capacity when duly fulfilled is to be recognised by the courts of this country.

There appear to us to be sound reasons in principle why this should be the law. Legitimacy is not a unilateral matter affecting the child alone. If an illegitimate child is legitimated it is not only the status of the child which is affected: the status of the putative father is also changed since he becomes what he was not before, namely, the father of a legitimate child with all the consequential rights and duties which flow from that relationship. Moreover, the position of the child is changed as regards the father's relatives: for it acquires the capacity to succeed to their property as next of kin, while they similarly acquire a like right to succeed to his property. If the question of the effect of the adoption of David Luck upon his legitimacy is to be determined by the law of his domicile at the time, it would apparently follow that if he had been legitimated by a privilegium enacted by the legislature of California he would have been regarded as legitimate by the English courts, even if his father had been domiciled in England at the time. In other words, the English courts would recognise the jurisdiction of a foreign legislature to impose upon a domiciled Englishman the status of paternity which he did not acquire at the date of the child's birth and the potentiality of acquiring which he did not at the time possess. We cannot accept a view which would lead to that result.

When the question of legitimation per subsequens matrimonium first came up for examination in *In re Wright's Will Trusts* (1856), 2 K. & J. 595, the law might have been laid down differently and it might have been held that the domicile of the father or of the child at the date of the marriage was the sole matter to be considered. Lord Hatherley's decision in that case was, we think, largely influenced by the Scotch law as laid down by the House of Lords in *Munro* v. *Munro* (1840), 7 Cl. & F. 842. It was natural that the English law on this matter should be founded upon the same principles as Scotch law which required the potentiality of legitimation to exist at the date of the birth. The result is that the English authorities have been based upon the principle that before subsequent legitimation can take place the status of illegitimacy as acquired at birth under the law of the domicile of the putative father must have as an integral part of itself the potentiality of subsequent legitimation.

If it has not this potentiality, it is incapable of change since the capacity to be changed exists and exists only by virtue of the potentiality. It is in our opinion only within these narrow limits that the English law recognises an exception to the principle that bastardy is indelible, a principle which it always steadfastly maintained in opposition to the civil and the canon law save in so far as it was forced to recognise an exception in cases of persons not domiciled in England.

It was suggested that a logical distinction between the present case and the case of legitimation per subsequens matrimonium might be found in the circumstance that the act of adoption by the father was done deliberately for the purpose of legitimising the child, whereas marriage is contracted for its own sake and the consequential legitimation is, so to speak, only a collateral result. There appears to us to be no substance in this distinction. Moreover, as we have already pointed out, it appears from *In re Wright's Will Trusts* (1856), 2 K. & J. 595, that by French law an act of recognition was required in addition to the marriage and it was not suggested that this circumstance in any way affected the principles to be applied.

SCOTT L.J. dissented.

Appeal allowed.

NOTE G: LEGITIMACY AND LEGITIMATION

IT is as well to begin by defining our terms. Legitimacy is the status acquired by a legitimate child at the date of its birth. Legitimation is a process whereby an illegitimate child becomes legitimate by events subsequent to the date of its birth. The most common of such subsequent events, but not the only one, is the subsequent marriage of the parents. In some countries (but not in England) legitimation has retroactive effect to the date of the child's birth. Legitimacy and legitimation are related but distinct questions, though they are sometimes confused by judges and even by text-writers.

(1) *Legitimacy*

We are not here confronted by the familiar problem, what is the English conflict of laws rule? but by the more fundamental problem, is there an English conflict of laws rule for legitimacy at all? Three views have been suggested:

(*a*) A child is legitimate if (and only if) it is born or conceived in lawful wedlock, that is, a marriage valid by English conflict of laws rules. This view was adopted in the first edition of this book, by Westlake (pp. 101–3), and (semble) by Dicey (3rd ed., pp. 520–1). It starts from the undoubted rule of English domestic law, that only a child born or conceived in lawful wedlock is legitimate, and projects that rule into the conflict of laws. It is supported by all the cases down to 1947, including two in the House of Lords: *Brook* v. *Brook* (*ante*, p. 70)

and *Shaw* v. *Gould* (*ante*, p. 144). In the former case Charles Brook was admittedly illegitimate on any view (assuming that the marriage of his parents was void); but the validity of the marriage was the only question discussed by the House of Lords. This view is said to be open to the objection that according to some systems of law (e.g. Roman-Dutch) which accept the doctrine of putative marriage, a child may be legitimate although its parents were not validly married. But this difficulty has not yet arisen in any reported English case; when it does arise, it should be possible to dispose of it by making an exception.

(*b*) The legitimacy of a child depends on the law of its domicile of origin: Cheshire, pp. 498–511; Wolff, pp. 388–9; Schmitthoff, pp. 273–80; Graveson, pp. 120–7. This view starts from the assumption that legitimacy is a question of status and therefore governed by the law of the domicile. The objection to it is that it involves a particularly vicious form of circular argument, for if the domicile of origin of a child depends on whether it is legitimate or illegitimate, how can its legitimacy depend on its domicile of origin? This is not a mere academic objection. It arose in practical form in at least two of the leading cases, *Shaw* v. *Gould* (*ante*, p. 144) and *Re Paine* (*ante*, p. 78), with both of which this view is hopelessly inconsistent. Its exponents try to explain away the decision of the House of Lords in *Shaw* v. *Gould* on various grounds; they all overlook *Re Paine*, and their failure to cite it in this connexion undoubtedly misled Romer J. in *Re Bischoffsheim* (*ante*, p. 149). Nor does this view derive any better support from the dicta in *Birtwhistle* v. *Vardill* (1835), 2 Cl. & F. 571, 573–4, *Re Don's Estate* (1857), 4 Drew. 194, 197, *Re Goodman's Trusts* (1881), 17 Ch.D. 266, 292, and *Re Andros* (1883), 24 Ch.D. 637, cited by Dr. Cheshire on pp. 499–501, for these were all cases of legitimation, not legitimacy, and the dicta were not even correct in the former context.

(*c*) The question whether a child is legitimate is a question of construction governed by the law of the domicile of the testator or intestate, and not a question of status governed by the law of the domicile of the child: Welsh, 63 L.Q.R. 65 (1947). This view is not actually inconsistent with any decision prior to 1947, but forms the ratio of none. It involves the conclusion that *Shaw* v. *Gould* would have been differently decided if the testator had been domiciled in Scotland, which seems doubtful. The objection to it is that legitimation has been definitely held to raise a question of status, and not a question of construction, so that it seems inelegant and unnecessary to have a diametrically different rule for legitimacy.

The proposition laid down by Romer J. in *Re Bischoffsheim* undoubtedly supports the second view. But that case is open to criticism on many grounds:

(i) It is one thing to say that a child not born in lawful wedlock is legitimate *in spite of the invalidity* of its parents' marriage (see the possible exception to view (*a*), *supra*). It is quite another thing to say that a child not born in lawful wedlock is legitimate *because of the validity* of the marriage. That seems to be arguing in a circle. Romer J. was unable to hold that Nesta and George had acquired a New York domicile at the date of their marriage in 1917. Therefore the marriage was void in England. He held that they were both domiciled in New York at the date of Richard's birth in 1920 and therefore that Richard was legitimate. But the conclusion does not follow from the premiss. New York law said that Richard was legitimate only because he was born in lawful wedlock.

But it had already been decided by Romer J. that he was not born in lawful wedlock. The acquisition of a New York domicile by Nesta and George in 1920 did not relate back to 1917 so as to validate their marriage.

(ii) Romer J.'s principal authorities are dicta in *Re Goodman's Trusts* and *Re Andros*. But, as has been already pointed out, these were cases of legitimation, not legitimacy. The learned Judge says 'there is no real distinction between the two classes of case' (*ante*, p. 155). He seems to have assumed that legitimation is governed by the law of the child's domicile of origin. This of course is not so: at common law legitimation depends upon the law of the father's domicile at the date of the child's birth and at the date of the subsequent marriage; under the Legitimacy Act, 1926, s. 8, legitimation depends upon the law of the father's domicile at the date of the marriage; in both cases the law of the child's domicile of origin might well be different.

(iii) Romer J. assumes that the law of a child's domicile of origin is the same as that of its parents at the date of its birth. On the facts before him, this was correct. But it would not have been correct if Nesta had never lived with George in New York. Romer J.'s proposition therefore will not work in cases where the parents are domiciled in different countries at the date of the child's birth.

(iv) The decision is inconsistent with *Re Paine*, which was not cited.

(v) The decision is inconsistent with *Shaw* v. *Gould*, which was distinguished on three not very satisfactory grounds:

(*a*) In *Shaw* v. *Gould* the domicile of origin of the children was English, because the domicile of their mother remained that of Buxton, since the divorce in Scotland was invalid. This is true, but it is arguing in a circle, because the House of Lords could not have held that the children's domicile of origin was English without first holding that they were illegitimate—and this was the very point at issue. The children were held to be illegitimate because their parents' marriage was invalid, not because they were illegitimate by the law of their domicile of origin.

(*b*) The validity of the divorce and second marriage in *Shaw* v. *Gould* was not really relevant but was 'a matter rather of assumption by the House of Lords than one of direct decision' (*ante*, p. 154). This is a bold argument. It treats as obiter nearly every word spoken by every Lord in *Shaw* v. *Gould*.

(*c*) In *Shaw* v. *Gould* there was a claim to real estate in England as well as a claim to movables and 'this may have had some effect on the line which was adopted both in the argument and in their Lordships' opinions' (*ante*, p. 154). This is, of course, a reference to the rule in *Birtwhistle* v. *Vardill* (1839), 7 Cl. & F. 895, *post*, p. 174. Here Romer J. seems to fall into an elementary error. For the gift in *Shaw* v. *Gould* was to '*sons* lawfully begotten', and it is settled that the rule in *Birtwhistle* v. *Vardill* only applies to succession by *heirs*: *Re Grey's Trusts*, [1892] 3 Ch. 88.

Conclusion. It is submitted that *Re Bischoffsheim* was wrongly decided and should be overruled. But until this happens, the cases can be reconciled by adopting the following formula: a child is legitimate if (1) it is born or conceived in lawful wedlock, or (2) it is legitimate by the law of the domicile of each of its parents at the date of its birth: Dicey, p. 494. (No doubt a child legitimate under the second branch of the formula could not succeed as heir to English real estate or to a peerage: ibid.) The suggested reconciliation wears the evident

air of ex post facto rationalization. It involves the conclusion that *Shaw* v. *Gould* would have been decided differently if Buxton had acquired a domicile of choice in Scotland after the divorce but before the children were born. This seems very doubtful: the House of Lords treated his domicile as relevant at one date only, namely, the date of the divorce.

(2) *Legitimation*

(*a*) *By subsequent marriage.* Until 1927 English domestic law stood practically alone in the world in refusing to recognize legitimation by subsequent marriage. But long before 1927 English conflict of laws recognized legitimation by subsequent marriage if the father was domiciled in a country which allowed it both at the date of the child's birth and at the date of the subsequent marriage. This was settled, after a period of hesitation and uncertainty, by the decision of the Court of Appeal in *Re Goodman's Trusts* (*ante*, p. 155). The earlier cases had held that the question was one of construction, dependent on the law of the domicile of the testator or intestate. From *Re Goodman's Trusts* onwards, the cases firmly establish that the question is not one of construction but of status: see per Kay J. in *Re Andros* (1883), 24 Ch.D. 637. At common law it is insufficient if the father was domiciled in the foreign country at the date of the child's birth only (*Re Grove*, *ante*, p. 160) or at the date of the subsequent marriage only (*Re Wright's Trusts* (1856), 2 K. & J. 595). This latter rule seems illogical; American judges have called it 'a refinement of reasoning'; and it is significant that *Re Wright's Trusts* was decided well before the main rule was established on its modern foundation in 1881.

The main rule had one important limitation. For the purpose of succeeding *as heir* to real estate in England or to an English peerage, the child had to be born or conceived in lawful wedlock, 'as it were porphyro-genitus, born legitimate within the narrowest pale of English legitimacy', per James L.J. in *Re Goodman's Trusts* (*ante*, p. 158); it was not sufficient that he was legitimated by a foreign law: *Birtwhistle* v. *Vardill* (1839), 7 Cl. & F. 895.

The Legitimacy Act, 1926, has made three important changes in the law. (1) S. 1 (1) introduces legitimation by subsequent marriage for the first time into English domestic law. (2) S. 8 says legitimation can take place under a foreign law if the father was domiciled in the foreign country at the date of the marriage only, thereby getting rid of the illogical rule in *Re Wright's Trusts*. (3) Ss. 3 and 10 emasculate the rule in *Birtwhistle* v. *Vardill* by providing in effect that a person legitimated under the Act can take any interest in property except (*a*) by descent under an entailed interest created *before* the date of legitimation, (*b*) peerages, and (*c*) property limited to devolve therewith—provided of course that he was legitimated before the death of the testator or intestate.

A difficulty is created by s. 1 (2) of the Act, which provides that 'Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.' The intention was no doubt to state either a rule of English domestic law or a rule of English public policy designed to strike at adulterous intercourse. (The design is only partially successful, because a child conceived in adultery but born after the death of the innocent spouse has been held to be outside the sub-section: *Re Heath*, [1945] Ch. 417.) If the sub-section states a rule of English public policy, one would

expect it to be applicable in all cases of legitimation under a foreign law, even if the foreign law was less strict; but the contrary was held in *Re Askew* (*ante*, p. 10), where it was assumed that the Act did not apply, but that the old rule in *Re Goodman's Trusts* was still available. On the other hand, if the sub-section states a rule of English domestic law, one would expect it to have said 'Nothing in this *section*'. It was so construed in *Collins* v. *A.-G.* (1931), 47 T.L.R. 484, where the facts were similar to those in *Re Askew*. But this construction does violence to the language of the sub-section.

(*b*) *Legitimation by recognition.* The only case in which an English court has had to consider this mode of legitimation is *Re Luck's Settlement Trusts* (*ante*, p. 166), where it was held by a majority of the Court of Appeal that the father must be domiciled in the foreign country both at the date of the child's birth and at the date of the act of recognition. Most commentators prefer the view of Farwell J. and Scott L.J., that it is sufficient if the father was domiciled in the foreign country at the date of the act of recognition: see Falconbridge, chap. 39; Mann, 57 L.Q.R. 112 (1941); and Cheshire, p. 521, who says 'though it is obviously convenient that one principle should govern all types of legitimation, it is a little eccentric to choose one that has been abrogated by statute'. But assuming that the Court of Appeal were not prepared to overrule *Re Wright's Trusts* (which might have been the best solution of the problem), there is a certain logic in the decision of the majority. The case was one of first impression. A new conflict rule had therefore to be formulated. Two analogies lay ready to hand: first, the analogy of the rule in *Re Goodman's Trusts*; secondly, the analogy of the Legitimacy Act, 1926. But whichever analogy was adopted, David Luck was illegitimate: under the rule in *Re Goodman's Trusts*, because his father was not domiciled in California when he was born; under the Legitimacy Act, 1926, because his father was married to a third person when he was born.

PART III
LAW OF OBLIGATIONS

CHAPTER I
CONTRACTS

Section A: ESSENTIAL VALIDITY

The essential validity of a contract is governed by its proper law, i.e. that law with which the contract has the most real connexion.

The proper law may be the lex loci contractus.

P. & O. STEAM NAVIGATION COMPANY *v.* SHAND. — Turner L.J.

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* SHAND (1865), 3 Moo. P.C. (N.S.) 272. (Privy Council)

THE judgment of their lordships (Knight Bruce and Turner L.JJ. and Coleridge J.) was delivered by

TURNER L.J.: This is an appeal against a judgment of the Supreme Court at Mauritius in favour of the respondent, who sued the appellants for damages occasioned by their non-delivery at Mauritius of certain articles of baggage.

The facts of the case appear to be that the respondent, the Chief Justice of the court below, intending to proceed to the Mauritius with his family, took and paid for a ticket for the passage from Southampton to Alexandria, and from Suez to Mauritius, for which he paid one entire sum of £315; in the body of the ticket the engagement of the appellants was stated to be subject to the conditions and regulations endorsed, and on its face, at the foot of it, the respondent signed his acceptance in the following form:—'I hereby accept this ticket, subject to the conditions and regulations endorsed thereon.'

Numerous regulations both as to the passengers and as to their baggage were endorsed, and at the close of all was a notice commencing thus, 'All parties are requested to take notice', and containing among other things the following clause, 'that the company do not hold themselves liable for damage to or loss or detention of passengers' baggage.'

By the ticket it appeared that the voyage from Southampton to Alexandria was to be on board the Ceylon, and from Suez to Mauritius on board the Norna; nothing, however, turns on this nor on the land

carriage between Alexandria and Suez, although in the argument for the respondent some reliance was placed on the fact that the appellants during this last transit took exclusive possession and charge of the passengers' baggage, with some trifling exceptions of articles required for immediate personal use. At Suez, the Norna lying a little distance out at sea, in consequence of the shallowness of the water, the passengers were conveyed to her in a small steamboat, the baggage in another vessel. It was on board this small steamer that, according to the evidence, the parcel in question was last seen. It consisted of cloaks, an overcoat, and plaids—articles which probably had been retained for personal use. When last seen, however, it was in the possession and custody of one of the servants of the appellants. The respondent's female servant would have herself taken it on board the Norna, but the servant of the appellants told her not to do so, for that he would take charge of it. Whether it reached the Norna, is uncertain. It was missed by the respondent when on board that vessel, and on the arrival at Mauritius it was not forthcoming.

Upon these facts the court below held that the law by which the case was to be tried was the French law, which prevails generally at Mauritius, and that by that law the appellants were liable. In the argument before their Lordships the latter proposition was not seriously disputed, but it was contended that the court below should have tried the case by the rules of English law, and that according to those rules the appellants were protected, under the circumstances of the case, by the terms of their contract with the respondent. On his part, however, it was argued, that even if the court below were wrong as to the rule it had governed itself by, yet the judgment was right, even upon the principles of English law. The case was ably and learnedly argued, and a very large number of authorities were cited for the respondent; the conclusion, however, at which their Lordships have arrived is, that the appellants are right in both of their propositions, and consequently that the judgment below cannot be supported.

In stating the grounds upon which their Lordships have arrived at this conclusion, it will not be necessary to review or distinguish between all the authorities cited in the argument; every one who is but moderately familiar with the text books and decisions must know how easy it is to produce authorities on either side, when the question is by what law to interpret a contract made in one country, and to be performed, wholly or partly, in another; but if these be carefully

P. & O. STEAM NAVIGATION COMPANY v. SHAND. — Turner L.J.

examined, it will be found, after all, that the same general principles have, for the most part, prevailed throughout, and that where the conclusions vary, they do so from distinctions more or less minute in the facts. The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the Power there ruling or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its actions upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed de jure, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations. Their Lordships are speaking of the general rule; there are, no doubt, exceptions and limitations on its applicability, but the present case is not affected by these, and seems perfectly clear as to the actual intention of the contracting parties.

This is a contract made between British subjects in England, substantially for safe carriage from Southampton to Mauritius. The performance is to commence in an English vessel, in an English port; to be continued in vessels which for this purpose carry their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessels might be in the course of the voyage. Into this contract, which the appellants frame and issue, they have introduced for their own protection a stipulation, professing in its terms to limit the liability which, according to the English law, the contract would otherwise have cast upon them. When they tendered this contract to the respondent, and required his signature to it, what must it be presumed that he understood to be their intention as to this stipulation? What would any reasonable man have understood that they intended? Was it to secure to themselves some real protection against responsibility for accidental losses of luggage and for damage to it; or to stipulate for something to which, however clearly expressed, the law would allow no validity? This question leaves untouched, it will be observed, the extent of the contemplated protection; it asks, in effect, was it intended that the stipulation in case of an alleged breach of contract should be construed by the rules of the English law, which would give some effect to it? or by those of the French or any other law, according to which it would have none, but be treated as a merely fruitless

attempt to evade a responsibility inseparably fixed upon the appellants as carriers? The question appears to their Lordships to admit of one answer only; but if they take the respondent so to have understood the intention of the appellants, they must take him to have adopted the same intention; it would be to impute want of good faith on his part to suppose that with that knowledge he yet intended to enter into a contract wholly different on so important an article; he could not have done this if the intention had been expressed, and there is no difference as to effect between that which is expressed in terms and that which is implied and clearly understood.

P. & O. STEAM NAVIGATION COMPANY v. SHAND. — Turner L.J.

The actual intention of the parties, therefore, must be taken clearly to have been to treat this as an English contract, to be interpreted according to the rules of English law; and as there is no rule of general law or policy setting up a contrary presumption, their Lordships will hold that the court below was wrong in not governing itself according to those rules.

It is a satisfaction to their Lordships to find that in the year 1864 the Cour de Cassation in France pronounced a judgment to the same effect in a case under precisely the same circumstances, which arose between the appellants and a French officer who was returning with his baggage from Hong Kong in one of their ships, the Alma, and who lost his baggage in the wreck of that vessel in the Red Sea. The same question arose as here on the effect to be given to the stipulation in the ticket; two inferior courts, those of Marseilles and Aix, decided it in favour of the plaintiff on the provisions of the French law; the Supreme Court reversed these decisions, and held that the contract having been made at Hong Kong, an English possession, and with an English Company, was to receive its interpretation and effect according to English law.

(His Lordship proceeded to hold that by English law the clause in the contract exempted the appellants from liability.)

Appeal allowed.

Or the proper law may be the lex loci solutionis.

CHATENAY *v.* BRAZILIAN SUBMARINE TELEGRAPH CO., LTD., [1891] 1 Q.B. 79. (Court of Appeal)

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY.

Appeal from a judgment of Day J. on a preliminary issue.

In 1880 the plaintiff, who was a Brazilian subject and resident in Brazil, executed, in favour of one Broe, a stockbroker carrying on

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY.

business in the City of London, a power of attorney to purchase and sell shares in public companies and public funds. The power of attorney was in the Portuguese language, and was executed by the plaintiff in Brazil with the formalities required by the Brazilian law. Broe, purporting to act under the power of attorney, disposed of certain shares in the defendant company which were the property of the plaintiff and registered in his name. Broe did not account to the plaintiff for the proceeds of the sale of these shares, the purchasers of which were registered as owners in the books of the company. The plaintiff issued an originating summons asking for the rectification of the register by inserting therein his name as holder of the shares, and an issue was directed to be tried by a jury in London to determine whether the plaintiff was entitled to have the register so rectified. Before this issue came on for trial an order was made that the question whether Brazilian or English law was to govern the construction of the power of attorney should be tried by a judge without a jury. The matter came on before Day J., who decided that English law was to govern the construction of the power of attorney, and a certificate to that effect was accordingly made out.

The defendants appealed.

LORD ESHER M.R.: In this case a person resident in Brazil and carrying on business there wrote down that which he intended to be an authority to an agent, if that agent would accept the delegation. The person whom he desired to be his delegate did afterwards accept that delegation. The question raised is, what is the meaning of that document? Now, I agree that it has one meaning, and no more; and the question is, what was the meaning of the plaintiff when he wrote that document? The court has to ascertain that meaning from a consideration of what it is that was written under the circumstances in which it was written; that is, in other words, having regard to the words used, and to the surrounding circumstances at the time they were used.

Now, this writing was a business document, written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil. An English court has to construe it, and the first thing, therefore, that the English court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words

which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and, if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. That is the first thing the court has to do. Then, when the court has got a correct translation into English, it has to do what it always has to do in the case of any such document—either a contract, or such an authority as this—that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it, and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY. — Lord Esher M.R.

which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.

Now, applying those rules to the present case, the first thing to be done is to get at the true construction of the language used in the authority. When the plaintiff used the Brazilian language in this document he must have used it in the business sense given to it in Brazil. Therefore, that has to be ascertained; and then having got that, the equivalent in the English language must be found. Having got in English the equivalent of the Brazilian words, we have to see what the meaning of the language so used is. If it appears that the contract is to be performed in Brazil wholly—that is to say, that the contract shall be performed according to Brazilian law—that is the construction of it, and that is the meaning of the parties; but if it appears that it was to be wholly carried out in England, we should infer that the meaning of the parties and the true construction of the contract were that it was to be carried out according to English law. If we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document, and not putting a different construction on it in different countries. The one meaning that he had was, 'I give an authority which if carried out in England is to be carried out according to the law of England; if in France, according to the law of France.' That is one meaning, though this authority is to be applied in a different way in different places.

If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what the plaintiff meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, as to the meaning of the language used; and if according to such evidence the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority

is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.

CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH COMPANY. — Lord Esher M.R.

Now, that I consider to be a mere expansion of the judgment of Day J. It is the same judgment, but it is in an expanded form. His judgment, therefore, is not altered, but is held to be a correct judgment, although we express it in an expanded form. It follows that the appeal fails, and must be dismissed.

LINDLEY and LOPES L.JJ. delivered judgment to the same effect.

Appeal dismissed.

Or the proper law may be the law of the country to which a ship belongs.

LLOYD *v.* GUIBERT (1865), L.R. 1 Q.B. 115 (Exchequer Chamber)

LLOYD v. GUIBERT. — Willes J.

WILLES J.: The facts disclosed by the record are as follows: The plaintiff below, a British subject, at St. Thomas, a Danish West India Island, chartered the ship Olivier, belonging to the defendants, who are Frenchmen, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option. The plaintiff must have known that the ship was French. The charter-party was entered into by the master in pursuance of his general authority as master, and not under any special authority from the owner. The plaintiff shipped a cargo at St. Marc for Liverpool, with which the vessel sailed. On her voyage, she sustained damage from a storm, which compelled her to put into Fayal, a Portuguese port, for repair. There the master properly borrowed money upon bottomry of the ship, freight, and cargo, and repaired the ship, which proceeded with the cargo, and arrived in safety at Liverpool. The bondholder proceeded in the Court of Admiralty against the ship, freight, and cargo. The ship and freight were insufficient to satisfy the bond; the deficiency and costs fell upon the plaintiff as owner of the cargo, and in respect thereof he seeks to be indemnified by the defendants as shipowners.

The defendants abandoned the ship and freight; and it must be taken as a fact (because it is alleged and not denied) that, by the law of France, they abandoned in time, and in such manner, and under such circumstances as are required by the French law, and that according to such law, abandonment, by which we understand a giving up of the ship and freight to the shippers, absolved them from liability. This law, if applicable, is one which furnishes an absolute bar to the plaintiff's claim by way of satisfaction or discharge, and

LLOYD v. GUIBERT. — Willes J.

affected the validity of the claim, and not merely the mode of proceeding to enforce it.

By the English law, a shipowner, under such circumstances, is liable personally, and not merely to the value of the ship and freight. And it is alleged, and not denied, that the Danish Portuguese and Haytian laws agree in this respect with our own. The law of Hayti was not however relied upon in argument.

Upon these facts, it was insisted for the plaintiff that the decision ought to proceed upon either what was called the 'general maritime law', as regulating all maritime transactions between persons of different nationalities at sea; the Danish law, as that of the place where the contract was made (lex loci contractus); the Portuguese law, because the bottomry bond, which in one sense caused the question to arise, was given in a Portuguese port, and the rule that the place governs the act (locus regit actum) was supposed, therefore, to furnish a solution; or the English law, as being that of the place of the final act of performance by the delivery of the cargo (quasi lex loci solutionis), in either of which alternatives the liability of the defendants was established. And it was argued, that, the charter-party having been entered into bonâ fide in the ordinary course of business by the master, within the scope of his ostensible authority to contract for the employment of the vessel, which the owner, by appointing a master and sending him abroad in command, allows him to assume, the right of the charterer could no more be narrowed by a provision of foreign law unknown to him than by secret instructions from the owners, which would clearly be inoperative—a proposition which needs no authority in our law.

For the defendants, it was answered, that by the French law they are absolved; and that that law, as being that of the ship, governs the case, either because of the character of the transaction itself, showing that the plaintiff impliedly submitted his goods to the operation of the law of the ship, or because the master, who entered into the contract (although his doing so was within the scope of the authority which he was allowed by the owners to assume), was disabled by the French law from binding his owners, otherwise than with the exception expressed or implied of exemption from liability by abandonment, and that of such disability, or lack of authority, his flag was sufficient notice.

Upon this latter ground, the Court of Queen's Bench gave judgment for the defendants, not expressing any opinion upon the former;

whereupon the plaintiff brought error, and the case was well argued at the sittings after Trinity Term last, before Erle C.J., Pollock C.B., Martin B., Keating J., Pigott B., and myself, when we took time to consider.

In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud, and mistake apart) the true construction of the language of the contract (lex contractus) is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers.

In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter.

A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence: for whoso goes to Rome must do as those at Rome do. . . .

Hitherto we have viewed the question generally; but in order to its satisfactory solution as applied to the present case, we must deal with the operative facts, that the contract of affreightment was made by persons of different nationalities in a place where both of them were foreigners, to be performed, partly there by breaking ground in order to start for the port of loading,—a place where both parties would also have been foreigners; partly at the latter port by taking the cargo on board; and partly on board a ship at sea, subject there to the laws of her own country, and never out of its jurisdiction as to acts done by those on board; and partly by final delivery in the port of discharge; that the principal subject-matter of the contract was the employment of a foreign ship for a voyage across the high seas; and that the question in dispute arose in consequence of sea damage to the ship, and its ordinary result.

In the diversity or conflict of laws, which ought to prevail, is a question that has called forth an amazing amount of ingenuity, and

LLOYD v. GUIBERT. — Willes J.

many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is primâ facie that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

The present question does not appear to have ever been decided in this country, and in America it has received opposite decisions, equally entitled to respect. We must therefore deal with it as a new question, and endeavour to be guided in its solution by a steady application of the general principle already stated, viz., that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves.

We must apply this test successively to the various laws which have been suggested as applicable; and first to the alleged general maritime law.

(His Lordship held that there was no general rule in maritime law upon the subject, and continued:) In one other point of view the general maritime law, as administered in England, or (to avoid periphrasis) the law of England, viz. as the law of the contemplated place of final performance, or port of discharge, remains to be considered. It is manifest, however, that what was to be done at Liverpool (besides that, it might at the charterer's option have been done at Havre) was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby. . . . It is unnecessary, however, to discuss this point further, because we have been anticipated and the question set at rest, in an instructive judgment of the Judicial Committee, delivered by the Lord Justice Turner, since the argument of the present case, in that of *Peninsular and Oriental Company* v. *Shand* (*ante*, p. 176).

Next, as to the law of Portugal: the only semblance of authority for resorting to that law, as being the law of the place where the bottomry bond was given, is *Cammell* v. *Sewell* (*post*, p. 270); and we consider that the judgment in that case, if applicable at all, as to which we say nothing, could only affect the validity of the bottomry, and not the duties imposed upon the shipowner towards the merchant by the fact of the bottomry, which duties must be traced to the contract of affreightment and the bailment founded thereupon.

The law of Hayti was not mentioned nor relied upon in argument; and there remain only to be considered the laws of Denmark and of France, between which we must choose.

In favour of the law of Denmark, there is the cardinal fact that the contract was made within Danish territory; and, further, that the first act done towards performance was weighing anchor in a Danish port.

For the law of France, on the other hand, many practical considerations may be suggested; and, first, the subject-matter of the contract, the employment of a sea-going vessel for a service, the greater and more onerous part of which was to be rendered upon the high seas, where, for all purposes of jurisdiction, criminal or civil, with respect to all persons, things, and transactions, on board, she was, as it were, a floating island, over which France had as absolute, and for all purposes of peace as exclusive, a sovereignty as over her dominions by land, and which, even whilst in a foreign port, was never completely removed from French jurisdiction.

Further, it must be remembered that, although bills of lading are ordinarily given at the port of loading, charterparties are often made elsewhere; and it seems strange and unlikely to have been within the contemplation of the parties that their rights or liabilities in respect of the identical voyage should vary, first, according as the vessel was taken up at the port of loading or not; and secondly, if she were taken up elsewhere, according to the law of the place where the charterparty was made, or even ratified. If a Frenchman had chartered the Olivier upon the same terms as the plaintiff did, it would seem strange if he could appeal to Danish law against his own countryman because of the charterparty being made or ratified in a Danish port, though for a service to be rendered elsewhere, by a transient visitor, for the most part within French jurisdiction.

Moreover, there are many ports which have few or no seagoing vessels of their own, and no fixed maritime jurisprudence, and

LLOYD v. GUIBERT. — Willes J.

which yet supply valuable cargoes to the ships of other countries. Take Alexandria, for instance, with her mixed population and her maritime commerce almost in the hands of strangers. Is every vessel that leaves Alexandria with grain under a charterparty or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian, or French, subject to Egyptian law? As to not a few half-savage places in Africa and Asia, with neither seagoing ships nor maritime laws, a similar question—what is the law in such cases, or is there none except that of the court within whose jurisdiction the litigation first arises?

Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new sort of civil liability, at each new country she visits, in respect of cargo there taken on board? An English steamer, for instance, starts from Southampton for Gibraltar, calling at Vigo, Lisbon, and Cadiz. A Portuguese going in her from Southampton to Vigo would naturally expect to sail subject in all respects to English law, that being the law of the place and the ship. But if the locality of the contract is to govern throughout, an Englishman going from Vigo to Lisbon on the same voyage would be under English law as to crimes and all obligations not connected with the contract of carriage, but under Spanish law as to the contract of carriage; and a Spaniard going from Lisbon to Cadiz during the same voyage would enjoy Portuguese law as to his carriage, and be subject to English law in other respects.

The cases which we have thus put are not extreme nor exceptional; on the contrary, they are such as would ordinarily give rise to the question, which law is to prevail? The inconvenience and even absurdities which would follow from adopting the law of the place of contract in preference to that of the vessel, are strong to prove that the latter ought to be resorted to.

No inconvenience comparable to that which would attend an opposite decision has been suggested. The ignorance of French law on the part of the charterer is no more than many Englishmen contracting in England with respect to English matters might plead as to their own law, in case of an unforeseen accident.

Nor can we allow any weight to the argument, that this is an impolitic law, as tending to interfere with commerce, especially in making merchants cautious how they engage foreign vessels. That is a matter for the consideration of foreigners themselves, and nothing

short of a violation of natural justice, or of our own laws, could justify us in holding a foreign law void because of being impolitic. No doubt the French law was intended to encourage shipping, by limiting the liability of shipowners, and in this respect it goes somewhat further than our own; but whether wisely or not is matter within the competence and for the consideration of the French legislature, and upon which, sitting here, we ought to pronounce no opinion.

Exceptional cases, should they arise, must be dealt with upon their own merits. In laying down a rule of law, regard ought rather to be had to the majority of cases upon which doubt and litigation are more likely to arise; and the general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce.

In order to preclude all misapprehension, it may be well to add, that a party, who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England.

For these reasons we have arrived at the same conclusion as the Court of Queen's Bench; and without examining the grounds upon which the court proceeded, we are of opinion that the judgment was right, and ought to be affirmed.

Judgment affirmed.

Or the proper law may be the lex situs of land which is the subject-matter of the contract.

MOUNT ALBERT BOROUGH COUNCIL v. AUSTRALASIAN ETC. LIFE INSURANCE SOCIETY LTD., [1938] A.C. 224 (Privy Council)

In 1926 the appellants, a New Zealand borough council, and a local body within the New Zealand Local Bodies' Loans Act, 1926, borrowed money for public works from the respondents, a company incorporated in Victoria, Australia, and carrying on business in Australia and New Zealand. As security for the loan the appellants issued in New Zealand debentures totalling £130,000 repayable in Melbourne, Victoria, and bearing interest payable in Melbourne

MOUNT ALBERT BOROUGH COUNCIL v. AUSTRALASIAN ETC. LIFE INSURANCE SOCIETY LTD.

half-yearly. The debentures were issued under the Local Bodies' Loans Act, 1913, of New Zealand, and the loan and interest were secured on a special rate of 3*d.* in the £ on the rateable value of all rateable property in the borough of Mount Albert, i.e. they were charged on land in the borough.

The respondents claimed that the interest due on 1 March 1935 was £3,696. 17*s.* 6*d.* The appellants, however, paid £3,250, alleging that as the interest was payable at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, which provided for a reduction in the rate of interest on mortgages and other securities.

In the action the respondents claimed £446. 17*s.* 6*d.* as being the balance of interest alleged to be due to them. The New Zealand Court of Appeal gave judgment for the respondents (plaintiffs). The Mount Albert Borough Council now appealed.

The judgment of their Lordships (Lords Atkin, Macmillan, Wright, and Maugham) was delivered by

LORD WRIGHT: . . . The debentures and the interest coupons in so far as they give a security on real property, namely, a portion of the local rate in New Zealand, are beyond question governed by the New Zealand law. The security can be enforced only in the Courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by New Zealand law. But in their Lordships' judgment it is equally true that the personal obligation to pay is a New Zealand contract, governed by New Zealand law. It seems impossible to sever this personal covenant from the mortgage provisions which secure it. Indeed, the whole tenor of the transaction is only consistent with its being governed by New Zealand law. The loan was agreed in New Zealand, the money under the loan was paid by the respondents to the appellants there. The appellants were a statutory body in New Zealand which in borrowing were acting under the statutory powers contained in the Loans Act as set out above. The respondents carried on business in New Zealand as well as in Australia. It is true that the place of repayment of the loan, and of payment of interest from time to time, was to be Melbourne, in Australia. But even that was fixed in accordance with s. 32 of the Loans Act of 1913, which required payment of the debt to be at the place within or out of New Zealand named in the debenture, so that the obligation to pay has statutory sanction. Mr. O'Shea, in his able

and exhaustive argument, has contended that the payment is governed by Victorian law because Victoria is the place of performance, and that Victorian law for this purpose includes s. 19, sub-s. 1, of the Financial Emergency Act. He further contends that s. 19, sub-s. 1, applies to the debt because it is a specialty debt and the coupon, which is the document of title, must necessarily be presented at the place of payment in Melbourne when payment is due and demanded, and thus at the relevant moment the lex situs applies so as to introduce the statutory reduction of interest. Their Lordships are not prepared to accept either contention. While they think that the lex situs applies to the security in New Zealand, they do not think that the lex situs of the actual coupon can be applied to the instrument, whether or not the personal obligation to pay is properly regarded as a specialty debt. Nor can they accept the view that the obligation to pay is here governed by the place where it is stipulated that payment is to be made, in the sense that the amount of the debt, as expressed in the instrument creating it, can lawfully be varied by the Victorian Financial Emergency Act so as to bind a foreign jurisdiction, or indeed at all. So to hold would be, in their Lordships' judgment, to confuse two distinct conceptions, that is, to confuse the obligation with the performance of the obligation. It is well established in the law of England and of New Zealand, which in this respect follows it, that the proper law of a contract has to be first ascertained where a question of conflict of laws arises.

The proper law of the contract means that law which the English or other court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as lex loci contractus or lex loci solutionis, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain prima facie rules to which a court in

MOUNT ALBERT BOROUGH COUNCIL v. AUSTRALASIAN ETC. LIFE INSURANCE SOCIETY LTD. — Lord Wright.

deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as prima facie presumptions. It is not necessary to cite authorities for these general principles. Sometimes their application involves difficulty; but not in this case. It has been already pointed out that there are, in their Lordships' opinion, such circumstances as lead to the inference that in the present case the proper law of the contract is the law of New Zealand, and accordingly that law should prima facie govern the rights and obligations to be enforced under the contract by a court before which the matter comes, a fortiori a New Zealand court. It is true that, when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will prima facie govern the incidents or mode of performance, that is, performance as contrasted with obligation. Thus in the present case it is not contested that the word 'pound' in the debenture and coupon is to be construed with reference to the place of payment, and as referring to the 'pound' in Victorian currency. Again, different considerations may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance. But there is no question of illegality here, since the Victorian statute is not prohibitory.

Mr. O'Shea relied on certain expressions used in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122, as indicating that the House of Lords there laid down that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation expressed or embodied in the contract, with the result in the present case that the amount of the interest was reduced by the effect of the Financial Emergency Acts. Their Lordships cannot accept this reading of the *Adelaide* case. The House of Lords was not concerned there with any such general questions, or with questions of the substance of the obligation which, in general, is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation, in regard to the particular matter of the currency in which payment was to be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction emphasized in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589, between obligation and performance. Indeed, that line of authorities

was not referred to either in argument or in the speeches. It may be that in some cases difficulties have arisen in distinguishing 'obligation' from 'performance', and that 'manner and mode of performance' may affect the value of the obligation. But the Victorian statute here is in express terms directed to 'obligation', that is, to the construction and effect of the mortgage, and the reduction of the covenanted rate of interest. In *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, this Board has recently adverted to that distinction between obligation and performance (at p. 606). This way of considering the present case has been fully elucidated in the very careful judgments of the Court of Appeal. Their Lordships do not desire to be thought to express any dissent from these judgments in so far as they hold that the Financial Emergency Acts do not operate to reduce the amount of the interest in this case, or proceed on the ground that to recognise the application of the Acts, as the appellants contend should be done, would not be to apply the law of the place of performance to the performance of the contract, but to apply it so as to change the substance of the obligation, because according to the appellants' contention the Acts would be applied to change the amount payable, which is a matter of obligation and is not a mode or manner of performance. But their Lordships do not feel it necessary to pursue this aspect of the case at any greater length, or to give any final opinion upon it, because they think that the appeal can be determined on the single ground that, in their Lordships' judgment, which again agrees with that of the Court of Appeal, the Financial Emergency Acts do not apply to these debentures, or to the interest payable under them. . . .

Appeal dismissed.

Or the proper law may be the law intended by the parties.

VITA FOOD PRODUCTS INC. *v.* UNUS SHIPPING CO., [1939] A.C. 277 (Privy Council)

Appeal from the Supreme Court of Nova Scotia.

The appellant was a body corporate incorporated under the laws of the State of New York; the respondent was a body corporate incorporated under the laws of the Province of Nova Scotia. The respondent owned a motor vessel called the Hurry On which was registered at Halifax, Nova Scotia. In January 1935 the respondent agreed to carry a cargo of herrings from Middle Arm, Newfoundland, for

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO.

delivery to the appellant in New York, and accordingly bills of lading were signed in Newfoundland by the agents of the parties.

The Newfoundland Carriage of Goods by Sea Act, 1932, provided in s. 1 that 'subject to the provisions of this Act' the Rules set out in the Schedule thereto should 'have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion'. Section 3 provided that 'Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as expressed in this Act.' Sections 4, 5, and 6 contained certain provisions to which the Rules were subject.

The Rules scheduled to the Act were identical with those scheduled to the United Kingdom Carriage of Goods by Sea Act, 1924. They are commonly called the Hague Rules and were settled by an International Conference on Maritime Law held at Brussels in 1922 and 1923. Article III, rule 8, provided that any clause, covenant, or agreement lessening the carrier's liability under the Rules should be null and void and of no effect. Article IV, rule 2, provided that 'neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (*a*) act, neglect, or default of the master, mariners, pilot or the servants of the carrier in the navigation or in the management of the ship; . . . (*c*) perils, dangers and accidents of the sea or other navigable waters'.

Owing to the inadvertence of the parties in using obsolete forms the bills of lading did not contain the statement required by section 3 of the Newfoundland Act. The bills of lading conferred on the carrier a number of immunities, some of which were wider and some narrower than those contained in the Rules. Clause 7 of the bills provided that the carrier should not be liable for any loss or injury arising from any act or omission, negligence, default or error in judgment of the pilots, masters, mariners, engineers, stevedores, workmen or other men in the service of the carrier. They also contained a statement that 'this contract shall be governed by English law', and a provision that the United States Harter Act, 1893, should apply to shipments from the United States and that save as so provided the bills of lading were subject to the terms and provisions of, and exemptions from liability contained in, the Canadian Water Carriage of Goods Act, 1910 (which, however, only applied to shipments of goods from any port in Canada).

The Hurry On sailed from Middle Arm on 16 January 1935, bound for New York with the herrings on board. Two days later she ran into bad weather and ice off the coast of Nova Scotia. The captain decided to make for a port of refuge, but in an attempt to do so ran ashore on the coast of Nova Scotia in a gale of wind owing (as was ultimately admitted) to his negligence. The herrings were unloaded, reconditioned, and forwarded by another ship to New York, where the appellant took delivery of them in a damaged condition and paid freight.

The appellant brought an action against the respondent in Nova Scotia claiming damages for the failure of the respondent to deliver the cargo in New York in like condition as received on board. The appellant claimed that the respondent operated the Hurry On as a common carrier and that as such it was an insurer of the safety of the cargo. The respondent pleaded that the bills of lading or, alternatively, the Rules exempted it from liability, even if the damage was caused by the captain's negligence; and that the contract was governed by the law of Newfoundland. The appellant admitted that the contract was governed by the law of Newfoundland, but alleged in reply that the bills of lading were illegal, null and void under Newfoundland law in that, contrary to section 3 of the Act of 1932, they did not contain an express statement that they were to have effect subject to the Rules; and that therefore the respondent could not take advantage of any of the exemptions from liability provided by the Rules or by the bills of lading.

Chisholm C.J. and the Supreme Court of Nova Scotia rejected the appellant's contention, and the Supreme Court also held that, if the bills of lading were illegal, the parties were in pari delicto and the action must fail. The appellant appealed.

The judgment of their Lordships (Lords Atkin, Russell of Killowen, Macmillan, Wright, and Porter) was delivered by

LORD WRIGHT: . . . The first question to determine is the true construction of ss. 1 and 3 of the Act. Sect. 1 provides for the application of the rules to every bill of lading for the carriage of goods by sea in ships from any port in Newfoundland to any other port, whether in or outside that Dominion. The appellant contended that since s. 1 only provided that the rules should have effect 'subject to the provisions of this Act,' the rules could not apply to a bill of lading unless the terms of s. 3 were complied with. Their Lordships do not so construe the section. In their opinion the words 'subject to the provisions

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO. — Lord Wright.

of this Act' merely mean in this connection that the rules are to apply but subject to the modifications contained in ss. 2, 4, 5 and 6 sub-s. 3 of the Act. To read these words as meaning that the rules are only to have effect if the requirements of s. 3 are complied with, would be to put an unnecessarily wide interpretation upon them instead of the narrower meaning, which is more natural and obvious. In their Lordships' judgment s. 1 is the dominant section. Sect. 3 merely requires the bill of lading to contain an express statement of the effect of s. 1. This view of the relative effect of the sections raises the question whether the mandatory provision of s. 3, which cannot change the effect of s. 1, is under Newfoundland law directory or imperative, and, if imperative, whether a failure to comply with it renders the contract void, either in Newfoundland, or in courts outside that Dominion.

It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect, with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract 'is the law which the parties intended to apply'. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances. But as Lord Atkin, dealing with cases where the intention of the parties is expressed, said in *Rex* v. *International Trustee for, etc., Bondholders A.-G.*, [1937] A.C. 500, 529 (a case which contains the latest enunciation of this principle), 'Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive'. It is objected that this is too broadly stated and that some qualifications are necessary. It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case, however, it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction, which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries,

contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential. The provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England. Moreover in the present case the Hurry On, though on a Canadian register, is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case parties may reasonably desire that the familiar principles of English commercial law should apply. The other ground urged is that the choice of English law is inconsistent with the provisions of the bill of lading, that in respect of certain goods the Harter Act or the Canadian Water Carriage of Goods Act of 1910 (now repealed, but in force at the date of the bill of lading) was to apply. It has been explained that the incorporation of these Acts may have only contractual effect, but in any case, though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract. The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms. But that part of the English law which is commonly called the conflict of laws requires, where proper, the application of foreign law; e.g., English law will not enforce a performance contrary to the law of the place of performance in circumstances like those existing in *Ralli Bros.* v. *Compania Naviera Sota y Aznar* (*post*, p. 215), and the law of the place of performance, though it will not be effective to affect the construction of the contract in regard to its substance (which must be ascertained according to the rule of the proper law, as was held in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589) will still regulate what were called in that case the incidents and mode of performance in that place. English law will in these and sometimes in other respects import a foreign law, but the contract is still governed by its proper law. The reference to the United States and the Canadian Acts does not on any view

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO. — Lord Wright.

supersede English law which is to govern the contract, nor does Newfoundland law, though Newfoundland was the place where the contract was made, apply to oust English law from being the law of the contract, and as such from being the law which defines its nature, obligation and interpretation, though Newfoundland law might apply to the incidents of performance to be done in Newfoundland. There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act.

If, however, by reason of this failure to obey the Act the bills of lading were illegal in Newfoundland, it would not follow as a necessary consequence that a Nova Scotian court, applying the proper law of the contract, would in its own forum treat them as illegal, though the position of a court in Newfoundland might be different, if it held them illegal by Newfoundland law. A court in Newfoundland would be bound to apply the law enacted by its own Legislature, if it applied, and thus might treat the bills as illegal, just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship; *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* (1889), 129 U.S. 397. Such a clause, it was held, was against public policy and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *In re Missouri Steamship Co.* (1888), 42 Ch.D. 321, where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy, though the shipment took place in America and the bill of lading was issued there, and that the clause, being valid in English law, must receive effect.

With these considerations in mind it is necessary first to consider if the bills of lading are illegal by Newfoundland law. If they are not, the question of illegality cannot arise in the courts of another jurisdiction, e.g., those of Nova Scotia. Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. . . . Each case has to be considered on its merits. Nor must it be forgotten that

the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

Are there such grounds for holding that the Newfoundland law does in Newfoundland nullify bills of lading such as those in question? In their Lordships' opinion there are not. The matter can be tested by asking what would be the position if a bill of lading set out in extenso the exact provisions of the rules, but failed to contain an express statement in compliance with s. 3, that the provisions of the rules applied to it. Surely such a bill of lading could not be regarded as illegal. Or again, what is the position where not only is a shipment made in a Newfoundland port but the port of delivery also is in Newfoundland? In such a case s. 1, by its own force, imports the rules, and s. 3 is merely an intimation of what, if the parties concerned are all residents or natives of Newfoundland and bound by that law, they must be taken to be aware. At least this is the position if Newfoundland law governs the contract. It seems impossible to hold that in such cases the bills of lading would be illegal and void. If that is so of a transaction beginning and ending in Newfoundland, and if such a transaction is not illegal, their Lordships do not think that such a transaction is to be treated as illegal because the place of delivery is outside Newfoundland and the parties or some of them are outside that Dominion and are not bound by its laws. It is said that the rules are not made part of the contract save when there is an express clause in the contract stating that they are to apply as provided in s. 3, and that to hold the bills of lading legal and effective documents without such a clause would frustrate the purpose of the Hague Rules and of the International Conference, which aims at an obligatory unification of bills of lading all over the world, at least so far as particular nations adopt them. The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes s. 3, nor does it impose penalties for failure to comply with s. 3, nor does it in terms expressly prohibit the failure. Indeed there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all: see *Harland & Wolff* v. *Burns*, [1931] S.C. 722. The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious. A foreign merchant or banker could not be assumed to know or to

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO. — Lord Wright.

inquire what the Newfoundland law is, at any rate when the bill of lading is not expressed to be governed by Newfoundland law and still less when it provides that it is governed by English law, and it would seriously impair business dealings with bills of lading if they could not be taken at their face value, and as expressing all the relevant conditions of the contract. It was partly for that reason that in *Dobell* v. *Steamship Rossmore Co.*, [1895] 2 Q.B. 408, the Court of Appeal refused to treat the Harter Act as having any effect as a foreign law affecting the validity of the contract, but treated it only as part of the English contractual document which expressly embodied it. A bill of lading fulfils other functions than merely that of setting out the conditions of carriage. It is a document of title which if endorsed passes the property, and which, if money is advanced upon it, as is done in ordinary course of business, passes a special property by way of pledge to the banker or other lender. It would be a grave matter if business men when dealing with a bill of lading had in a case like the present to inquire into the foreign law ruling at the port of shipment.

All these reasons seem to justify the conclusion that the omission of what is called the clause paramount does not make the bills of lading illegal documents, in whole or in part, either within Newfoundland or outside it. Sect. 3 is in their Lordships' judgment directory. It is not obligatory, nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion. If that is so, the bills of lading are binding according to their terms and consequently the respondent is entitled to succeed in its defence.

But on the basis that the bills of lading were illegal in Newfoundland in that their issue without the clause paramount was prohibited by the law of that country it was argued that no court in any country would enforce their terms and exemptions, and the carriage would therefore be upon the terms implied where goods are taken for carriage by a common carrier, i.e., subject only to the exception of the Act of God and the King's Enemies. No further terms, it was said, could be implied nor could any reliance be put upon the provisions of the Hague Rules, since they had not been incorporated in the bills of lading by the insertion of the clause paramount. The appellant contended that, unless the clause was inserted, no contract between

carrier and shipper which included the provisions of the Hague Rules was entered into. Nor could the Act be said to have incorporated them even in Newfoundland itself, since s. 1 only provided that the rules should have effect 'subject to the provisions of this Act', a phrase which the appellant maintained meant (inter alia) that the rules were not incorporated unless the provisions of s. 3 were complied with. For reasons already explained their Lordships do not so construe the section.

But whatever view a Newfoundland court might take, whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated the Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case, where the action was brought not in a Newfoundland but in a Nova Scotian court. It may be that, if suit were brought on these bills of lading in a Newfoundland court, and the court held they were illegal, the court would refuse to give effect to them, on the basis that a court is bound to obey the laws of its own legislature or its own common law, as indeed the United States Supreme Court did in *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* (1889), 129 U.S. 397. But it does not follow that any other court could properly act in the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law. This was done in the *Missouri* case (1888), 42 Ch.D. 321, both by Chitty J. and by the Court of Appeal. Lord Halsbury, having stated that the contrary view would mean that no country would enforce a contract made in another country unless their laws were the same, said (at p. 336) 'that there may be stipulations which on ecountry may enforce and which another country may not enforce, and that to determine whether they are enforceable or not you must have regard to the law of the contract, by which I mean the law which the contract itself imports to be the law governing the contract.' Having held that the law of the contract was English, he went on to hold that the exception of negligence, even if of no validity in the place where made, must receive effect in English law, although the exception of negligence was invalid in the United States as being against the public policy of that country, and although to do an act contrary to public policy is one type of illegal action. The same attitude is illustrated in *Dobell* v. *Steamship Rossmore Co.*, [1895] 2 Q.B. 408, where the Harter Act, which declares certain stipulations to be

VITA FOOD PRODUCTS INC. v. UNUS SHIPPING CO. — Lord Wright.

unlawful and imposes penalties on shipowners inserting them in bills of lading, was not considered as affecting the English contract as a part of the contract where its provisions were infringed, save so far as it was expressly incorporated. Foreign law was also disregarded in *Trinidad Shipping Co.* v. *G. R. Alston & Co.*, [1920] A.C. 888, where the contract was an English contract and payment of certain rebates on freight were rendered illegal by the law of the United States, where the freight was payable. From the rule which he states Lord Halsbury in the *Missouri* case puts aside 'questions in which the positive law of the country [sc. the foreign country] forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it.' In this passage Lord Halsbury would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English court to give effect to the transaction, just as an English court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which by the foreign law of the place where a contract was entered into are essential to its formation, though even in that case the validity of the contract may depend on its proper law. But whatever the precise ambit of that saving expression, it is clear that it does not apply to such a statutory enactment as s. 3, even if disobedience to it were regarded as rendering the bill of lading in some sense illegal. . . .

(His Lordship proceeded to express disapproval of *The Torni*, [1932] P. 78, and refused to distinguish it either on the ground that the bills of lading in that case provided that they were to be 'construed in accordance with' (not 'governed by') English law; or on the ground that s. 4 of the Palestine Carriage of Goods by Sea Ordinance, which was otherwise identical with s. 3 of the Newfoundland Act of 1932, contained the additional words 'and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement'.)

Appeal dismissed.

Or the proper law may be the law of the country with which the contract has the most substantial connexion.

BOISSEVAIN *v.* WEIL, [1949] 1 K.B. 482 (Court of Appeal)[1] BOISSEVAIN v. WEIL.

The plaintiff, a male Dutch subject, and the defendant, a female British subject, were at all material times, by reason of the war, involuntarily resident in Monaco, which was then in the military occupation of the enemy. In June and July 1944 the defendant borrowed from the plaintiff 960,000 francs, which she agreed to repay in England in sterling at the agreed exchange rate of 160 francs to the pound after the war. The defendant drew cheques in blank for the full amount borrowed on an English bank, and addressed a letter to the manager informing him of the circumstances in which the cheques had been drawn and requesting him to honour them on presentation as soon as the law permitted.

The defendant had no account at the bank and the plaintiff, being unable to obtain repayment of the loan, brought the present action to recover £6,000 and interest. The defendant relied on Defence (Finance) Regulations, 1939, regulation 2, and on s. 3 (1) of the Emergency Powers (Defence) Act, 1939.

Regulation 2 provides: 'Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.'

S. 3 (1) of the Act of 1939 provides: 'Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall . . . (*b*) in so far as they impose prohibitions, restrictions or obligations on persons, apply . . . to all persons in the United Kingdom . . . and to all other persons being British subjects except persons in' certain listed countries of which Monaco was not one.

Croom-Johnson J. gave judgment for the plaintiff. The defendant appealed.

DENNING L.J.: The regulations here in question were made during the war for the protection of our purchasing power. All the foreign assets of the people resident in this country were mobilized to form a pool, which was used for purchases abroad. There were, of course, big demands on this pool for essential purchases, such as to pay for

[1] Affirmed on other grounds, [1950] A.C. 327.

BOISSEVAIN v. WEIL. — Denning L.J.

necessary imports, and the country could not afford to allow it to be used for any other than essential purposes. The country could not, therefore, allow British subjects unrestricted freedom to deal in foreign exchange or to buy goods or services from foreign countries, for that would give foreigners sterling credits and increase the demands on the pool. Section 3 of the Emergency Powers (Defence) Act, 1939, makes it plain that these regs. 2 and 3 (*c*), apply to British subjects in foreign countries, unless the contrary intention appears from the regulations themselves. I can find no such contrary intention. If the regulations were not to apply to British subjects in foreign countries, it would mean that any British subject who went on a visit to the United States could freely buy dollars and give sterling cheques in exchange—or promise to repay in sterling in London—and thus create a drain on sterling for non-essential purposes. The sterling credits could be used by Americans for their purposes here, instead of bringing here goods or dollars which would strengthen the pool. Again, if the regulations were not to apply to British subjects in enemy occupied territories, it would mean that any British subject in the south of France during the war could freely buy francs and create in exchange sterling credits which might be transferred to the enemy and used against this country in the war, or transferred to a neutral country and increase the pressure on sterling.

I cannot agree, therefore, with either of the suggested limitations as to the scope of regs. 2 and 3 (*c*). The principal argument against their application here was the argumentum ad absurdum. It is said that it is unthinkable that a British subject long resident in, say, the United States, should not be able to buy or borrow dollars and pay for them with a cheque on his New York bank in dollars, or that a British prisoner of war should not be able to borrow foreign currency on which to live during his escape through enemy-occupied territory. Those cases are, however, very different from the present case, because they do not involve the creation of any sterling credit. The proper law of the contracts in those cases is not English law. According to private international law, when a British subject who is residing in the United States borrows dollars from an American, the validity of the contract to repay—that is to say, the question whether it creates legal obligations or not—depends on the proper law of the contract; and that depends not so much on the place where it is made, nor even on the intention of the parties, or on the place where it is to be performed, but on the place with which it has the most substantial

connexion. (See Westlake, 7th ed., p. 302, and Prof. Cheshire's recent book on International Contracts especially at pp. 12–15, 30–33.) If in the case put he promises to repay in dollars in the United States, the proper law of the contract is the law of the United States, and its validity in no way depends on what the British Defence Regulations may say. If, however, he promises to repay in sterling in the United Kingdom, the proper law of the contract is the law of this country; and its validity depends on whether it is made illegal by the Defence Regulations. If it is illegal by the law of England, it is, or should be, invalid everywhere.

In construing the Defence Regulations, it must be assumed that in so far as they have extra-territorial effect on the validity of contracts, they apply only to contracts of which the proper law is the law of England, for those are the only contracts whose validity they can affect, and not to contracts of which the proper law is the law of some other country, whose validity they do not affect.

I need hardly say that a British subject cannot contract out of the Defence Regulations. If, for instance, when on a visit to the United States, he makes a contract to borrow dollars and to repay in sterling in the United Kingdom, the proper law of the contract is the law of England, and he cannot escape the effect of that law by stipulating in the contract that it is governed by the law of the United States. Notwithstanding what was said in *Vita Food Products* v. *Unus Shipping Co.* (*ante*, p. 193), I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account. If, however, a British subject resident in the United States makes a contract to borrow dollars and to repay there in dollars, the proper law of the contract is the law of the United States: and, if it is valid in the United States, it is, or should be, valid everywhere. Nevertheless, although it is valid and would be enforced in the United States, it is quite another matter to say that it would be enforced in this country. The validity of the contract is one thing and the enforcement of it is another. Then the public policy of the lex fori may come into play. An English court, whilst recognising that the contract was valid, would yet have to face the fact that a British subject is not allowed to make a payment to any person resident outside the sterling area without the consent of the Treasury. So, also, cases might occur where English law clearly prohibited a British subject from entering into a foreign contract which was valid by its proper law, in which

BOISSEVAIN v. WEIL. — Denning L.J.

case, of course, it would not be enforced by the English courts. I need not, however, go into those matters in detail. Suffice to say that the regulations do not affect innocent transactions, such as those instanced in argument, because when the contract is valid by its proper law and the only question is payment, the Treasury would no doubt in any proper case grant the necessary permission to make payment. In my opinion, therefore, the argumentum ad absurdum is not valid, because, on the view of the regulations which I have expressed, there is nothing unreasonable in them.

In this case, the proper law of the contract is English law. Having regard to the nationality and domicile of the defendant, to the detailed arrangements for the repayment of the loan in London, and to the circumstances which gave rise to the transaction, there can be no doubt that England was the country with which the transaction was most essentially connected, and that therefore English law was the proper law. The only connexion with Monaco was that it happened to have been made there. It is illegal by English law, and cannot be enforced either directly by action on the loan or the cheques, or indirectly by an action for money had and received.

TUCKER and ASQUITH L.JJ. delivered judgments allowing the appeal.

Appeal allowed.

NOTE H: THE PROPER LAW OF THE CONTRACT

THE question what law governs the validity of a contract is one of the most discussed questions in the conflict of laws, and many solutions have been suggested.

(1) *The law of the place of contracting.* This is the view adopted by the American Restatement. It is a corollary of the vested rights theory, that only the place where events occur has power to annex legal obligations to them. It is open to many objections. The place of contracting may be quite casual and may have no substantial connexion with the contract, as when an English contract is concluded by a letter of acceptance posted in Madrid. It may be impossible to determine the place of contracting without arguing in a circle, as when an offer is sent from London and accepted by letter posted in Leningrad, the law of Russia holding that a contract is made where the letter of acceptance is received. Moreover, even the most fervent advocates of the place of contracting theory have to admit that matters of performance (as opposed to matters of formation) are governed by the law of the place of performance. But it is extremely difficult to draw any clear line between matters affecting the formation of a contract and matters affecting its performance.

(2) *The law of the place of performance.* This was Story's view, and was said by him to be based on 'natural justice'. It avoids the difficulties so far considered. It is based upon an internal or substantial relationship between the

contract and its governing law instead of an external or casual relationship. But it raises formidable difficulties of its own. What if the contract is to be performed in two or more countries—as when a ship is required to unload at Liverpool and Glasgow? What if the contract is bilateral and each party is to perform in a different country—why should one law rather than the other determine the validity of the contract? What if the contract is a negative one, and so can be broken anywhere, for example a general covenant not to compete in business?

(3) *The law intended by the parties.* This is the fashionable judicial mode of stating the English view, and has been ever since 1865. The locus classicus is the judgment of Willes J. in *Lloyd* v. *Guibert* (*ante*, p. 183), and his formulation is adopted in Dicey, rule 136.

(4) *The law with which the contract has the most substantial connexion.* This was the view of Westlake and is now the view of Dr. Cheshire (*International Contracts*). According to this view, the court should examine all the relevant factors, including the place of contracting (unless it is casual), the place of performance (if there is one), the situs of the land (if the contract relates to land), and the residence, domicile, or even perhaps the nationality of the parties, in order to discover the centre of gravity of the contract. A number of presumptions in favour of various laws have been established; the courts emphasize that they are only presumptions, and therefore capable of being rebutted. The dilemma is that the more this is insisted on, the more certainty recedes. The objection to this theory is that it may require a lawsuit to determine the validity of the contract. But this is an objection which might be urged against a great deal of law in general; and in spite of this objection it will be submitted that this is the best view.

So far as English law is concerned, the choice lies between view (3) (the subjective theory) and view (4) (the objective theory). In many situations, the choice between them is academic. If the parties have not made an express selection of the proper law, the court is likely to reach the same result whether it inquires what was the intention of the parties, or whether it inquires with what country was the contract most substantially connected. The crucial question is, therefore, can the parties select the law of a country with which their contract has no substantial connexion?

In many situations it is evident that they can. A contract for the sale of goods, made and to be performed in England between two Englishmen, provides that the property shall pass in accordance with the law of Ruritania. Section 17 (1) of the English Sale of Goods Act, 1893, provides that 'where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred'. The rule is therefore purely facultative, and there is no reason for not giving effect to the intentions of the parties. Ruritanian law would in such a case operate not as such, but as a contractual term agreed to by the parties. This is technically called Incorporation. The difference between an incorporation of and a reference to foreign law is clearly explained by Lord Esher in *Dobell* v. *Rossmore S.S. Co. Ltd.*, [1895] 2 Q.B. 408, 412. The difference emerges most clearly if there is a change in the foreign law between the date of the contract and the date of the action. If the foreign law has merely

been incorporated as a contractual term, the foreign law as it stood at the former date will be applied.

Other considerations arise if the law with which the contract is most substantially connected is not facultative but obligatory. Suppose that A, an Englishman, in England promises in writing to make a donation in England to B, another Englishman: and that the writing contains a statement that it is governed by Italian law. It is hard to suppose that an action would lie on the promise in England, even if it is proved that consideration is not needed in Italian law. A contract is an agreement to which the law annexes an obligation: what law annexes the obligation to this agreement that Italian law shall govern? It begs the question to say that the conflict of laws of the forum annexes the obligation, for the question what is the conflict of laws of the forum is the very question under discussion; and in any case the conflict of laws cannot say directly that a contract is valid, but only indirectly that the validity of a contract is governed by a certain law.

This argument derives additional force if the question is not whether there is a contract, but whether the parties have agreed. Suppose that A, an Englishman, is induced by the fraud of B, another Englishman, to sign a paper in England which A mistakenly thinks is some insurance matter, but which turns out to be a guarantee of B's overdraft at an English bank. If the bank sues A on his guarantee, it is inconceivable that he would be precluded from pleading non est factum by the fact that the document contains a statement that it is to be governed by Ruritanian law, and that by Ruritanian law a party who signs a document is bound by all its terms.

It is often said that the subjective theory is the only one which is consistent with freedom of contract. Undoubtedly the subjective theory was developed in an atmosphere permeated by freedom of contract; but that ideal has now lost its attraction to many minds. Moreover, freedom of testation is at least as salient a feature of English law as freedom of contract: yet no one maintains that a testator domiciled in England could avoid the impact of the rule against perpetuities merely by stating that his will was to be governed by some foreign law.

Even the most convinced adherents of the subjective theory have to admit that some qualifications on it are necessary. In *Vita Food Products* v. *Unus Shipping Co.* (*ante*, p. 196) Lord Wright says that the intention expressed must be 'bona fide and legal'. But this qualification begs the question, since it is not stated by what law the legality of the choice is to be determined. What does 'bona fide' mean? It might mean that the choice is limited to the law of some country with which the contract has a substantial connexion. But this is difficult to reconcile with Lord Wright's statement that 'connection with English law is not as a matter of principle essential'. Other writers say that the intention must be reasonable (see an article by Dr. Mann in 3 Int. L.Q. 60 (1950), and a reply thereto in 3 Int. L.Q. 197). This is a most important admission. It implies that in the last resort the test is objective, and that the parties cannot select the law of a country with which their contract has no substantial connexion.

With the possible exception of the cases on submission to arbitration, there is no English case in which a different result would have been reached by

applying the objective test; on the other hand, there are several American cases in which the parties' choice has been rejected. Even in the *Vita Food* case the decision would have been the same on either test. The contract was not held to be illegal by the law of Newfoundland or any other law. In the events which happened the shipowner was exempt from liability whether the Hague Rules scheduled to the Newfoundland statute applied or whether they did not. The decision that English law was the proper law of the contract was singularly destitute of legal consequences. (See an article on the case in 56 L.Q.R. 320 (1940).)

Adherents of the subjective theory strongly object to the splitting of the contract into separate phases, each governed by a different law. According to them, there can only be one proper law of a contract. Admittedly, in a normal case such splitting is undesirable, because it is practically simpler and juristically more elegant for the contract to be governed by one law rather than several. But contracts in the conflict of laws are apt to give rise to a large variety of complicated questions; simplicity and elegance may be bought at too high a price. It is here that the objective theory has a great advantage. It is unlikely that parties will select more than one law as the proper law of the contract. (The parties in the *Vita Food* case did so, but only through inadvertence.) On the other hand, the objective theory enables the problem to be broken down into smaller groups, and contemplates the application of different laws to such questions as the following: Are the outward phenomena of agreement (offer and acceptance) present? Have the parties reached agreement or is their apparent agreement void for mistake? Is the agreement voidable for misrepresentation, or void for illegality? Does the law annex an obligation to this agreement, or is it void for want of consideration or causa? Have the parties capacity to contract? Have the requisite formalities been observed? What is the substance, the effect, and the interpretation of the contract? Can a stranger to the contract sue or be sued thereon? What amounts to performance, and what excuses for non-performance are available? The true inquiry therefore is not what law governs the contract, but what law governs the particular question raised before the court. For this reason great merit attaches to attempts like those of Dr. Cheshire (*International Contracts*) and Dr. Kahn-Freund in Dicey to formulate the various questions that may arise, and to suggest appropriate solutions.

Conclusion. The conclusion is submitted that, however valuable it may have been historically in the development of the English conflict of laws, the subjective theory is as much a fiction as the theory of an implied contract in the law of quasi-contract, or the theory of an implied term in the law of frustration of contracts; and that the theory ought now to be abandoned. It is further submitted that the reaction against the subjective theory, judicially inaugurated by Denning L.J. in *Boissevain* v. *Weil* (*ante*, p. 203), is one which is much to be welcomed.

Footnote. The case of *P. & O. S.S. Co. Ltd.* v. *Shand* (*ante*, p. 176) is usually cited as an illustration of the presumption in favour of the lex loci contractus. It is arguable, however, that the case ought to be cited as an illustration of the presumption in favour of the lex loci solutionis, the most substantial part of the performance having taken place on board an English ship. This may be tested

by asking whether the decision would have been different if (1) the plaintiff had been a Frenchman who took his ticket and boarded the ship at Cherbourg; or (2) the contract had been one for the carriage of the plaintiff from Mauritius to Southampton. It is submitted in both cases that it would not.

Section B: CAPACITY

Capacity to enter into a commercial contract is governed by the proper law of the contract.

BOND-HOLDERS SECURITIES CORPORATION *v.* MANVILLE.

BONDHOLDERS SECURITIES CORPORATION *v.* MANVILLE, [1933] 4 D.L.R. 699 (Saskatchewan Court of Appeal)

On 14 January 1925 the defendant, a married woman domiciled in Saskatchewan, while on a visit to Florida, agreed in Florida to purchase land in Central Miami, Florida, from the Edward E. Dammers Realty Corporation of Miami, Florida; and she gave a promissory note payable in instalments for the payments due under the contract. The note was endorsed for value to one G. E. Merrick and by him to the plaintiffs. To an action by the plaintiffs in Saskatchewan to recover the balance due on the note with interest, various defences were raised: (1) that the plaintiff corporation had no status to sue in Saskatchewan; (2) that the payee's endorsement on the notes had not been proved; (3) that the action was barred by certain court proceedings in Florida in 1929 and 1930; (4) that by the law of Florida a married woman could not make a promissory note; (5) that the defendant was induced to enter into the agreement for sale, and to sign the note, by fraud and misrepresentation; (6) that the plaintiffs should have shown that they tendered good and sufficient deeds to the lands; (7) that the plaintiffs had not shown that they were ready, able, and willing to convey title; (8) that the vendors had broken certain covenants contained in the agreement of sale. All these defences were rejected except the fourth.

Evidence of Florida law was given on commission.

TURGEON J.A.: . . . It was contended by counsel for the plaintiffs that the law of Mrs. Manville's domicile should govern the contract, and that she should be held bound by the law of this Province. The law on the question of the incapacity of persons to contract, in relation to their domicile and to the place where the contract is made, has been left in an unsatisfactory condition by the authorities. As an example we find that in *Sottomayor* v. *De Barros* (*ante*, p. 76)

Cotton L.J. in delivering the judgment of the Court of Appeal gave expression to the following dictum: 'But it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile.'

When later on this case came before the Probate Division, the President, Sir James Hannen, after quoting Cotton L.J., had this to say (5 P.D. 94, 100): 'It is of course competent for the Court of Appeal to lay down a principle which, if it formed the basis of a judgment of that Court, must, unless it should be disclaimed by the House of Lords, be binding on all future cases. But I trust that I may be permitted without disrespect to say that the doctrine thus laid down has not hitherto been "well recognised". On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way.' Sir James Hannen then goes on to cite with approval what was said by Sir C. Cresswell in *Simonin* v. *Mallac* (*ante*, p. 56): 'In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made.'

In *Male* v. *Roberts* (1800), 3 Esp. 163, Lord Eldon held that in the case of a contract entered into in Scotland by an infant the law of Scotland would prevail in the courts in England, if properly proved.

On the whole I am of opinion that, at least in the case of mercantile contracts not prohibited by the lex fori, the weight of authority is to the effect that the capacity or incapacity of a person to contract must be determined by the law of the country where the contract arises. Therefore Mrs. Manville is not bound by her signature to the note sued upon. . . .

MARTIN J.A.: . . . The notes and contracts for deed were made in the State of Florida and are there payable. The essential qualities of the notes and contracts must, therefore, be governed by the law of Florida; whatever relates to the rights of the parties must be determined by the proper law of the contract; and prima facie the proper law of the contract is the law of the country where the contract is made—the lex loci contractus—a presumption which applies with particular force when the contract is to be performed wholly in the country where it is made; Dicey's Conflict of Laws, 4th ed., pp. 629–631.

BOND-HOLDERS SECURITIES CORPORATION v. MANVILLE. Martin J.A.

On the other hand, whatever relates to the remedy to be enforced is governed by the lex fori, for persons suing in a country must take the procedure as they find it: Dicey's Conflict of Laws, p. 798. . . .

The defence is set up that the note of a married woman is void according to the law of Florida. It is clear from the expert testimony that, under the law of Florida, the promissory note of a married woman is void and unenforceable. The plaintiff therefore cannot recover against Mrs. Manville on the note upon which this action is brought. Counsel for the plaintiffs argued that Mrs. Manville's capacity to contract should be governed by the law of her domicile, and that, as in this Province a married woman is competent to sign a promissory note, she is bound by her signature. There is doubt whether the competency of an individual to contract depends upon the lex loci contractus or upon the law of the country where the contracting party is domiciled. In *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, Lord Macnaghten expressed the opinion that the question is not finally settled, but also stated that the preponderance of opinion seems to be in favour of the place of domicile, although all cases may not be governed by the same rule. The language used by Cotton L.J. in *Sottomayor* v. *De Barros* (*ante*, p. 76) is also to the effect that the capacity to enter into any contract is to be decided by the place of domicile, for he stated: 'As in other contracts, so in that of marriage, personal capacity must depend upon the place of domicile.'

The authority of these statements is, however, affected, not by the judgment, but by the dicta contained in the judgment of the Court of Appeal in *Ogden* v. *Ogden* (*ante*, p. 59). On the one hand the weight of authority appears to be that capacity to marry, or to enter into a contract connected with marriage, depends upon the law of the domicile of the contracting party; but, on the other hand, there is very strong authority for holding that the capacity to enter into an ordinary mercantile contract is governed, not by the lex domicilii, but by the lex loci contractus: Westlake's Private International Law, 7th ed., p. 41. In Dicey's Conflict of Laws, 4th ed., p. 598, the learned author, after reviewing the authorities, states that there is every ground for distinguishing, as a matter of common sense, between the ordinary contracts of every-day life and the formal contracts of marriage and settlement of property on marriage.

In 1800 Lord Eldon held in *Male* v. *Roberts* that the capacity to contract for the purchase of 'liquors of different sorts' was to be determined by the law of the place where the contract was made.

The decision, so far as I can find, has not been overruled, and I am of the opinion that the authorities support the view that capacity to make a commercial contract is governed by the lex loci contractus, although this is inconsistent with statements contained in some of the marriage cases, as to which a different rule may apply. . . .

MACKENZIE J.A. concurred with MARTIN J.A.

NOTE J: CAPACITY TO CONTRACT

THERE is an extraordinary lack of modern English authority on this subject, and neither judicial dicta nor the views of text-writers are in agreement. The problem is usually expressed in terms of a choice between the law of the domicile and the law of the place of contracting. An illustration will make the nature of the problem clear. Suppose that a man aged 24, domiciled in Ruritania, buys goods on credit in an English shop: could he refuse to pay for them on the ground that by Ruritanian law infancy ends at the age of 25? Most students coming fresh to this subject would say no, and that commercial convenience requires that the lex loci contractus should govern. In many situations, this is undoubtedly true. But if we assume that the customer never left Ruritania, the contract being concluded by correspondence, and that the shopkeeper knew the customer was a Ruritanian and also knew that by Ruritanian law infancy ends at 25, then the answer is not nearly so obvious. And it seems absurd to make the validity of the contract depend on whether the letter of acceptance was posted in England or in Ruritania. Moreover, it is clear that an application of the lex loci contractus will not necessarily mean that the contract is valid, for example in the converse situation of an Englishman aged 24 buying goods on credit in Ruritania.

The following solutions of the problem have been suggested:

(1) *The law of the domicile.* The majority of continental jurists assert that capacity to contract is governed by the personal law (which for Anglo-American courts means the law of the domicile). At least one decision of the United States Supreme Court supports this view: *Union Trust Co.* v. *Grosman* (1918), 245 U.S. 412. But continental courts (France) and legislatures (Germany) have abandoned this principle when its application would lead to injustice to their own subjects; and most American courts prefer the lex loci contractus: *Milliken* v. *Pratt* (1878), 4 Mass. 374, Restatement, s. 333. The objection to the law of the domicile is that it hinders commerce by enabling a party to carry an incapacity about with him wherever he goes.

(2) *The law of the place of contracting.* In many situations, this law has strong claims. But the place of contracting may sometimes be casual or accidental. It is unreasonable that the capacity not only of the offeree but also of the offeror should be governed by Spanish law merely because the letter of acceptance happened to be posted in Madrid.

(3) *The law intended by the parties.* Whatever plausibility this law may have for essential validity (*ante*, p. 207), it is almost universally agreed that it cannot apply to capacity: for otherwise a party could confer capacity on himself by

choosing the law of some country with which the contract had no substantial connexion. As Lord Macnaghten said in *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, 99: 'It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled.'

(4) *The law most favourable to the contract.* This view is adopted by Dr. Wolff and Dr. Cheshire. Dr. Wolff says the contract will be valid if the parties have capacity by either the lex domicilii or the lex loci contractus (s. 262). Dr. Cheshire says the contract will be valid if the parties have capacity by either the lex domicilii or the proper law of the contract, by which he means the law with which the contract has the most substantial connexion (*International Contracts*, p. 51). But these statements seem to carry the principle in favorem negotii much too far. The conflict of laws is not a science for upholding whenever possible the validity of a contract, a marriage, or a will; it is a science for determining what law should govern the validity of these matters.

(5) *The law with which the contract has the most substantial connexion.* This is the view of Dicey (pp. 619–24) and Falconbridge (pp. 324, 547) and it has much to commend it. It would furnish the necessary flexibility and would allow the necessary weight to be given to all the relevant factors. It would enable the courts to discriminate between the usual type of case where commercial convenience requires the contract to be upheld if the parties had capacity by the law of the place of contracting, and the exceptional type of case where the stringent policy of the law of the domicile requires an opposite result (e.g. *Union Trust Co.* v. *Grosman*). It would not necessarily follow that the proper law governing capacity should be the same as the proper law governing essential validity, nor that the proper law governing the capacity of one party should be the same as the proper law governing the capacity of the other: though in normal cases such splitting of the contract should be avoided.

In *Male* v. *Roberts* (1800), 3 Esp. 163, Lord Eldon says that capacity to contract is governed by the law of the country where the contract 'arises', and this phrase is repeated by Turgeon J.A. in *Bondholders Securities Corp.* v. *Manville* (*ante*, p. 211). There can be no doubt, however, that the laws of Scotland and of Florida were the proper laws of the contracts in those two cases. On the other hand, Martin J.A. in the *Manville* case (*ante*, p. 213) prefers to say that capacity to contract is governed by the lex loci contractus, and Lord Greene M.R. in *Baindail* v. *Baindail* (ante, p. 90) expresses the same view. See also the judgment of Scrutton L.J. in *Republica de Guatemala* v. *Nunez* (*post*, pp. 283–4).

There seems to be no reason for distinguishing between commercial contracts made by infants and by married women, as in Cheshire, 3rd ed., pp. 263–6, 297–8.

Section C: ILLEGALITY

An English court will not enforce a contract which is valid by its proper law but the performance of which is illegal by the law of the place of performance: at any rate if (a) the proper law is English, or (b) the place of performance is in England.

RALLI BROTHERS *v.* COMPANIA NAVIERA SOTA Y AZNAR, [1920] 2 K.B. 287 (Court of Appeal)

RALLI BROTHERS *v.* COMPANIA NAVIERA SOTA Y AZNAR.

In July 1918 an English firm chartered a Spanish steamship from the owners, a Spanish firm, to carry a cargo of jute from Calcutta to Barcelona at a freight of £50 per ton, one half to be paid to the owners in London on the vessel sailing from Calcutta, and the other half to be paid at Barcelona, after the arrival of the ship. The charter-party was made in London in the English language and form and the Court of Appeal held (what had not been disputed) that English law was its proper law. The steamship arrived at Barcelona in December 1918. Meanwhile in September 1918 there came into force in Spain a decree having the force of law which fixed the maximum freight on jute imported into Spain at 875 pesetas per ton, and imposed penalties upon persons infringing it. The freight reserved by the charter-party was largely in excess of 875 pesetas per ton. The receivers of the cargo at Barcelona tendered the balance of the freight at this rate but refused to pay the balance at the rate reserved by the charter-party. The Spanish shipowners then claimed to recover the balance of the freight from the charterers in England, notwithstanding that it exceeded the freight limited by Spanish law. The matter came before Bailhache J. in the form of a special case stated by a commercial umpire. The learned judge decided in favour of the charterers. The shipowners appealed.

SCRUTTON L.J. (after stating the facts, continued): I accept the contention of the shipowners that the charterers remain liable for the freight, in spite of the provision that half of it is to be paid by the receivers. But I think they remain liable to pay it in Spanish currency at the Spanish port of discharge to a Spanish company resident in Spain. To pay freight in Spain to a Spaniard for goods to be discharged in Spain at a rate in excess of the maximum freight fixed by Spanish law for the carriage of such goods is illegal by the law of Spain. What then is the effect on the contract of illegality by the law of the place where it is to be performed, such law not being British law?

RALLI BROTHERS v. COMPANIA NAVIERA SOTA Y AZNAR. — Scrutton L.J.

In my opinion the law is correctly stated by Professor Dicey in Conflict of Laws, 2nd ed., p. 553, where he says: 'A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed'—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English courts. The early authorities on this point require reconsideration in view of the obligations of international comity as now understood.

The argument addressed to us was that illegality by foreign law was only impossibility in fact, which the parties might have provided against by their contract, and for which they must be liable, if they had not expressly relieved themselves from liability. This is the old doctrine of *Paradine* v. *Jane* (1647), Aleyn, 26, 27: 'When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' It was emphasised by Lord Ellenborough in *Atkinson* v. *Ritchie* (1809), 10 East, 530, 533, where he said: 'No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance.' And Lord Bowen as late as 1884 in the case of *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589, cited Lord Ellenborough's approval of *Paradine* v. *Jane* with approval. But the numerous cases, of which *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1919] A.C. 119, is a recent example, most of which are cited in McCardie J.'s exhaustive judgment in *Blackburn Bobbin Co.* v. *Allen & Sons*, [1918] 1 K.B. 540, 546, have made a serious breach in the ancient proposition. It is now quite common for exceptions, or exemptions from liability, to be grafted by implication on contracts, if the parties by necessary implication must have treated the continued existence of a specified state of things as essential to liability on the express terms of the contract. If I am asked whether the true intent of the parties is that one has undertaken to do an act though it is illegal by the law of the place in which the act is to be done, and though that law is the law of his own country; or whether their true intent was that the doing of that act is subject to the implied condition that it shall be legal for him to do the act in the place where it has to be done, I have no hesitation in choosing the second alternative. 'I will do it

provided I can legally do so' seems to me infinitely preferable to and more likely than 'I will do it, though it is illegal'.

. . . Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not in my opinion assist or sanction the breach of the laws of other independent States.

LORD STERNDALE M.R. and WARRINGTON L.J. delivered judgments to the same effect.

Appeal dismissed.

CHAPTER II

TORTS

Actions in England upon torts committed abroad will succeed only if (a) the act would have been actionable if committed in England, and (b) the act was not justifiable by the law of the place where it was committed.

(a) *Actionable in England*

THE HALLEY.

THE HALLEY (1868), L.R. 2 P.C. 193 (Privy Council)

APPEAL from the High Court of Admiralty.

The respondents, as owners of a Norwegian barque called the Napoleon, brought an action against the appellants, as owners of a British steamship called the Halley, for damages in respect of a collision which occurred in January 1867 in Flushing roads between the Napoleon and the Halley. The appellants pleaded that the collision was caused by the sole negligence of the pilot whom they were compelled by Belgian or Dutch law to have on board the Halley. The respondents replied that by Belgian or Dutch law the owners of a ship were liable for the negligence of a compulsory pilot.

The judgment of their Lordships (Sir William Erle, Lord Justice Wood, Lord Justice Selwyn, Sir James Colville, and Sir Edward Vaughan Williams) was delivered by

LORD JUSTICE SELWYN: The claim of the respondents is stated by the learned Judge to be founded upon a tort committed by the defendants in the territory of a foreign state, and we are not called upon to pronounce any opinion as to the rights which the respondents might have obtained, either against the appellants as the owners of the Halley, or as against that ship, if the respondents had instituted proceedings and obtained a judgment in the foreign court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in England; and it is admitted by the counsel for the respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned Judge in the court below, that the respondents are entitled to plead that the law of Belgium, within whose territorial

jurisdiction the collision took place, renders the owners of the Halley, although compelled to take a pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned Judge in his statement of the common law of England, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a pilot, whom the owner was compelled to take on board, and in whose selection he had no voice. This exemption of the owner from liability when the ship is under the control of what has been termed a 'compulsory pilot' has also been declared by express statutory enactments (vide Merchant Shipping Act, 1854, s. 388). Their Lordships think that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in, or cause of action against, the appellants.

It follows, therefore, that the liability of the appellants, and the right of the respondents to recover damages from them, as the owners of the Halley, if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English Court of Justice is bound to apply and enforce that law in a case when, according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists.

The counsel for the respondents, when challenged to produce any instance in which such a course has been taken by any English Court of Justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English courts for damages in respect of torts committed in foreign countries has long since been established; and, as is observed in the note to *Mostyn* v. *Fabrigas* (1775), in Smith's Leading Cases, vol. i. p. 656, there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable both by the law of England and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous. . . .

It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become

THE HALLEY. — Selwyn L.J.

necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed. . . .

Appeal allowed.

(*b*) *Not justifiable by the lex loci delicti commissi*

PHILLIPS v. EYRE. — Willes J.

PHILLIPS *v.* EYRE (1870), L.R. 6 Q.B. 1 (Exchequer Chamber)

Error from the judgment of the Court of Queen's Bench in favour of the defendant (L.R. 4 Q.B. 225).

The judgment of the Court (Kelly C.B., Martin, Channell, Pigott, and Cleasby BB., Willes and Brett JJ.) was delivered by

WILLES J.: This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested by force of arms; that an Act was afterwards duly passed by the legislature of the island, and received the royal assent, by which it was enacted by the governor, legislative council, and assembly of the island, amongst other things that the defendant and all officers and other persons who had acted under his authority, was thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were 'thereby made and declared lawful, and were confirmed'. The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the

defendant to be proper for the purpose of putting an end to, and bonâ fide done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the law of Jamaica, a necessary party to the making of the Act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error.

It was agreed at the bar that, for the purpose of this argument, the decision ought to turn upon the colonial Act, and numerous objections were urged against its validity and effect. . . .

(After considering the nature and effect of an Act of Indemnity, and disposing of objections (1) that the Crown had no power to create a legislative assembly in a settled colony; (2) that the Act in question was contrary to English statute law and was therefore void; (3) that the defendant was as governor a necessary party to the passing of the Act and so could take no benefit thereunder; (4) that the Act was retrospective in character and therefore contrary to natural justice, his Lordship continued:)

The last objection to the plea of the colonial Act was of a more technical character; that assuming the colonial Act to be valid in Jamaica and a defence there, it could not have the extra-territorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. 'Quæ accessorium locum obtinent extinguuntur cum principales res peremptæ sunt.' A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may shew that the parties intended their bargain to be governed by some other law; but, primâ facie, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be

PHILLIPS v. EYRE. — Willes J.

drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land: *Doulson* v. *Matthews* (1792), 4 T.R. 503, and even with respect to those not falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; therefore, in *The Halley* (*ante*, p. 218), the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore in *Blad's Case* (1673), 3 Swan. 603, and *Blad* v. *Bamfield* (1674), 3 Swan. 604, Lord Nottingham held that a seizure in Iceland, authorized by the Danish Government and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree* v. *Napier* (1836), 2 Bing. N.C. 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese water an English ship breaking blockade, was held by the Court of Common Pleas to be justified, by the law of Portugal and of nations, though his serving under a foreign Prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *Reg.* v. *Lesley* (1860), Bell, C.C. 220, an imprisonment in Chile on board a British ship lawful there, was held by Erle C.J., and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect

of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature. This distinction is well illustrated on the one hand by *Huber* v. *Steiner* (*post*, p. 410), where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure, and the time and manner of suit (tempus et modum actionis instituendæ), and did not affect to destroy the obligation of the contract (valorem contractus); and on the other hand by *Potter* v. *Brown* (1804), 5 East, 124, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of the bill here by a certificate in bankruptcy, under the law of the United States of America, the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Ballantine* v. *Golding* (1784), Cooke's *Bankrupt Law*, 487, and ever since recognized, that 'what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere'. So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, ex delicto, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided. Cases may possibly arise in which distinct and independent rights or liabilities or defences are created by positive and specific laws of this country in respect of foreign transactions; but there is no such law (unless it be the Governor's Act already discussed and disposed of) applicable to the present case.

It may be proper to remark, before quitting this part of the subject, that the colonial Act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad; so that, for instance, if a foreign country after a rebellion or civil war were to pass a general Act of oblivion and indemnity, burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure

PHILLIPS v. EYRE. — Willes J.

results of anarchy and violence, it would, if the argument for the plaintiff prevailed, be competent for a municipal court of any other country to condemn and disregard, as naturally unjust or technically ineffectual, the law of a sovereign state, disposing, upon the same constitutional principles as have actuated our own legislature, of matters arising within its territory—a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

MACHADO v. FONTES.

MACHADO *v.* FONTES, [1897] 2 Q.B. 231 (Court of Appeal)

Appeal from Kennedy J. at chambers.

The plaintiff brought this action to recover damages from the defendant for an alleged libel upon the plaintiff contained in a pamphlet in the Portuguese language alleged to have been published by the plaintiff in Brazil.

The defendant delivered a statement of defence (in which, amongst other defences, he denied the alleged libel), and he afterwards took out a summons for leave to amend his defence by adding the following plea: 'Further the defendant will contend that if (contrary to the defendant's contention) the said pamphlet has been published in Brazil, by the Brazilian law the publication of the said pamphlet in Brazil cannot be the ground of legal proceedings against the defendant in Brazil in which damages can be recovered, or (alternatively) cannot be the ground of legal proceedings against the defendant in Brazil in which the plaintiff can recover general damages for any injury to his credit, character, or feelings.'

The summons came before Kennedy J. in chambers, who allowed the plea to be added, but expressed some doubt as to the propriety of so doing, and gave leave to plaintiff to bring the present appeal.

LOPES L.J.: I am of opinion that this appeal ought to be allowed. [The Lord Justice then referred to the facts, and, after reading the plea, continued:—]

Now that plea, as it stands, appears to me merely to go to the remedy. It says, in effect, that in this case no action in which

damages could be recovered would lie in Brazil, and, assuming that any damages could be recovered in Brazil, they would be special damages only. Mr. Walton contends that that is not the meaning of the plea: that the plea is intended to raise a larger question than that, and to say that libel cannot be made the subject of any civil proceedings at all in Brazil, but it is only the subject-matter of criminal proceedings; and, for the purposes of what I am about to say, I will assume that to be so.

Now the principle applicable in the present case appears to me to be this: where the words have been published outside the jurisdiction, then, in order to maintain an action here on the ground of a tort committed outside the jurisdiction, the act complained of must be wrongful—I use the word 'wrongful' deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with.

In the case of *Phillips* v. *Eyre* (*ante*, p. 222) Willes J. lays down very distinctly what the requisites are in order to found such an action. He says this: 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England.... Secondly, the act must not have been justifiable by the law of the place where it was done.' Then in *The M. Moxham* (1876), 1 P.D. 107, James L.J., in the course of his judgment, uses these words: 'It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here.'

Both those cases seem to me to go this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed. In the present case there can be no doubt that the action lies, for it complies with both of the requirements which are laid down by Willes J. The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed. Both those

MACHADO v. FONTES. Lopes L.J.

conditions are complied with; and, therefore, the publication in Brazil is actionable here.

It then follows, directly the right of action is established in this country, that the ordinary incidents of that action and the appropriate remedies ensue. Therefore, in this case, in my opinion, damages would flow from the wrong committed just as they would in any action brought in respect of a libel published in this country.

It is contended that it would be much better that this question should not be decided at the present time, but that a commission should go to Brazil, and that the Brazilian law should be inquired into. If our view is correct, it seems to me that that would be a great waste of time and money, because, having regard to the authorities I have mentioned, this plea is absolutely bad, and ought to be struck out.

RIGBY L.J.: I am of the same opinion. I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

Willes J., in *Phillips* v. *Eyre*, was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from 'actionable' in the first branch of the rule to 'justifiable' in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act

in the foreign country is an answer to the action. That is what is meant when it is said that the act must be 'justifiable' by the law of the place where it was done.

It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes J. in *Phillips* v. *Eyre*; and in the case of *The M. Moxham* all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case.

I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published. James L.J. states in *The M. Moxham* what the settled law is. Mellish L.J. is quite as clear upon the point as James L.J. in laying down the general rule; and Baggallay L.J. also takes the same view. We start, then, from this: that the act in question is primâ facie actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act accordingly to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

Appeal allowed.

NOTE K: TORTS

BY insisting that the tortious act must be actionable in England as well as not justifiable by the law of the place where it was committed, English law 'manifests an illiberal attitude which does not obtain elsewhere except in China and Japan' (Lorenzen, p. 376). 'One would look far to find a more striking example of "mechanical jurisprudence", blind adherence to a verbal formula without regard to policies or consequences' (Hancock, *Torts in the Conflict of Laws*, p. 89). The only English authority for the requirement that the act must be actionable in England is *The Halley* (*ante*, p. 218). In the United States it is sufficient if the act is wrongful by the lex loci delicti, subject to the public

policy of the forum. But as between sister states, this public policy safeguard is narrowly construed. As Cardozo J. said in *Loucks* v. *Standard Oil Co.* (1918), 224 N.Y. 99: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'

A recent case in Scotland furnishes a striking example of the injustice which the present English rule may produce. In *McElroy* v. *McAllister*, [1949] S.C. 110, the pursuer's husband, who was resident in Glasgow, was killed on an English road in Westmorland by the alleged negligence of the defender, who was also resident in Glasgow. At the time of the accident the pursuer's husband was a passenger in a vehicle belonging to his employers, a Glasgow company, and the defender was driving another vehicle. If the accident had happened in Scotland, the pursuer could have recovered substantial damages in respect of solatium and patrimonial loss. If the action had been brought in England, she could have recovered substantial damages as a dependant under the Fatal Accidents Acts, 1846–1908, and as executrix for the deceased for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934. It was held, however, by a full court of seven judges (Lord Keith dissenting) that she could only recover £40 in respect of funeral expenses, that being the only point at which Scots and English law coincided. The claim for solatium failed because English law does not recognize such a claim for wrongful death. The claim under the Fatal Accidents Acts failed because the action was begun more than twelve months after the accident, contrary to s. 3 of the Act of 1846. The claim under the Law Reform (Miscellaneous Provisions) Act, 1934, failed because by Scots law all rights of action vested in an injured person (as opposed to his family) for personal injuries due to negligence die with the injured person, unless he had instituted proceedings before his death. The case is discussed in 12 Mod. L.R. 248 (1949).

It is submitted that tort liability in the conflict of laws should be governed by the proper law of the tort, and that the place where the alleged tort is committed should be only one of several elements to be taken into consideration. Is there any reason in principle why the liability of an English motorist for injuries inflicted on an English pedestrian on a Scots road should not be governed by English law? or why the liability of a Scots motorist for injuries inflicted on a Scots pedestrian on an English road should not be governed by Scots law? This reasoning has been criticized as 'absurd' on account of the difficulty of determining the proper law of the tort (65 L.Q.R. 316). But is the difficulty any greater than that of determining the proper law of the contract, or the place where an interstate tort is committed?

The case of *Machado* v. *Fontes* (*ante*, p. 228), which has been followed in Canada (*McLean* v. *Pettigrew*, [1945] 2 D.L.R. 65) but not in Scotland (*Naftalin* v. *L.M.S.R.*, [1933] S.C. 259; *McElroy* v. *McAllister*, [1949] S.C. 110), has been criticized by Cheshire (pp. 376–9); Hancock, *Torts in the Conflict of Laws*, pp. 15–18; Robertson, 4 Mod. L.R. 27 (1940); but defended by Lorenzen (47 L.Q.R. 483); Gutteridge (6 Camb. L.J. 20); and Falconbridge (chap. 45). It is clear that in Scots law the act must be actionable by the law of the place where it was done, but whether this is so in English law remains open to conjecture.

PART IV
LAW OF PROPERTY

CHAPTER I
IMMOVABLES

Section A: DISTINCTION BETWEEN MOVABLES AND IMMOVABLES

The primary division of property according to the English conflict of laws is into movables and immovables, not into realty and personalty.

An interest in the proceeds of sale of English freeholds which are subject to a trust for sale but not yet sold is an interest in an immovable.

In re BERCHTOLD, [1923] 1 Ch. 192 (Chancery Division) *In re* BERCHTOLD,

Originating Summons.

On 2 April 1906 Count Richard Berchtold died, being a person of Hungarian nationality and domicile. He left a will (dated 2 March 1901) in English form dealing with his estate in England. By that will he devised all his freehold estate in Birmingham to English trustees upon trust for sale and conversion with power to postpone such sale and conversion for so long as they should think fit. The proceeds of sale and the investments for the time being representing the same and the rents and profits of such part of the estate as should for the time being remain unsold were directed to be held in trust for his son Count Nicholas subject to the payment of an annual sum to the testator's wife during her life. Count Richard left him surviving his wife (who died in 1913), his only son Count Nicholas, and an only daughter, the defendant Countess Szokolyi.

Count Nicholas died intestate on 9 July 1911. He was of Hungarian nationality and domicile. He left him surviving his widow the plaintiff and one child only, Count Antoine, who was killed in action on 23 October 1915, under the age of 21 years. He was of Hungarian nationality and domicile. He died intestate leaving his mother, the plaintiff, his sole next of kin. The estate of Count Nicholas in this country consisted of his beneficial interest in the Birmingham freeholds under the will of Count Richard. No part of the Birmingham freeholds had been sold before the date of the summons.

The summons asked 'Whether the persons or person beneficially

In re BERCHTOLD. entitled to the proceeds of sale of the said real estate (if sold) and to the rents and profits thereof (until sale) are the persons or person who would be entitled according to English law or the persons or person who would be entitled according to the law of Hungary.'

RUSSELL J.: It is conceded that when a conflict of laws arises on the death of an intestate, the devolution of his immovables is governed by the lex situs; the devolution of his movables is governed by the lex domicilii. It is further conceded that whether particular property is a movable or an immovable is decided according to the lex situs.

The questions which arise in the present case, arise in regard to (1) the interest owned by Count Nicholas at his death in respect of the Birmingham freeholds which were subject to a trust for sale, and the other provisions contained in Count Richard's will; and (2) the interest owned by Count Antoine at his death in respect of the same freeholds. If these respective interests are immovable property according to the lex situs (i.e., the law of England) the law applicable to their devolution will be the law of England, and being, according to English law, personal estate, they will devolve upon the persons entitled by English law to the intestate's personal estate. The result of this solution would be that the plaintiff would take one-third on the intestacy of Count Nicholas as his widow, and the remaining two-thirds on the intestacy of Count Antoine as his mother and sole next of kin. On the other hand, if these respective interests are movable property according to the lex situs, the law applicable to their devolution will be the lex domicilii or law of Hungary. The result of this solution would be that, subject to a usufruct in favour of the plaintiff as the widow of Count Nicholas (as to the extent of which usufruct there is a question) the whole devolves upon and belongs to the Countess Szokolyi as the only sister of Count Nicholas, Count Antoine having died intestate and without leaving him surviving any issue, or any brother and sister, or any issue of a deceased brother or sister, or a father, or any brother of his deceased father. It will thus be seen that the primary question for decision can thus be framed. Were the interests taken by Count Nicholas and Count Antoine under or by virtue of the will of Count Richard, so far as regards the Birmingham freeholds thereby devised upon trust for sale, immovable property or movable property according to English law? The distinction between real estate and personal estate under English law

has nothing to do with the question. The alternatives and the only alternatives for consideration are immovable property or movable property. It is said that there is no decision of the English courts directly upon the point. There is a decision on the exact point in the Irish courts, which though entitled to the highest respect, is not binding on me. I will first consider the matter apart from that decision.

Different classes of property have come under the consideration of the courts of this country and have been held to be immovables. Leaseholds are immovables: *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461, and *Duncan* v. *Lawson* (1889), 41 Ch.D. 394. A testatrix's share of a rentcharge issuing out of lands during the lives of herself and two others and the life of the longest liver was held to be an estate pur autre vie applicable by law as personal estate and chargeable with duty as personal estate under the Legacy Duty Act, 1796; and was held not to be exempt from duty by reason of the foreign domicile of the testatrix because the property was as much land as if land to the annual value of the rentcharge had been given, and was accordingly immovable property: *Chatfield* v. *Berchtoldt* (1872), L.R. 7 Ch. 192. Scotch heritable bonds are immovables: *In re Fitzgerald*, [1904] 1 Ch. 573. A mortgage debt secured by land is immovable property: *In re Hoyles* (*post*, p. 233). Numerous authorities were cited for the purpose of showing that an interest in the proceeds of sale of real estate subject to a trust for sale was under different statutes treated as an interest in land. I will refer to a few. (After referring to *Briggs* v. *Chamberlain* (1853), 11 Hare 69, *Brook* v. *Badley* (1868), L.R. 3 Ch. 672, *Bowyer* v. *Woodman* (1867), L.R. 3 Eq. 313, and *In re Thomas* (1886), 34 Ch.D. 166, his Lordship continued:) These authorities are only decisions that the property in question in each case fell within the wording of the relevant statute, but they certainly show that an interest in property such as I have to consider in the present case is aptly described as being 'an interest in land', or 'a sum of money payable out of land'.

Let me now consider what rights existed in Count Nicholas during his lifetime and at his death in regard to the Birmingham freeholds by virtue of the dispositions contained in the will of Count Richard. Subject to his mother's 500*l.* a year, he was absolutely entitled to the proceeds of sale if and when the sale took place. No sale in fact took place; the property continued to be land, immovable property. Subject to his mother's interest, Count Nicholas was entitled down

In re BERCHTOLD. — Russell J.

to his death to the rents and profits of that immovable. It is arguable that under s. 63 of the Settled Land Act, 1882, he, or he and his mother together, would be deemed to be tenant for life of the Birmingham freeholds which would be deemed to be settled land, with the result that the land might have been sold by the tenant for life, or an order might have been made letting the tenant for life into possession: *In re Bagot's Settlement*, [1894] 1 Ch. 177. Further, subject to the interest of the mother of Count Nicholas, the land was his in equity. As to Count Antoine, his position was the same as regards so much of the benefit taken by Count Nicholas under Count Richard's will as passed to Count Antoine upon the intestacy of Count Nicholas, except that at the time of Count Antoine's death, the 500*l.* a year had ceased to be payable owing to the previous death of Count Nicholas' mother, and except as to the possible position under the Settled Land Act, 1882. The rights and interests of Count Nicholas and Count Antoine, under or by virtue of the will of Count Richard in relation to the Birmingham freeholds and the proceeds of sale thereof being such as I have described, are those rights and interests more properly to be classified as immovable property, or as movable property? In my opinion, they should be classified as immovable property equally with the freehold land out of which the money is eventually to be paid. That is the conclusion to which I have come independently of the Irish decision to which I will now refer. (His Lordship referred to *Murray* v. *Champernowne*, [1901] 2 I.R. 232, and continued:) That decision seems to me to cover the exact point and is in my opinion right. . . .

On behalf of the Countess Szokolyi it was argued that according to English law land directed to be sold and turned into money must be considered to be money; and that on the principle that equity considers done what should be done, the Birmingham freeholds are, in the eye of the law, money. This argument, to be effective, must add the words 'for all purposes'. That the Birmingham freeholds are to be treated as money for some purposes, no one doubts. Thus the interest of the taker is personal estate. But this equitable doctrine of conversion only arises and comes into play where the question for consideration arises as between real estate and personal estate. It has no relation to the question whether property is movable or immovable. The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables. As Farwell L.J.

pointed out in *In re Hoyles*, the fact that a mortgage is regarded as personal estate for certain purposes in questions between our fellow subjects here has no bearing on the question whether such a mortgage should be regarded as a movable or not in questions of international law. . . .

In re BERCHTOLD. — Russell J.

I answer the second question in the summons by declaring that the persons or person beneficially entitled to the proceeds of sale of the Birmingham freeholds and to the rents and profits thereof until sale are the persons or person who would be entitled thereto according to the law of England.

The lex situs determines whether an interest in a thing is an interest in a movable or in an immovable.

Mortgages on freehold land are interests in immovables.

In re HOYLES. *In re* HOYLES, [1911] 1 Ch. 179 (Court of Appeal)

A testator who died in February 1888, domiciled in England, gave one-third of his real and personal property after the death of his wife to charity. His property included $16,340 invested on legal mortgages of freehold land in the city of Toronto, in the province of Ontario, Canada. A summons was taken out to determine whether the charitable gift was void to any and what extent under the Mortmain Act, 1736, which was in force at the date of the testator's death. It was proved that the Mortmain Act, 1736, was in force in Ontario and that by the law of that province mortgages were impure personalty, and that bequests thereof to charity by persons domiciled in Ontario were void.

Swinfen Eady J. held that the bequest of mortgages to charity was void.

FARWELL L.J.: I am of opinion that Swinfen Eady J.'s judgment is quite right.

At the date of the death of the testator the laws of England and of Ontario were the same, and the Statute of Mortmain of George II applied in Ontario as it then did in England. If a testator domiciled in England had devised to a charity a mortgage of real estate in England, it would have been void under the statute, and if a testator domiciled in Ontario had devised to a charity a mortgage of real estate in Ontario, that devise also would have been void under the statute. But it is argued that if a testator domiciled in England

In re HOYLES. — Farwell L.J.

devises to a charity a mortgage on land in Ontario, or a testator domiciled in Ontario devises to a charity a mortgage on land in England, the statute has no application in either case. It is sought to establish this amazing proposition by an argument founded on the division of property in certain cases into movable and immovable. But this division is no part of the law either of England or of Ontario; in both England and Ontario the division is into real and personal property. The division into movable and immovable is only called into operation here when the English courts have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt our division into real and personal property. In such cases, out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognise and act on a division otherwise unknown to our law into movable and immovable. But when there is no such difficulty there is no ground for attempting any such division. In this case the law is the same in both countries; the mortgaged property savours of the realty in both countries; the Statute of Mortmain applies in both countries; and any argument founded on what would be the case if the law of Ontario required us to consider movables and immovables is merely hypothetical and has no application to the present case. There is no necessity for ascertaining which law is applicable because the law in both countries is the same.

But even if this were not so, and the case were that put by Mr. Sargant of a domiciled Frenchman, I should come to the same conclusion. International law is a matter of international comity. No country can be expected to allow questions affecting its own land, or the extent and nature of the interests in its own land which should be regarded as immovable, to be determined otherwise than by its own courts in accordance with its own interests.

. . . It is true that a mortgage is as between mortgagor and mortgagee regarded as personal estate for many purposes; but the fact that it is so for certain purposes in questions between our fellow subjects here has no bearing on the question whether such a mortgage should be regarded as movable or not in questions of international law. The mortgage undoubtedly affects the land directly; the mortgagee can enter and take possession at any time after his estate has become absolute at law; he can by foreclosure acquire the full title to the land in fee, and the Legislature has forbidden any devises of

land for any estate or interest whatsoever in any way charged or incumbered by any person or persons whatsoever in trust or for the benefit of any charitable use whatsoever and has made them void: 9 Geo. 2, c. 36, ss. 1 and 2. And the reason is stated in the preamble: 'Whereas gifts or alienations of lands, tenements or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs.' It is for this court to determine whether mortgages on land are movables or immovables, and in order to come to a conclusion we are bound to consider the result of our decision on the general welfare of this country as shown by our laws, and if a decision in one way will involve results which our law considers prejudicial to the public interest, or immoral, or the like, it is our duty to decide the other way. Mr. Sargant invites us to leave the Mortmain Act out of sight and decide as a preliminary abstract question whether mortgages on land are movable or immovable. But we should fail in our duty if we did not consider that Act and the effect of our decision upon devises within it. We must have regard to the fact that such gifts have been regarded as prejudicial to and against the public utility and a public mischief, and we must accordingly come to such conclusion as will avoid these evils.

In re HOYLES. — Farwell L.J.

COZENS-HARDY M.R. delivered judgment to the same effect.

FLETCHER MOULTON L.J. doubted but did not dissent.

Appeal dismissed.

NOTE L: MOVABLES AND IMMOVABLES

IN English domestic law, the leading distinction between proprietary interests in things is the historical and technical distinction between realty and personalty. In the English conflict of laws, however, the leading distinction between things is the more universal and natural distinction between movables and immovables. This distinction is capable of application to the different systems of law in the world, which the distinction between realty and personalty is not. The suggestion of Farwell L.J. in *Re Hoyles* (*ante*, p. 234) that our courts only adopt the distinction between movables and immovables when the conflict is between English law and the law of some civil law country, and not when the conflict is between English law and another common law country, looks plausible, but is (it is submitted) unsound. At any rate it has not been followed

in England: *Macdonald* v. *Macdonald*, [1932] S.C. 79 (H.L.); *Re Cutcliffe*, [1940] Ch. 565; but see *Re Hole*, [1948] 4 D.L.R. 419, criticized in 27 Can. Bar Rev. 225.

The importance of the distinction between movables and immovables is most apparent in the field of succession, because succession to movables is (in general) governed by the law of the testator's domicile, while succession to immovables is (in general) governed by the lex situs.

If there is a conflict between the lex situs and the lex fori as to whether a particular thing is movable or immovable, the lex situs is decisive: *Re Hoyles*.

Leasehold interests in land in England (*Freke* v. *Carbery* (1873), L.R. 16 Eq. 461; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394); mortgages on land in England (*Re Hoyles*); and interests in land in England held on trust for sale but not yet sold (*Re Berchtold*, *ante*, p. 229), are all interests in immovables, though they are personal estate for the purposes of English domestic law and also for the purposes of the Wills Act, 1861 (*post*, p. 342). The decision in *Re Hoyles*, that mortgages are interests in immovables, has been followed in Canada (*Re Landry and Steinhoff*, [1941] 1 D.L.R. 699; *Re Ritchie*, [1942] 3 D.L.R. 330) but not followed in New Zealand (*Re O'Neill*, [1922] N.Z.L.R. 468) or Australia (*Re Young*, [1942] V.L.R. 4; *Re Williams*, [1945] V.L.R. 213). It is not law in South Africa (Lee, Introduction to Roman-Dutch Law, 4th ed., p. 133).

Section 75 (5) of the Settled Land Act, 1925, re-enacting section 22 (5) of the Settled Land Act, 1882, provides that capital money arising under the Act while remaining uninvested and unapplied, and securities on which an investment of any such capital money is made, shall for all purposes of disposition, transmission, and devolution be treated as land. Under this section, Morton J. held in *Re Cutcliffe*, [1940] Ch. 565 that stock in England which represented the reinvestment of the proceeds of sale of English settled land was immovable. This decision has not escaped criticism, but would appear to be perfectly correct. The gist of the criticism is that 'the doctrine of conversion is a characteristic doctrine of domestic English law arising from the distinction between realty and personalty, and whether it is a judge-made rule, as in the *Berchtold* case, or has been expressed in statutory form, as in the *Cutcliffe* case, in either event the doctrine can have no application to a particular situation unless it has first been decided in accordance with the conflict rule of the forum that the proper law is domestic English law or some other law that distinguishes between realty and personalty and includes the doctrine of conversion' (Falconbridge, p. 515). The answer would appear to be that in the *Berchtold* case the doctrine of conversion said that realty was to be treated as personalty, while in the *Cutcliffe* case the statute said that capital money and securities were to be treated as land. In other words, in the *Berchtold* case the doctrine of conversion that had to be considered was formulated in terms appropriate only to domestic English law, while in the *Cutcliffe* case the statute that had to be considered was expressed in terms appropriate also to the conflict of laws.

Section B: JURISDICTION

English courts have no jurisdiction to adjudicate upon the right of property in or the right of possession to foreign immovables, or to give damages for trespass thereto, unless the case falls within one of the three exceptions mentioned below.

BRITISH SOUTH AFRICA COMPANY *v.* COMPANHIA DE MOÇAMBIQUE, [1893] A.C. 602 (House of Lords)

BRITISH SOUTH AFRICA COMPANY *v.* COMPANHIA DE MOÇAMBIQUE.

By their statement of claim the plaintiffs, a Portuguese company, alleged that they were in possession of large tracts of land and mines and mining rights in South Africa; and that the defendant company by its agents wrongfully broke and entered and took possession of the said lands, mines, and mining rights, and ejected the plaintiff company, its servants, agents, and tenants therefrom. The plaintiffs claimed (1) a declaration that the plaintiff company were lawfully in possession and occupation of the lands, mines, and mining rights; (2) an injunction restraining the defendant company from continuing to occupy or from asserting any title to the said lands, mines, and mining rights; (3) £250,000 damages for trespass.

The defence alleged that the lands in question were in South Africa, out of the jurisdiction of the High Court, and that the statement of claim disclosed no cause of action.

By an order of Collins J. in chambers the questions of law raised by the pleadings were set down for hearing before a Divisional Court.

The Divisional Court (Lawrance and Wright JJ.) made an order that judgment be entered for the defendants dismissing the action for want of jurisdiction.

In the Court of Appeal the plaintiffs formally abandoned their claim for a declaration of title and an injunction, and that court by a majority (Fry and Lopes L.JJ.; Lord Esher M.R. dissenting) declared that the High Court had jurisdiction to entertain the claim for damages for trespass. In the course of his judgment Fry L.J. said ([1892] 2 Q.B. 413–14): 'In a case like the present, where, according to the allegations of the plaintiffs, there are no courts of adequate jurisdiction in the locus rei sitae, it is obvious that to repel the jurisdiction is to produce a total failure of justice. If neither Africa nor England afford a forum the plaintiff is remediless.

'. . . Suppose that in a foreign country A enters upon a close, of which B claims to be in possession, and each assaults the other, and both A and B come to this country. A could sue B here for the

BRITISH SOUTH AFRICA COMPANY v. COMPANHIA DE MOÇAMBIQUE.

personal injury, although B's defence might be the possession of the close; it would be strange if B could not also sue A for entry on the close. Or, again, suppose in a foreign land A enters upon the house of B, and injures the house, the furniture, and the person of B, and both A and B come hither. It would be strange if B could sue A for the injuries to his furniture and his person, but not to his house.'

The defendants appealed to the House of Lords.

LORD HERSCHELL: My Lords, the principal question raised by this appeal is whether the Supreme Court of Judicature has jurisdiction to try an action to recover damages for a trespass to lands situate in a foreign country.

It is not in controversy that prior to the Judicature Acts no such jurisdiction could have been exercised; but it is asserted on behalf of the respondents that the only barrier to its exercise was the technical one, that the venue in such a case must be local, and that the rules made under the Judicature Acts which have abolished local venues have removed the sole impediment which prevented the courts entertaining and adjudicating on cases of this description. This contention has been sustained by a majority of the Court of Appeal, reversing the judgment of the Queen's Bench Division, with which, however, the Master of the Rolls agreed.

The nature of the controversy between the parties renders it necessary to consider the origin of the distinction between local and transitory actions, and the development of the law which determined the venue or place of trial of issues of fact.

It was necessary originally to state truly the venue—that is, the place in which it arose—of every fact in issue, whether those on which the plaintiff relied, or any matter stated by way of defence; and if the places were different, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. After the statute 17 Car. 2, c. 8, which provided that 'after verdict judgment should not be stayed or reversed for that there was no right venue, so as the cause were tried by a jury of the proper county or place where the action was laid', the practice arose, which ultimately became regular and uniform, of trying all the issues by a jury of the venue laid in the action, even though some of the facts were laid elsewhere. When juries ceased to be drawn from the particular town, parish, or hamlet where the fact took place, that is, from amongst those who were supposed to be cognisant of the

circumstances, and came to be drawn from the body of the county generally, and to be bound to determine the issues judicially after hearing witnesses, the law began to discriminate between cases in which the truth of the venue was material and those in which it was not so. This gave rise to the distinction between transitory and local actions, that is, between those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with a particular locality and those in which there is such a connection. In the latter class of actions the plaintiff was bound to lay the venue truly; in the former he might lay it in any county he pleased. It was, however, still necessary to lay every local fact with its true venue on peril of a variance if it should be brought in issue. Where a local matter occurred out of the realm, a difficulty arose, inasmuch as it was supposed that the issue could not be tried, as no jury could be summoned from the place, and it was by the general rule essential that a jury should be summoned from the venue laid to the fact in issue. It was, however, early decided that, notwithstanding the general rule, such matters might be tried by a jury from the venue in the action, and thus the difficulty was removed and the form was introduced of adding after the statement of the foreign place the words, 'To wit at Westminster in the county of Middlesex', or whatever else might happen to be the venue in the action. . . .

It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place. It was not called a local action because the venue was local, or a transitory action because the venue might be laid in any county, but the venue was local or transitory according as the action was local or transitory. It will be seen that this distinction is material when the Judicature Rule upon which so much turns comes to be examined.

My Lords, I cannot but lay great stress upon the fact that whilst lawyers made an exception from the ordinary rule in the case of a local[1] matter occurring outside the realm for which there was no proper place of trial in this country, and invented a fiction which enabled the courts to exercise jurisdiction, they did not make an exception where the cause of action was a local matter arising abroad, and did not extend the fiction to such cases. The rule that in local actions the venue must be local did not, where the cause of action arose in this country, touch the jurisdiction in the courts, but only

[1] *Sic* in the report; evidently 'transitory' was meant (*Ed.*).

BRITISH SOUTH AFRICA COMPANY v. COMPANHIA DE MOÇAMBIQUE. — Lord Herschell.

determined the particular manner in which the jurisdiction should be exercised; but where the matter complained of was local and arose outside the realm, the refusal to adjudicate upon it was in fact a refusal to exercise jurisdiction, and I cannot think that the courts would have failed to find a remedy if they had regarded the matter as one within their jurisdiction, and which it was proper for them to adjudicate upon.

The earliest authority of importance is *Skinner* v. *East India Company* (1665), 6 State Trials, 710, 719. The House of Lords in that case referred it to the judges to report whether relief could be obtained in respect of the matters mentioned in the petition, either at law or in equity, and if so in what manner. The judges answered, 'that the matters touching the taking away of the petitioner's ship and goods and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by His Majesty's ordinary Courts at Westminster. And as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law.'

Notwithstanding the opinion thus expressed, Lord Mansfield entertained and acted on the view that where damages only were sought in respect of a trespass committed abroad, an action might be maintained in this country, although it was one which would here be a local action (see *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 180). . . .

The view acted on by Lord Mansfield in the two cases referred to has not been followed. It came before the Court of Queen's Bench for consideration in *Doulson* v. *Matthews* (1792), 4 T.R. 503, which was an action of trespass for entering the plaintiff's house in Canada and expelling him therefrom. The decisions of Lord Mansfield were relied on by the plaintiff, but the action was held not to lie. Buller J. in delivering judgment said: 'It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the courts that the law has settled the distinction, and that an action quare clausum fregit is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad; but not such as are in their nature local.'

In saying that we may not try actions here arising out of transactions abroad which are in their nature local, I do not think that the learned judge was referring to the mere technical difficulty of there being no venue in this country in which these transactions could be laid, but to the fact that our courts did not exercise jurisdiction in matters arising abroad 'which were in their nature local'. The case of

Doulson v. *Matthews* has ever since been regarded as law, and I do not think it has been considered as founded merely on the technical difficulty that in this country a local venue was requisite in a local action. . . .

The question what jurisdiction can be exercised by the courts of any country according to its municipal law cannot, I think, be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another. On the other hand, if the courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication in personam, it is by no means certain that any rule of international law would be violated. But in considering what jurisdiction our courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles which have found general acceptance amongst civilised nations as defining the limits of jurisdiction are of great weight.

It was admitted in the present case, on behalf of the respondents, that the court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these matters abandoned their appeal in the court below. But it is said that the court may inquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. My Lords, I find it difficult to see why this distinction should be drawn. It is said, because the courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should not they equally proceed in personam against a person who, in spite of that determination, insists on disturbing one who has been found by the court to be the owner of the property?

It is argued that if an action of trespass cannot be maintained in this country where the land is situate abroad a wrong-doer by coming to this country might leave the person wronged without any remedy. It might be a sufficient answer to this argument to say that this is a state of things which has undoubtedly existed for centuries without any evidence of serious mischief or any intervention of the legislature; for even if the Judicature Rules have the effect contended for, I do not think it can be denied that this was a result neither foreseen

BRITISH SOUTH AFRICA COMPANY v. COMPANHIA DE MOÇAMBIQUE. — Lord Herschell.

nor intended. But there appear to me, I confess, to be solid reasons why the courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages founded on that adjudication.

The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages and re-possessing himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might? Such an occurrence is not an impossible, or even an improbable, hypothesis. It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.

Reliance was placed on the decisions of Courts of Equity, as showing that our courts were ready, when no technical difficulty of venue stood in the way, to adjudicate on the title to lands situate abroad. If the refusal of the Common Law Courts to exercise jurisdiction in cases of the nature now under consideration had been regarded as the result of a mere technical difficulty, I cannot help thinking that the Courts of Equity, which were, in early days, at all events, keen to supplement the deficiencies of the Common Law, when the requirements of justice were impeded by technical difficulties, would have found some means of affording a remedy. Lord Mansfield, in his judgment in *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 180, refers to a case of an injury in the East Indies similar to that

with which he had to deal in the case of Captain Gambier, in which Lord Hardwicke in a Court of Equity had directed satisfaction to be made in damages. But in this exercise of jurisdiction he has not been followed by any judge of the Court of Chancery.

Whilst Courts of Equity have never claimed to act directly upon land situate abroad, they have purported to act upon the conscience of persons living here. In *Lord Cranstown* v. *Johnston* (1796), 3 Ves. 170, 182, Sir R. P. Arden, Master of the Rolls, said: '*Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, and *Lord Kildare* v. *Eustace*, clearly show that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situate in England.'

Story, in his Conflict of Laws, ss. 544, 545, although he says that to the extent of the decision in *Cranstown* v. *Johnston* (1796), 3 Ves. 170, there may, perhaps, not be any well-founded objection, nevertheless expresses the view that the doctrine of the English Courts of Chancery on this head of jurisdiction seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law, and therefore it must have a very uncertain basis as to its recognition in foreign countries so far as it may be supposed to be founded upon the comity of nations. My Lords, the decisions of the Courts of Equity do not, to my mind, afford any substantial support to the view that the ground upon which the Courts of Common Law abstained from exercising jurisdiction in relation to trespasses to real property abroad was only the technical difficulty of venue. . . .

The terms of rule 1 of Order XXXVI, which are relied on by the plaintiffs, are as follows: 'There shall be no local venue for the trial of any action except where otherwise provided by statute.' The language used appears to me important. The rule does not purport to touch the distinction between local and transitory actions—between matters which have no necessary local connection, and those which are local in their nature. It deals only with the place of trial, and enables actions, whatever their nature, to be tried in any county. But it is, in my opinion, a mere rule of procedure, and applies only to those cases in which the courts at that time exercised jurisdiction. It has been more than once held that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties. . . .

BRITISH SOUTH AFRICA COMPANY v. COMPANHIA DE MOÇAMBIQUE. — Lord Herschell.

According to the contention of the respondents in this case the rule under consideration had the effect of conferring upon them a right of action in this country which they would not otherwise have possessed. As I have already pointed out, a person whose lands, situate in this country, were trespassed upon always had a right of action in respect of the trespass. The rules relating to venue did no more than regulate the manner in which the right was to be enforced. But in respect of a trespass to land situate abroad there was no right of action, for an alleged right which the courts would neither recognise nor enforce did not constitute any right at all in point of law.

My Lords, I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before. If this conclusion be well founded, I do not think that the allegation contained in paragraph 16 of the statement of claim, 'that the defendant company did and committed the acts above mentioned and complained of with intent to injure and destroy the trade of the plaintiff company, and to deprive it of its aforesaid lands, territories, mines, minerals and mining rights and property', disclosed a cause of action cognisable by our courts any more than the paragraph complaining of trespass. . . .

LORD HALSBURY delivered judgment to the same effect.

LORDS MACNAGHTEN and MORRIS concurred.

Appeal allowed: judgment of Divisional Court restored.

Exception 1: English courts have jurisdiction to adjudicate upon rights in foreign immovables, if the defendant is affected by some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which in the view of a Court of Equity would be unconscionable.

DESCHAMPS v. MILLER.

DESCHAMPS *v.* MILLER, [1908] 1 Ch. 856 (Chancery Division)

On 6 October 1831 a contract of marriage in French form was made in France in consideration of the then contemplated marriage of Jean Deschamps and Marie Taris, who were both then domiciled and residing in France. The agreement provided that the marriage should be governed by the régime dotal with community of acquired property under the French law. The plaintiff, Thomas Deschamps,

the son of the marriage, alleged that by the law of France his mother, Marie Taris, became entitled, by virtue of the contract and marriage, to one-half of the after-acquired property of Jean Deschamps (with some unimportant exceptions), and also to a life interest, on his death, in the other half of the property.

About the year 1836 Jean Deschamps went to India, and there, in 1839, in the lifetime of his wife, Marie Deschamps, he went through a form of marriage in Madras with Cecilia Taylor.

By an indenture dated 14 February 1865, Jean Deschamps, in consideration of his natural love and affection for his so-called 'wife Cecilia Deschamps' and of a share in her father's estate which he had received, conveyed and assigned his business premises at Madras to a trustee, upon trust for Jean Deschamps for his life without impeachment of waste, and after his death upon trust to sell the same, and to hold the net proceeds of sale on trusts for the benefit of Cecilia Taylor and her children, if any, by Jean Deschamps, and in default of children for certain relations of Cecilia Taylor.

By deeds executed by him in 1866 and 1869 Jean Deschamps conveyed other real estate at Madras to be held upon the trusts of the settlement of 1865.

According to the plaintiff, all these properties were after-acquired property of Jean Deschamps settled without the knowledge of Marie Deschamps, and in breach of trust, and with intent to defraud her and deprive her of her rights in the property subject to the marriage contract of 1831; there was no good or valuable consideration for the settlement; by French law the husband could dispose of after-acquired property during the coverture, but only for 'good consideration', which meant full consideration in money or money's worth.

Jean Deschamps died on 14 December 1885, and his wife died intestate in France on 14 March 1890, and the plaintiff claimed that by the law of France he was entitled to all her rights under the marriage contract of 1831.

The defendants took the preliminary objection that the court had no jurisdiction.

PARKER J.: In this action the plaintiff sues as administrator of his mother, who died on March 14, 1890, and he asks for a declaration of his title as such administrator, under a contract made on the marriage of his mother with his father, Jean Deschamps, in the year 1831, the

DESCHAMPS v. MILLER. — Parker J.

contract being made in France, to various interests in certain real estate in India of which the defendants are in possession as trustees of a settlement made by the father on February 14, 1865, under which settlement the plaintiff himself is in no way interested. He asks also for various consequential relief founded on the declaration. Certain preliminary objections are taken by the defendants to the plaintiff's right to maintain this action, and I am asked to give my decision on those objections without going into evidence on what I may call the merits of the case. Both parties are agreed that this course will be a convenient one and likely to save expense, although, of course, if I dismiss the action on a preliminary point, and my decision is reversed on appeal, the action will have to be sent down again for trial on the merits.

The first of these preliminary points, and indeed the one which has most substance in it, is as follows: It is said that the action relates to the title and possession of real estate out of the jurisdiction of the court, and therefore that it ought not to be entertained by the court, even though all parties to the action are resident within the jurisdiction. . . .

The question is whether under these circumstances the court ought to entertain jurisdiction. In my opinion the general rule is that the court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to

the claim of another party, I do not think the court ought to entertain jurisdiction to decide the matter.

In the present case there is, in my opinion, no such personal obligation as above mentioned, and I do not think I could assume jurisdiction in this case without acting contrary to the decision in *Norris* v. *Chambres* (1861), 29 Beav. 246; affirmed 3 D. F. & J. 583. In that case there was a contract for sale of immovables abroad, and a deposit was paid. The vendor refused to complete, and the purchaser claimed a lien for the deposit on the property agreed to be sold; but he claimed that lien, not as against the vendor with whom he had contracted, but against a third party who had purchased subsequently with notice of the prior contract and of the claim to the lien for the deposit. There was no personal obligation based on contract, fiduciary relationship, fraud, or other unconscionable conduct between the parties, and the right, if there was a right, to succeed in the action depended, therefore, solely on whether the law of the locus of the immovable property would recognize any lien as arising out of the contract for sale coupled with the payment of a deposit, and, if so, what was the position, with regard to such lien, of a purchaser with notice. The court refused to entertain the action. In a similar way here, the question depends on whether the Indian law will recognize the French contract as having created an interest in the wife, and, if so, what is the position with regard to such interest of the defendants, who in their pleadings claim to have purchased for value without notice. There is no obligation on the part of the defendants to the plaintiff based on any contract, fiduciary relationship, fraud, or other unconscionable conduct. Such obligation, if any, as exists depends, in my opinion, on the Indian law relating to immovables, and on that alone. It was suggested that the defendants have since action, or shortly before action, sold some of the property in dispute, and that this at any rate gives the court jurisdiction. I do not think, however, that I could so decide without acting contrary to the decision of Kay J. in *In re Hawthorne* (1883), 23 Ch. D. 743. In my opinion, therefore, the preliminary objection which I have been discussing succeeds.

Exception 2: Where an English court has jurisdiction to administer an estate or a trust, and the property includes movables or immovables situated in England and immovables situated abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration.

In re HOYLES, [1911] 1 Ch. 179 (*ante*, p. 233)

In re ROSS, [1930] 1 Ch. 377 (*ante*, p. 6)

Exception 3: English courts have jurisdiction to entertain an action in rem against a ship to enforce a maritime lien on the ship for damage done to foreign immovables.

THE TOLTEN.

THE TOLTEN, [1946] P. 135 (Court of Appeal)

By their statement of claim the plaintiffs alleged that they were the owners and occupiers of a wharf at Lagos, Nigeria, and that damage was caused thereto by the negligent navigation of the defendant ship. They brought an action in rem against the ship seeking to enforce a maritime lien on the ship for the damage caused. The defendants objected that the court had no jurisdiction to adjudicate in an action in rem for damage done by a ship to foreign land.

Bucknill J. decided in favour of the plaintiffs on the ground that the Judicature Act, 1925, s. 22 (1) (*a*) (re-enacting the Admiralty Court Act, 1861), provides that the High Court shall have jurisdiction over 'any claim for damage done by a ship'.

The defendants appealed.

SOMERVELL L.J.: Mr. Devlin for the defendants submitted that the *Moçambique* case (*ante*, p. 237) laid down a general principle as summarized in the first sentence of the headnote:—'The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad'; and that the general words of the Judicature Act must be read subject to this rule, as they must be read subject to the rule against impleading a foreign sovereign, as applied to the arrest of a State ship in *The Parlement Belge* (1880), 5 P.D. 197. I think there is force in this last point, and feel unable to give as much weight to the part of the argument based on the general words of the Judicature Act as was given, I think, by the learned trial judge, with whose conclusion I agree.

Mr. Bateson for the plaintiffs submitted in the first place that the rule

in the *Moçambique* case ought to be confined to cases in which the issue raised by the claim involved, as in that case, a conflict as to title between plaintiff and defendant. He submitted that the rule was in the main based on the ineffectiveness of orders of the courts of one country purporting to decide questions of title regarding foreign land. He submitted that in actions such as this, where the trespass complained of is clearly not based on the assertion of a title adverse to the plaintiff, neither the principle of ineffectiveness nor any principle of international comity, also referred to in the *Moçambique* case, apply.

In my opinion, the House of Lords laid down the rule generally so far as common law actions in personam are concerned. Lord Herschell (at p. 240) refers to two cases in which Lord Mansfield entertained and acted on the view that where damages only were sought in respect of a trespass committed abroad an action might be maintained in this country. These cases are referred to by Lord Mansfield in *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, 180. Lord Mansfield's decisions were clearly on the basis that no question of title would arise. Lord Herschell says: 'The view acted on by Lord Mansfield in the two cases referred to has not been followed' and he regarded them as overruled by the Court of King's Bench in *Doulson* v. *Matthews* (1792), 4 T.R. 503. This may not have been necessary to the decision, as there was a clear conflict of title between the two parties to the *Moçambique* case, but I think that this court should apply the rule as laid down and, in my opinion, this is fatal to Mr. Bateson's first submission.

As the other two points raised by Mr. Bateson to some extent overlap it is convenient to consider them together. The first is that the rule should not be applied to admiralty jurisdiction which has always been wider than the common law jurisdiction, the second that the rule should in any event not apply to claims where there is a maritime lien and that there is a maritime lien in this case. In putting forward these submissions Mr. Bateson, as a basis for his argument, drew attention to the admitted exception to the rule. This exception is based on decisions of the Court of Equity 'showing that our courts were ready, when no technical difficulty of venue stood in the way, to adjudicate on the title to lands situate abroad.' This quotation is from Lord Herschell's speech in the *Moçambique* case (*ante*, p. 242), and it is, to my mind, clear that he accepts the validity of the exception.

In Dicey's Conflict of Laws, 5th ed., p. 207, the first sentence of the

THE TOLTEN. — Somervell L.J.

'Comment' dealing with this Exception to the rule reads as follows: 'The principle on which this exception, originally derived from the practice of the Court of Chancery, rests is that, though the court has no jurisdiction to determine rights over foreign land, yet, where the court has jurisdiction over a person *from his presence in England*, or now from the court having jurisdiction to serve him with a writ or notice thereof, though he is out of England, the court has jurisdiction to and will, in a fit case and in the exercise of its discretion, compel him to dispose of or otherwise deal with his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land.'

It is unnecessary to consider the precise limits of the exception. Mr. Devlin submitted that it was not really an exception as the rule applies only to real or mixed actions, and that proceedings in equity at any rate are not within those categories. The importance, to my mind, is that the existence of the exception negatives any suggestion that the courts have recognised a general principle that no decisions will be given which may determine or affect rights in or over foreign land. If there were any such principle it would be an end of this case. The plaintiffs have alleged they are the owners and occupiers of the wharf, and that must be taken to be a relevant fact on which the court would pronounce in giving its decision. It does not, however, follow that, because there is one exception, there should be another.

On his second submission, Mr. Bateson relied inter alia on the decision in *The Courier* (1862), Lush. 541, where it was held that the Court of Admiralty has jurisdiction where there is a collision between foreign vessels in foreign waters. This followed on *The Diana* (ibid., p. 539), which dealt with a collision between British ships in foreign inland waters. In both cases the jurisdiction was of course founded on the presence of the res within the jurisdiction. Admiralty jurisdiction is founded on the court's control over the res, as common law jurisdiction is founded primarily on the presence of the defendant. A foreigner defendant present in this country who has committed a wrong abroad against another foreigner may be sued here, if the act complained of is a wrong by the law of both countries, and this is analogous to the case of *The Courier* (1862), Lush 541. Even if, however, it were right to say that the general power of the admiralty court acting as it can both in rem and in personam is wider than the common law jurisdiction, that would not in itself be a ground for granting a further extension.

Mr. Devlin desired to keep open the point whether a collision with a port or pier situated abroad gave rise to a maritime lien. It was decided in *The Veritas*, [1901] P. 304, that damage to a port in British waters gave rise to a maritime lien, and I see no reason for applying any different rule when the damage is to a foreign port.

The ultimate issue in this case is whether a claim in rem in respect of which a maritime lien is exercisable in which the plaintiff claims for damage to foreign land should be treated as barred by the rule in the *Moçambique* case. That rule is said in part to be based on principles of international comity. Speaking broadly, I should have thought that it was in the interests of nations inter se that where damage is done which gives rise to a maritime lien, that lien should be enforceable in the courts of any country to which the ship may proceed. I have assumed, and think I am entitled to assume, that the law of other countries or, at any rate, most other countries is the same as ours on the matter in question here. Does the fact that the plaintiff asserts and, if it is disputed, will have to prove his ownership and occupation of the foreign land which has been damaged, compel one to make an exception to what is as between nations desirable?

In the *Moçambique* case there was a conflict as to title between plaintiff and defendant. Although, as I have stated, I think the rule as laid down by the House of Lords covers cases where there is no such conflict, it is undoubtedly the dispute as to title between plaintiff and defendant which is the origin of the rule. Here we are dealing with a special procedure, namely, the enforcement of maritime liens by proceedings in rem under admiralty jurisdiction. We are dealing with a class of claim in which any issue as to title is very unlikely, and a dispute as to title, in which the defendant owners of the colliding vessel are themselves claiming the title as against the plaintiff, is so improbable that, in my view, its theoretical possibility can be disregarded. I do not think the conflicting dicta in *The Mary Moxham* (1876), 1 P.D. 43, can be regarded as authority either way. All I wish to say about that case is that if the claim fell under the rule as subsequently laid down in the *Moçambique* case, I doubt whether a mere consent would have entitled the court to entertain the claim. That, however, does not arise here. I do not think that what was said in the *Moçambique* case is to be read as covering or being intended to cover an admiralty claim such as the present. The point therefore being uncovered by authority I think that the nature of a maritime lien and the unlikelihood of any dispute as to title arising,

THE TOLTEN. — Somervell L.J.

lead to the conclusion that the present claim should be allowed to proceed and that the point taken by the defendants is bad in law.

Our decision being based primarily on the existence of a maritime lien and procedure in rem, a question may arise whether s. 33, sub-s. (2) of the Judicature Act, 1925, applies, so that the court has the same power as in an ordinary case which is properly initiated in rem to exercise its jurisdiction in personam. The question was not discussed in argument and is not necessary for the decision, but, in my view, it follows that it would have the same jurisdiction in personam as in other cases where the relevant circumstances were the same.

We were referred to many authorities which were clearly relevant in order that the court should have the matter properly before it. I have not referred to them because in the result the matter seems to me to turn on the principles which I have tried to formulate. I would like to say that I do not think that the principles that have been laid down based on the immunity of sovereigns directly assist in solving the present problem.

It is unnecessary in this case to consider whether claims enforceable in rem against a ship but which do not give rise to a maritime lien should, if they concern foreign land in the same way as the claim here, be entertained. It may be that such a claim is difficult to imagine. All I need say is that, by relying as I do on the existence of the maritime lien, I do not intend to imply that the class of claim referred to in this paragraph, if it should arise, would necessarily be outside admiralty jurisdiction.

I think the appeal should be dismissed, with costs.

SCOTT and COHEN L.JJ. delivered judgments to the same effect.

Appeal dismissed.

NOTE M: JURISDICTION OVER FOREIGN LAND

ALTHOUGH Lord Herschell in the *Moçambique* case (*ante*, p. 244) says that 'the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical', it may be doubted whether he explains convincingly what those grounds were, or whether he rebuts the powerful arguments adduced by Fry L.J. in the court below (*ante*, pp. 237–8).

Three views are tenable as to the precise scope of the *Moçambique* rule:

(*a*) English courts have no jurisdiction to adjudicate upon the title to foreign immovables. Scott L.J. in *The Tolten* expressed the view that the House of Lords (but not the Court of Appeal) might hereafter restrict the scope of the *Moçambique* rule to this narrow proposition, and might grant damages for trespass to foreign land. 'I recognise', he said, 'that in a case where the action

is brought by a party in possession of land and structures, suing merely for damages for negligence, or even, it may be, for trespass quare clausum fregit, and the plaintiff relies solely on his possession as the foundation for his action, the House of Lords might hereafter distinguish the *Moçambique* case.' But this observation was obiter and was not concurred in by the other Lords Justices; moreover, Scott L.J. went on to say: 'I do not think, however, that it would be right for this court to attempt that distinction, as I am satisfied that, in regard to common law actions, no such distinction was then in the mind of the House.'

(*b*) English courts have no jurisdiction to adjudicate upon the title to foreign immovables, or to grant damages for trespass thereto. This view seems to be adopted in Cheshire (p. 715).

(*c*) English courts have no jurisdiction to adjudicate upon the title to foreign immovables, or to grant damages for trespass or trespass on the case thereto (e.g. for nuisance or negligence). There is no English case which carries the *Moçambique* rule as far as this, though there are Canadian cases (*Brereton* v. *Canadian Pacific Railway Co.* (1894), 29 O.R. 57; *Albert* v. *Fraser Companies*, [1937] 1 D.L.R. 39). It is, however, a legitimate deduction from *The Tolten* that the rule does so extend, for if it did not, it would have been easy to say so, the case being one of negligence.

Unless the scope of the *Moçambique* rule is restricted by the House of Lords in the manner suggested by Scott L.J. above, it is apparent that the rule may produce at worst a total denial of justice and at best some glaring anomalies. 'Suppose', said Scott L.J. in *The Tolten*, 'ship A, by one and the same act of negligent navigation at Lagos, to have caused injury to (1) the plaintiffs' wharf, (2) merchandise on the wharf, (3) people on the wharf, (4) ship B lying near the wharf. On those assumed facts, the injured parties numbers 2, 3, and 4 can conduct a suit in rem in the admiralty court, but if the *Moçambique* rule is applied, number 1 is barred. Can anything more contrary to common sense be imagined?' It will be seen that this is the same argument as that adduced by Fry L.J. in the Court of Appeal in the *Moçambique* case (*ante*, p. 238). The Court of Appeal in *The Tolten* were able to avoid so inequitable and absurd a result by creating a third exception to the *Moçambique* rule. But one has only to vary the illustration so as to take it out of this exception to see that serious anomalies remain. Suppose that an English motorist, negligently driving his car while on a temporary visit to France, causes damage to (1) a Frenchman sitting in his garden having tea, (2) a valuable tea service, (3) a greenhouse fixed to the land. If the *Moçambique* rule is applied, the Frenchman can recover damages for (1) and (2) but not for (3).

The question whether the parties can by agreement waive the *Moçambique* rule and confer jurisdiction on the court which it would not otherwise possess, does not appear to be satisfactorily settled. If the rule is founded on considerations of policy, on principle one would conclude that waiver ought not to be allowed: and this is the view of Cheshire (p. 721), Dicey (p. 149), Beale (p. 1655), and Somervell L.J. in *The Tolten* (*ante*, p. 251). However, in *The Mary Moxham* (1876), 1 P.D. 107, and *Re Duke of Wellington*, [1948] Ch. 118, the Court of Appeal seems to have assumed that waiver is permissible.

Of the three exceptions to the *Moçambique* rule, the first two are derived from the practice of the Court of Chancery and the third from the practice of

the Court of Admiralty. This fact is significant; it suggests that the rule was a common law rule only and as such ought not to have been allowed to survive the Judicature Act, 1873. The scope of each of the exceptions is very ill defined.

The first exception is the oldest. It can be traced back to the case of *Arglasse* v. *Muschamp*, 1 Vern. 75, decided in 1682, though *Penn* v. *Baltimore* (1750), 1 Ves. Sen. 444, is usually regarded as the leading case. In the early cases in which the equitable jurisdiction was invoked, the land was situated within British territory, and the exercise of jurisdiction could be justified on the ground that, if there were any courts in the countries then being colonized by Englishmen, the decisions of those courts could not command the same respect as those of the courts in England. In modern times the jurisdiction is much less easy to justify. A modern judge could hardly say, as Shadwell V.-C. said in *Bent* v. *Young* (1838), 9 Sim. 180, 181, 'I consider that in the contemplation of the Court of Chancery every foreign court is an inferior court.' The equitable jurisdiction is 'open to the strong objection that the court is doing indirectly what it dare not do directly', per Lord Esher in the *Moçambique* case, [1892] 2 Q.B. 404–5. The exercise of jurisdiction may easily lead to embarrassing conflicts with the courts of the country where the land is situated—for in the last resort only those courts can control the land and the rights of the parties thereto. This aspect of the matter becomes most obvious when we consider the converse situation: what effect would an English court give to a foreign decree in personam purporting to affect land in England? This question seems never to have arisen in England, but it has arisen in Canada. In *Duke* v. *Andler*, [1932] 4 D.L.R. 529, A agreed with B in California to sell to B land situated in British Columbia. A and B were both residents of California. The land was conveyed to B in accordance with British Columbia law and B was registered as the proprietor thereof. Subsequently A sued B in California to have the conveyance set aside because of B's fraud. The Californian court ordered B to reconvey the land to A and, on his refusal to do so, the clerk of the court purported to reconvey it in B's name. A sued B in Canada for a declaration that he was entitled to be registered as the proprietor of the land. The Supreme Court of Canada held that he was entitled to no such declaration. Although the ratio decidendi is not clear, the explanation of the decision may well lie in the well-known rule (Cheshire, p. 801; Dicey, p. 403) that a foreign judgment in personam cannot be enforced unless it is for a fixed sum of money.

The second exception is supported by the decisions in *Nelson* v. *Bridport* (1846), 8 Beav. 547; *Re Piercy*, [1895] 1 Ch. 83; *Re Moses*, [1908] 2 Ch. 235; *Re Stirling*, [1908] 2 Ch. 344; *Re Pearse's Settlement*, [1909] 1 Ch. 305; and *Re Duke of Wellington*, [1948] Ch. 118, as well as by those in *Re Hoyles* (*ante*, p. 233) and *Re Ross* (*ante*, p. 6). It has never been formulated by judges, and the only text-writers who recognize its existence are Dicey (p. 149) and Graveson (p. 259). But that it does exist can scarcely be doubted, for what other explanation of these cases is there? They were all cases where the court decided a naked question of title to foreign land, in the absence of any contract, fiduciary relationship, or equity between the parties. Even if the *Moçambique* rule can be waived, that cannot be the explanation of all the cases, because in some of them infants were parties. The scope of the exception is naturally somewhat vague. It may perhaps be justified on the ground that the court can make its adjudica-

tion effective through its control of the trustees or of the other assets situated in England.

As to the scope of the third exception, the actual decision in *The Tolten* is confined to the enforcement by actions in rem of maritime liens against a ship for damage done to foreign land. Scott and Somervell L.JJ. thought that the court had jurisdiction to entertain any Admiralty action in respect of foreign land, whether in rem or in personam. Cohen L.J. expressed no opinion on this point, which therefore remains doubtful.

Section C: CHOICE OF LAW

A will of immovables must be construed in accordance with that system of law intended by the testator, which is presumed to be the law of his domicile at the time when the will was made.

But the incidents of the estate created must be determined by the lex situs.

In re MILLER, [1914] 1 Ch. 511 (Chancery Division) *In re* MILLER.

Adjourned Summons.

By a trust disposition and settlement made in Scottish form dated 6 January 1876, and executed in the presence of two witnesses in manner required by English law for the execution of wills, Sir William Miller gave his whole estate, heritable and movable, real and personal, to trustees, in trust to allow his wife, Dame Mary Miller, the free life-rent use of (inter alia) his mansion house No. 1, Park Lane, London, and subject thereto he directed his trustees to hold 'my house No. 1, Park Lane, London, for behoof of my eldest son, James Percy Miller, and the heirs-male of his body in fee; whom failing, John Alexander Miller, my second son and the heirs-male of his body in fee'.

Sir William Miller, who was seised of No. 1, Park Lane, for an estate in fee simple, died on 10 October 1887, and his trust disposition and settlement was duly recorded in the books of Council and Session in Scotland and confirmation thereof duly obtained in Scotland and resealed in the Principal Registry of the Probate Division of the High Court of Justice in England.

By a trust disposition and settlement made in Scottish form dated 4 December 1901, and executed in the presence of two witnesses in manner required by English law for the execution of wills, Sir James Percy Miller gave to trustees all his estates and effects, heritable and movable, real and personal, of every description and wherever situated, then belonging or which should belong to him at the time of his death, to trustees upon trusts under which large benefits were

In re MILLER.

conferred upon Sir John Alexander Miller and under which the defendant Evelyn Mary Hunter took certain interests, and a power of sale was thereby conferred on the trustees.

Sir James Percy Miller died on 22 January 1906, aged 41 years, without leaving any issue and without having executed any disentailing assurance of No. 1, Park Lane; and his trust disposition and settlement was duly recorded and confirmation thereof duly obtained in Scotland and resealed in England.

Dame Mary Miller died in 1912.

This originating summons was taken out by the trustees of the trust disposition and settlement of Sir James Percy Miller against Sir John Alexander Miller and Evelyn Mary Hunter, as defendants, raising the questions (1) whether Sir James Percy Miller was at the date of his death seised of No. 1, Park Lane, for an estate in fee simple or for any other estate which entitled him to dispose of the said premises by his will or whether on his death the said premises vested in Sir John Alexander Miller for an estate in tail male or for any other and what estate; and (2) whether, in the latter case, Sir John Alexander Miller was bound to elect between the benefits conferred on him under the trust disposition and settlement of the said Sir James Percy Miller on the one hand and the estate in No. 1, Park Lane devised to him by the trust disposition and settlement of Sir William Miller on the other hand.

Evidence of Scottish law was given by a Scottish advocate to the effect that Sir William's trust disposition and settlement operated to vest the freehold premises in Sir James absolutely, that it was ineffectual to create a strict entail, that the limitation to John Alexander Miller and his heirs operated in substitution only, that it was competent for James Percy Miller to dispose of the premises by conveyance inter vivos or mortis causa, and that only if he failed to do so would the substitution in favour of John Alexander Miller and his heirs take effect.

WARRINGTON J.: The question in this case is whether Sir James Percy Miller was tenant in tail male of a house No. 1, Park Lane, or whether he had some estate the nature of which it is impossible to describe but which at all events gave him a power of disposition by will. When I say 'impossible to describe' I mean impossible to describe as an estate according to the rules of English law. It might be possible to work out the interests of the several parties by making

an elaborate settlement of the house, but I cannot in terms of English law describe the estate to which according to the argument Sir James Percy Miller became entitled in this house.

The facts are these: [His Lordship stated the facts and continued:] The question now arises between those who would take under the trust disposition and settlement of Sir James Percy Miller if it included No. 1, Park Lane and those who would take if the limitation in Sir William Miller's will created an estate in tail male according to English law in Sir James Percy Miller. That is the question I have to decide.

The will is undoubtedly a will in Scottish form including English immovables. It is said that the document being in Scottish form I must with reference to English land as a matter of construction give the same meaning to technical terms as would be given to them in a will in Scotland. The question really is not so much what is the construction of the will, but what is the estate conferred by the disposition in question after I have arrived at its true construction. The testator here has used expressions which undoubtedly are technical and proper expressions for creating an estate in tail male in English land. He has disposed of the house in Park Lane to trustees in trust for his son James Percy Miller and 'the heirs-male of his body'. It is quite true that he has added the words 'in fee', but those words have no special technical meaning in English law distinguishing an estate in fee simple from an estate in fee tail. They are as appropriate to the creation of an estate in fee tail as they are to an estate in fee simple, and in my judgment the addition of those words makes no substantial difference in the technicality of the expressions which the testator has used. He has therefore in express terms created an estate in tail male according to English law; but it is said that the estate which those terms would by Scottish law create would be an estate tail having different incidents from those which by English law an estate tail would have in England. The argument, though it professes to be an argument on the construction of the document, is really based on this, namely, that the estate created by those words in Scotland would have different incidents from the estate created by the same words in England; but there is no authority or principle which binds me to decide that because the will is made in Scottish form and includes land in Scotland therefore words which would create an estate with one set of incidents in Scotland must create an estate with the same set of incidents in England. Indeed I am bound to decide in an exactly

In re MILLER. — Warrington J.

contrary way, because the incidents of the estate which can be created in English land must be determined by the law of the country where the land is situated and not by the law of the country where the testator is domiciled or where the will is made. The decision of the House of Lords in *Studd* v. *Cook* (1883), 8 App. Cas. 577, which has been so much relied upon by counsel for the plaintiffs, is in my opinion in no way inconsistent with the view which I have expressed. The facts of that case were as follows: A testator domiciled in England was possessed of land both in England and Scotland. He made a will according to English law by which in terms appropriate to English law he devised 'all such and such parts of my manors, messuages, lands, and hereditaments situated in the counties of Devon, of Inverness in Scotland, of Stafford and of Warwick, and of my estates called the Four Dwellings, the Quinton, and the farm at Bell End, whether in Worcestershire or Staffordshire, or elsewhere, as consist of freehold of inheritance . . . to the use of my elder son Edward Fairfax Studd and his assigns, for his life, without impeachment of waste, and after the death of the said Edward Fairfax Studd to the use of the first and every other son of the said Edward Fairfax Studd, successively, according to their respective seniorities, in tail male' with remainders over, so that in that case, as in this, the testator combined a devise of his Scottish estates with a devise of his English estates. The question which arose in *Studd* v. *Cook* was whether the testator's son who by the devise in question was made tenant for life took the Scottish estates for life only or whether he took them for an estate which would give him practically an estate in fee simple, it being the law of Scotland that the mere limitation to a parent in life-rent and after his death to unborn and unnamed children in fee confers a fee simple on the parent, and it was contended that that rule must be applied to the land in Scotland. But when the rule came to be examined it was found that that rule was not a rule like that in English law limiting an estate in tail male by the use of the words 'heirs of the body', but was a rule which would yield to any expressions of contrary intention, and that the insertion in the limitation of the life-rent of the word 'allenarly' or the English word 'only' would have the required effect. Then the House of Lords in effect said, this being an English will and the devise of the Scottish estates being included in the devise of the English estates, the will must be construed according to English law, and construing it according to English law, the life estate was a life estate and a life estate only, and

therefore it was legitimate to read the will in its application to the Scottish estates as if the word 'only' had been inserted, which gave a perfectly intelligible effect to what we should call the 'devise' and what the Scots would call the 'disposition', without infringing any technical rule of Scottish law applicable to immovable property. That decision in my opinion has no application to the present case. There is no difficulty in the present case arising on the construction of the words which with reference to lands of inheritance in England create a well-known estate with certain incidents. Is the estate so created to have those incidents or is it to have some incidents unknown to English law? I think that question is really answered by a part of the speech of Earl Selborne L.C. in *Studd* v. *Cook*, where he said: 'I hold it to be clear that neither the use of English terms of art, nor the intention to create, in Scotland, an estate as nearly as possible corresponding to an English estate tail, ought to prevent such dispositions from operating in Scotland to the fullest extent to which, by the law of Scotland, they can operate. There is no reason why the intention should fail altogether because some consequences of it, which the testator may have had in contemplation, cannot take effect.' Then comes this passage which is the important one: 'The incidents and consequences of the estate or estates which, under such a form of gift, may vest in the donees, according to Scottish law, must, of course, be determined by that law and not by the law of England. But the fact that a donee, who, in England, would take under those words an estate tail, capable of being barred under the Act for the Abolition of Fines and Recoveries, and not otherwise, would, in Scotland, be a fiar, without fetters—or that, in England, he would have only limited statutory powers of leasing beyond his life, while, in Scotland, his powers would be unlimited—is no reason why the destination itself to him and the heirs male of his body, and to the rest of the hæredes designati in succession, should not take effect in Scotland, as far as by law it may.' Applying those words to the present case, the fact that the incidents of the estate tail in Scotland may be different from the incidents of the estate tail in England is no reason why that estate should not take effect in England according to the law of England; and that in my opinion is the correct footing on which to deal with the question. If I am not to deal with it on that footing, then I am driven to the conclusion that the testator did not intend according to English law to create any estate at all in the premises in Park Lane, but that he intended to direct his trustees

In re MILLER. — Warrington J.

to hold these premises upon certain trusts, the nature of which it would be extremely difficult to express but which would involve a power of appointment by deed or will in Sir James Percy Miller with certain trusts for his issue—the precise nature of which it would also be extremely difficult to ascertain—in default of appointment. In my view that is not the function of this court. The duty of the court is to ascertain the nature of the estate in the English land created by these apt technical terms, and that in my opinion is an estate tail, and can only be an estate tail.

[His Lordship accordingly answered the first question raised by the summons by declaring that, on the true construction of the trust disposition and settlement of Sir William Miller and in the events which had happened, No. 1, Park Lane passed to Sir John Alexander Miller for an estate in tail male. As regards the second question raised by the summons his Lordship held that, on the true construction of the trust disposition and settlement of Sir James Percy Miller, he did not purport to dispose of No. 1, Park Lane, and therefore no question of election arose.]

The question whether a beneficiary is put to his election is governed by the law of the testator's domicile at the date of his death.

In re OGILVIE.

In re OGILVIE, [1918] 1 Ch. 492 (Chancery Division)

Administration Action.

Margaret Ogilvie died on 2 April 1908, a widow, domiciled in England, possessed of real and personal estate in England and Scotland, and, as absolute owner in equity, of a tramway undertaking at Asuncion, in Paraguay, the property of which consisted of (inter alia) land. She had eight children, of whom four sons (Glencairn, Fergus, Gordon, Campbell) and one daughter were living at her death; of the three who had died in her lifetime, two left issue who were living and sui juris, and one had died an infant and bachelor. By her will and codicils she gave benefits to her surviving daughter, to her sons Glencairn, Fergus, and Campbell, and to certain of her grandchildren, including the children of her two deceased children who had died leaving issue. She made no provision for her son Gordon. She did not dispose of the residue of the personal estate in England and Scotland. She gave to her sons Glencairn and Fergus and her grandson Gerald all her Paraguayan property upon trust for sale and to apply the proceeds for such charitable purposes as they should think fit. The tram-

way undertaking had been sold and the purchase-money paid into court. The case now came before the court on a summons to proceed with an inquiry which had been directed on further consideration, and for the purpose of enabling the court to ascertain the effect of Paraguayan law on the disposition of the Paraguayan property all parties agreed to be bound by an opinion of a Paraguayan jurist, which, shortly, was as follows: (1) By the law of Paraguay the testamentary dispositions of Mrs. Ogilvie, in so far as the property situate in that republic is concerned, whether movable or immovable, real or personal, are governed by the law of Paraguay . . . (3) They are not valid by the law of Paraguay, inasmuch as they infringe upon the legal portions, under that law, of the obligatory heirs, and the bequest in favour of charity must, accordingly, be reduced until these portions are provided for. (4) These portions are not to be affected in amount by reason of the obligatory heirs or some of them having, by the will, been given benefits out of property of the testatrix situate in other countries. The transmission of property locally situate is, by the law of Paraguay, considered as completely independent of any disposition of property situate outside the republic. (5) The legal portion of the lawful descendants is four-fifths of all the properties existing at the death: the children inherit per capita; the grandchildren, children of deceased children, inherit per stirpes. (6) One-fifth only of the Paraguayan property has by the will, according to the law of Paraguay, been effectually given for charitable purposes.

YOUNGER J.: It seems clear, in the first place, that the testatrix' son Gordon, as one of the Paraguayan obligatory heirs for whom no other provision is made by the will, is left free by the law of this country to take what the law of Paraguay gives him. Accordingly, one-seventh of four-fifths of the undisposed-of proceeds of the undertaking falls to him. The real question is whether those of the obligatory heirs who take other benefits under the will can be allowed at the same time to gain by the partial invalidity in Paraguay of Mrs. Ogilvie's disposition of the tramway undertaking, or whether they must be put to their election either to treat the whole will as valid or, in case they find it to their interest in any instance to take advantage of its invalidity in Paraguay, to submit to make compensation, out of the other benefits given them by the will, to the charities ultimately disappointed by their refusal to allow the provision made for charity to have full effect.

In re OGILVIE. — Younger J.

In the main the authorities on this subject are clear. The testatrix here very plainly intended to deal by her will with her Paraguayan property as well as with her English movable and immovable estate. She purported to dispose of her Paraguayan property by express words of gift. There is, therefore, no room here for the difficulty which, although ultimately solved in the same sense, arose in the case of *Orrell* v. *Orrell* (1871), L.R. 6 Ch. 302. Again, in these cases of election the court has always shown a special tenderness to the heir-at-law of English real estate as contrasted with the customary heir or the person compendiously described—pace Joyce J. in *In re de Virte*, [1915] 1 Ch. 920, 926—as the 'foreign heir'. The principle is well established that, where a testator who dies domiciled in England makes a will which purports to dispose of, but is, in fact, inoperative to pass English real estate, his heir-at-law, as contrasted with the customary heir or the foreign heir in the corresponding case, is not put to his election between that realty and other benefits given him by the will—*Hearle* v. *Greenbank* (1749), 1 Ves. Sen. 298—unless there be contained in the will itself some such express condition, as, for instance, was found in *Boughton* v. *Boughton* (1750), 2 Ves. Sen. 12, that if any who receive benefit by the will shall dispute any part of it they shall forfeit all claim under it.

This distinction between the English heir-at-law and any other heir is not very satisfactory, but, although frequently severely criticized, it was too well established, even in the time of Sir William Grant, to remain open to effective discussion. In *Brodie* v. *Barry* (1813), 2 V. & B. 127, 129, 133, Sir William Grant deals with the point. He says: 'If it were now necessary to discuss the principles, upon which the doctrine of election depends, it might be difficult to reconcile to those principles, or to each other, some of the decisions, which have taken place on this subject. . . . This is, or is not, a case of election according as the English will is, or is not, to be read against the Scotch heir. Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine, what portion of each law is to enter into the decision of the question. It is not easy to say, how much is to be considered as depending on the law of real property; which must be taken from the country, where the land lies; and how much upon the law of personal property; which must be taken from the country of the domicile; and to blend both together; so as to form a rule, applicable to the mixed

question, which neither law separately furnishes sufficient materials to decide.' Then, after a discussion as to whether the law of England or the law of Scotland ought to determine the question in the case before him, and finding it unnecessary in that case to decide it, the result being the same under both, he proceeds: 'As to the law of England'—and this is the point—'a will of land in Scotland must be held analogous to that of copyhold estate in England; and the will is equally to be read against the heir.' And it is now, I think, clearly established that this is by the law of England always so if the realty in question is situate not in England, but, say, in Paraguay or in any other foreign country, and it is by the law of Paraguay or that country, and not by the law of England, that the devise of it fails to have effect. In such a case the Paraguayan or other foreign heir, to whom, say, a pecuniary legacy is given by the will, is put to his election here in England, whether the will does or does not contain any such express condition as that found in *Boughton* v. *Boughton.*

Further, it has since Sir William Grant's time become, I think, well settled, in accordance with what was plainly his own view, that the question whether in any particular case, like *Brodie* v. *Barry* or like the present, a case of election is or is not raised depends upon the domicile of the testator at death—for it is the law of that domicile which governs it. The reasons for this are given by Lord Brougham in his judgment in *Dundas* v. *Dundas* (1830), 2 Dow & Cl. 349. In that case a testator domiciled in Scotland had, by a will inoperative under the Statute of Frauds, purported to devise his English real estate to a stranger and had, by his same will, given benefits to his English heir-at-law. The Court of Session held that the heir-at-law was put to his election. The House of Lords affirmed that decision. And although the House of Lords in dealing with a Scotch appeal applies to it the principles of Scotch law applicable, *Orrell* v. *Orrell*, to cite no other case, shows that in this respect the principles of the law of England are the same.

The result at first sight may seem strange. It would appear remarkable that the question whether the English heir of a Scottish testator resident in England at his death is or is not put to his election under his will may, in fact, turn upon the question whether the testator had or had not then lost his domicile of origin—a question which many testators in that situation might themselves find it difficult to answer. But the point is one of substance, and I am inclined to think that it discloses the clue by which the difficulty in the present case may be

In re OGILVIE. — Younger J.

solved. If by the law of the domicile the gift of the tramway be, irrespective of its locality, to any extent invalid, there is no case of election; if it is only by the law of lex rei sitae that the gift is inoperative, then the foreign heirs are put to their election.

And the foreign heirs, in argument, ultimately accepted that position. But they said that by the law of England a foreign heir would not be put to his election in a case like the present, where the invalidity of the gift by the law of Paraguay was not due to any such formal matter as, for instance, a defect in signature or attestation, but was due to its being contrary to a cardinal principle of public policy adopted in Paraguay, the country where the property is situated. Cases like *Orrell* v. *Orrell*, *Brodie* v. *Barry*, and *Dundas* v. *Dundas*, where the foreign heir was put to his election, were all of them, they pointed out, cases in which the devise of the foreign realty might have been effectively made if it had been made in due form; here, on the other hand, the devise of the tramway undertaking to charity could not to the extent of four-fifths of the property be by the law of Paraguay, made valid by any means whatever. To such a case, so it was said, this court must apply the principles of *In re Oliver's Settlement*, [1905] 1 Ch. 191, and *In re Beales' Settlement*, [1905] 1 Ch. 256, approved by the Court of Appeal in *In re Nash*, [1910] 1 Ch. 1, and refuse to assist indirectly, by an application of the doctrine of election, a breach or evasion of positive rules of foreign law, just as in these cases it refused to, shall I say, encourage, by applying the doctrine, a breach of the rule against perpetuities. The argument is plausible, but, in my opinion, it is not sound. It is not open to me to consider the correctness of the principle as applied to the rule against perpetuities upon which *In re Oliver's Settlement* and the cases following it proceed. That principle has been accepted by the Court of Appeal and is binding upon me. Some day it may come under the notice of the House of Lords, and then the powerful reasoning of Mr. Theobald in the preface to the 7th edition of his Law of Wills and the views of the learned editors of Jarman on Wills, 6th ed. p. 851, may meet with more consideration than they have hitherto received, and even *In re Bradshaw*, [1902] 1 Ch. 436, may, as a decision, at the last come to its own, and the question may be asked whether any advantage is gained by driving testators, if they would attain the same end, to resort in that matter to the use of an express condition, the necessity for which, in cases then already established, was so deplored by Sir William Grant in *Brodie* v. *Barry*. Accepting,

however, as I must, the principle to the full, it does not, I think, apply here.

This court does not, in these cases of election, against a foreign heir, presume to sit in judgment upon the wisdom or the reverse according to its own notions of the municipal law of any foreign country. If it finds that an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, and has, in fact, so far as words are concerned effectually so disposed of it, this court merely says that it is against conscience that that foreign heir, given a legacy by the same will, and to that extent an object of mere bounty on the part of the testator, shall take and keep, under the protection of the foreign law, the land by the will destined for another, without making to that other out of his English legacy, so far as it will go, compensation for his disappointment, thus effectuating the testator's whole intentions. That object, as I take it, is, in the eye of this court, always the paramount object of attainment. But in so attaining it the court violates no foreign law; it leaves that law, as it must, untouched. If the heir can obtain under the protection of the foreign law property which the testator destined for others, he will, so far as this court is concerned, be at perfect liberty to take it and keep it; it is the legacy subject to its own jurisdiction that the court alone will touch and administer and, if necessary, impound for the purpose of effectuating the testator's intention, and so doing justice as it sees it. And, in my opinion, the court will always take this course upon the conditions presupposed, unless the heir's legacy would, if applied in compensating the disappointed devisees of the foreign land, be applied in a way or for purposes for which the testator himself could not, by English law, validly by his will have directed that legacy to be so applied. It is with the English law only that the court at this stage is concerned. If, in the result, no principle of that law is violated, the hand of the court will not be stayed. The foreign heir will be put to his election; and compensation, partial or complete, will, if necessary, be provided for the disappointed devisee. From this point of view the question what precise principle or provision of the foreign law, as such, has been left unobserved by the testator becomes quite immaterial in this court, and I cannot doubt that it is for this reason that no such distinction as that suggested in argument here has, so far as I can find, ever before been taken.

In my opinion these Paraguayan heirs are in this case put to their election.

NOTE N: IMMOVABLES AND THE LEX SITUS

IT is usually said that generally speaking all questions relating to immovables are governed by the lex situs. There is much to be said for such a rule on grounds of practical convenience. It is obvious that in the long run the choice of any other law will be ineffective, because only officials appointed by the courts of the situs can lawfully control the land. If this is so, it follows that if the lex situs is a foreign law—that is, if the land is situated abroad—the lex situs should mean not the domestic rule of the lex situs, but whatever system of domestic law the lex situs would apply. Most modern writers are therefore agreed that the question of title to land is an exceptional case justifying the application of the total renvoi doctrine (*ante*, p. 18): Dicey, pp. 59–60, 530; Cheshire, pp. 127–8, 713–15; Restatement, s. 8; Cook, pp. 264, 279–80; Falconbridge, p. 180. An example will perhaps make the reasoning clear. Suppose that a British subject domiciled in England dies intestate leaving land in Spain. Suppose that by Spanish domestic law (lex situs) X is entitled to the land, but that by the Spanish conflict of laws English law applies, according to which Y is entitled. The argument is that it is useless for the English court to decide in favour of X, if Spanish officials will not lift a finger to help him recover the land from Y.

Now if the lex situs means, for an English court dealing with foreign land, that system of domestic law which the lex situs would apply, it follows that there is nothing in the nature of the legal universe which compels an English court dealing with land in England to apply English domestic law. There is no logical or practical reason why a court sitting at the situs of the land should not apply some other law, e.g. the law of the domicile, at any rate in relation to capacity and matrimonial property: two matters in which the case for applying the law of the domicile seems strong. In practice, however, most English courts have applied the lex situs when dealing with land in England.

It is now necessary to consider in detail (1) Formalities, (2) Essential validity, (3) Capacity, (4) Matrimonial Property, (5) Contracts, (6) Construction of Wills, and (7) Election. It will be assumed that for an English court dealing with land in England, the lex situs means domestic English law, and that for an English court dealing with land abroad, the lex situs means whatever system of domestic law the lex situs would apply.

(1) *Formalities.* It has been decided that a written instrument leasing land in Scotland need not be under seal since a seal is not required by Scots law: *Adams* v. *Clutterbuck* (1883), 10 Q.B.D. 403. A will valid by English domestic law but invalid by the law of the testator's domicile will pass the beneficial interest in land in England: *De Fogassieras* v. *Duport* (1881), 11 L.R. Ir. 123; *Murray* v. *Champernowne*, [1901] 2 I.R. 232. Conversely, a will valid by the law of the testator's domicile but invalid by English domestic law will not pass the beneficial interest in land in England: *Pepin* v. *Bruyere*, [1902] 1 Ch. 24. The only exception is that such a will made by a British subject may pass the beneficial interest in English leaseholds or other personalty under sections 1 or 2 of the Wills Act, 1861 (*post*, p. 342): *Re Grassi*, [1905] 1 Ch. 584. This is because of the unfortunate use of the term 'personal estate' instead of 'movables' in the statute.

(2) *Essential validity.* The lex situs determines all questions of essential validity, e.g. what estates can be created: *Nelson* v. *Bridport* (1846), 8 Beav. 547; *Re Miller* (*ante*, p. 255); whether the limitations infringe the rule against perpetuities or accumulations: *Freke* v. *Carbery* (1873), L.R. 16 Eq. 461; whether gifts to charities are valid: *Duncan* v. *Lawson* (1889), 41 Ch.D. 394; *Re Hoyles* (*ante*, p. 233); whether the testator must leave a fixed part of his estate to his wife or children: *Re Ross* (*ante*, p. 6); who is entitled on an intestacy: *Duncan* v. *Lawson* (*supra*).

(3) *Capacity.* There appears to be no English case in which an English court has had to consider the question of capacity to transfer land at home. The question was considered in the American case of *Proctor* v. *Frost* (1938), 89 N.H. 304, where the law of the domicile and not the lex situs was applied. A married woman domiciled with her husband in Massachusetts in that state became surety for her husband, and as security gave a mortgage on her New Hampshire land. The mortgagee brought a bill in equity in New Hampshire for foreclosure. The defence was that by a New Hampshire statute a married woman cannot become surety for her husband. The New Hampshire court rejected this defence on the ground that 'the primary purpose of the statute . . . was not to regulate the transfer of New Hampshire real estate, but to protect married women [sc. domiciled] in New Hampshire from the consequences of their efforts, presumably ill-advised, to reinforce the credit of embarrassed husbands'.

The question what law governs capacity to transfer land abroad came before the Court of Appeal in *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129, where the lex situs was applied. The reasoning is, however, most unsatisfactory. A married woman, domiciled and resident with her husband in England, executed a deed in England whereby she agreed to mortgage land in Johannesburg to a bank as security for past and future advances made and to be made by the bank to her husband. The bank sued for specific performance of the deed. The defence was that by the Roman-Dutch law in force in the Transvaal, a married woman was incapable of becoming surety for her husband unless (*a*) she obtained a pecuniary benefit from the contract, or (*b*) she was engaged in trade, or (*c*) she clearly and specifically renounced the benefits of the Sc. Velleianum or the Authentica si qua mulier. None of these exceptions applied, but the trial Judge found as a fact that the defendant knew quite well what she was doing. The Court of Appeal held that the defendant's capacity to make the contract was governed by Roman-Dutch law and the contract was therefore void.

This decision is incomprehensible. The bank was left without security for advances made on the faith of the defendant's promise, and the defendant was allowed to break that promise with impunity although she knew quite well what she was doing. More specifically:

(*a*) The court made no attempt to ascertain the policy of the Transvaal law, or whether a Transvaal court would have applied Transvaal domestic law to this very case. Had it done so, it might well have discovered that the Transvaal law laid down a policy not for Transvaal land but for Transvaal married women, and that the Transvaal court would have applied English domestic law to this case because the defendant was domiciled and resident in England.

(*b*) The court was not dealing with a mortgage but with a contract to make a mortgage. As we shall see, contracts affecting land are not governed by the

lex situs as such but by their proper law, which need not necessarily be the lex situs. The court made no attempt to ascertain the proper law of the contract, but baldly asserted that the defendant's capacity was governed by the lex situs, and mechanically applied its domestic law.

(c) By Roman-Dutch law it seems that a mortgage on land is an interest in a movable, not (as in English law) an interest in an immovable: Lee, Introduction to Roman-Dutch law, 4th ed., p. 133. As the land was in the Transvaal, the mortgage should, on the principle of *Re Hoyles* (*ante*, p. 233), have been treated in England as an interest in a movable.

(4) *Matrimonial property.* If the court is dealing with foreign land, it should apply whatever system of domestic law the lex situs should apply. The scanty English authority is consistent with this view. Thus, in *Re Pearse's Settlement*, [1909] 1 Ch. 305, by an English marriage settlement the intended wife, who was domiciled before and after the marriage in England, covenanted to settle after-acquired property. She became entitled to land in Jersey. By the law of Jersey no trusts of land were permitted and all transfers thereof had to be for value. Eve J. held that the land was not caught by the covenant. This decision is obviously correct. The Jersey law laid down a policy for Jersey land and not for people domiciled in Jersey.

If the court is dealing with land in England, it has been held that the law of the domicile at the date of the marriage, and not the lex situs, applies. Thus in *Re De Nicols* (*No. 2*), [1900] 2 Ch. 410, a husband and wife, both domiciled in France, married there without an antenuptial contract, with the result that the French system of community of goods applied to their present and after-acquired property. The husband subsequently purchased land in England. On his death it was held by Kekewich J. that his widow's rights in the land were governed by French law. This decision has been criticized, but it appears to be in accordance with the best modern ideas; it has never been overruled; and moreover it does not stand alone. In *Chiwell* v. *Carlyon* (1897), 14 S.C. 61 (Cape of Good Hope), the facts were exactly the same, except that the spouses were domiciled at the Cape. Stirling J. sent a case for the opinion of the Supreme Court of Cape Colony. In other words, he decided that the matter was one for Cape law. The opinion of the Cape court was that the English land was held in community. The case is unfortunately not reported in England, but the record shows that Stirling J. gave judgment in accordance with this opinion.

(5) *Contracts.* Contracts relating to land are governed, not by the lex situs as such, but by their proper law, which is usually but not necessarily the lex situs: *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*, [1910] 2 Ch. 502. The proper law governs essential validity; interpretation; effect: *Re Anchor Line Ltd.*, [1937] Ch. 483; and formalities: *Re Smith*, [1916] 2 Ch. 206. On principle, it should also govern capacity to contract. But this is doubtful in view of *Bank of Africa* v. *Cohen*, *supra*.

(6) *Construction of wills.* The construction of a will of land is governed, not by the lex situs as such, but by the law intended by the testator, which is presumed to be the law of his domicile at the time of making the will: *Studd* v. *Cook* (1883), 8 App. Cas. 577. But the incidents of the estate created must be determined by the lex situs, because this is a matter not of construction but of essential validity: *Re Miller*, *ante*, p. 255.

(7) *Election.* In *Re Ogilvie, ante*, p. 263, Younger J. lays down that the question whether a legatee of movables under a will must elect between benefits under the will and foreign land coming to him dehors the will is governed by the law of the testator's domicile, and this view is consistent with all the previous cases on the subject. In *Re Allen's Estate* (1945), 114 L.J. Ch. 298, however (where *Re Ogilvie* was not cited), Cohen J. held that a beneficiary under the will of a testator domiciled in South Africa was put to her election, although it was 'common ground' that by South African law no case for election arose. The decision is perhaps right in the result, because in the circumstances the beneficiary was bound to elect by South African as well as by English law. But the reasoning is criticized in detail in 10 Conveyancer 102 and 24 Can. Bar Rev. 528, and Cheshire (p. 741, n. 1) and Dicey (p. 835) treat the case as wrongly decided.

CHAPTER II

TRANSFER OF TANGIBLE MOVABLES

If movable property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.

CAMMELL v. SEWELL.

CAMMELL *v.* SEWELL (1860), 5 H. & N. 728 (Exchequer Chamber)

ERROR from the Court of Exchequer (3 H. & N. 617).

The plaintiffs were underwriters in Hull; the defendants merchants in London. The action was brought to recover part of a cargo of deals shipped on board the Prussian ship Augusta Bertha at Onega, in Russia, by the Onega Wood Company, for Messrs. Simpson & Whaplate of Hull, and by them insured with the plaintiffs.

On the 17th of September 1852 the Augusta Bertha, having put into Haroe Roads in consequence of the shifting of her deck cargo, drove from her anchorage on the rocks at Smaage, about three miles from Molde in Norway. On the 19th the captain began discharging the cargo, which was ultimately stacked on two small islands. The cargo was not materially damaged. Witnesses, however, stated that as it stood it was exposed to injury from the weather and sea water: that possibly some of it might be washed away in storms; and that it would require to be watched. The wreck lay out of the track of shipping. There was no harbour; the anchorage at Smaage was bad, and ships could not have been readily obtained for the purpose of forwarding the cargo to its destination. There was a conflict of testimony as to whether or not a prudent owner, if uninsured, would have sold the cargo on the spot.

On the 23rd of September the captain notified the consignees of the wreck. The consignees gave notice of abandonment to the plaintiffs who paid as for a total loss.

The captain instructed surveyors to survey the vessel and cargo, and on the 27th of September they reported that a sale of the cargo by public auction was best for all parties. On the 15th of October the sale was held, Mr. Jervell, the representative of the plaintiffs, protesting against the sale. The cargo was bought by Mr. Clausen, the British Vice-Consul.

Mr. Jervell then instituted a suit before the superior diocesan Court of Trondhjem to set aside the sale, making the captain and

his agent and Mr. Clausen defendants; but on the 25th of November 1853[1] the court confirmed the sale.

The cargo remained in Norway throughout the winter, and in the spring it was shipped to London by a vessel called the Mindet under a bill of lading indorsed by Clausen to the defendants, who had made advances on the cargo. The Mindet arrived in the Thames in April 1853, when the plaintiffs immediately caused a notice to be served on the defendants requiring them to deliver up the deals. The cargo was afterwards sold by auction, and the net proceeds received by the defendants on the 9th of December 1853 were £1,470. 4*s*. 2*d*. The plaintiffs claimed this sum. By Norwegian law the sale conferred a good title on Clausen.

The Court of Exchequer (Pollock C.B., Martin B., and Channell B.) gave judgment for the defendants on the ground that the Norwegian judgment was in the nature of a judgment in rem and as such conclusively determined the title to the deals. The plaintiffs appealed.

CROMPTON J.: In this case the majority of the court (Cockburn C.J., Wightman, Williams, Crompton, and Keating JJ.) are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment in rem, nor are we satisfied that the defendants in the present action were estopped by the judgment of that court or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognise the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent

[1] *Sic* in the report. It is thought that this is a misprint for 1852 (*Ed.*).

CAMMELL v. SEWELL. — Crompton J.

purchaser, it appears to us that the questions are—did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognise that law? That question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognised by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be inclined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighbourhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our courts for a conversion, and can it alter the case if he re-sell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a

foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the court below, where he says 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.' And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of *The Eliza Cornish or Segredo* (1853), 1 Sp. Eccl. & Adm. 36. If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a court of error. We must remark also, that in the case of *Freeman* v. *The East India Company* (1822), 5 B. & Ald. 617, the Court of Queen's Bench appear to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of *Freeman* v. *The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority, or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat

CAMMELL v. SEWELL. Crompton J.

the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked also, that Lord Stowell, in the passage, cited in the case of *Freeman* v. *East India Company*, from his judgment in the case of *The Gratitudine* (1801), 3 C. Rob. 240, states that if the master acts unwisely in his decision as to selling still the foreign purchaser will be safe under his acts. The doctrine of Lord Stowell agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of *The Eliza Cornish*, as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and as the law of Norway appears to us, on the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN C.J.: Concurring in the judgment delivered by my brother Crompton, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought

to our notice during the argument. But no evidence was adduced to shew what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus,—a good contract of sale to transfer the property in Norway, without anything to shew that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

BYLES J. dissented on the grounds (1) that the law of Norway allowing indiscriminate sales of cargo by the masters of all ships wrecked on the Norwegian coast was so inconvenient and dangerous that effect could not be given to it in England; (2) that he could not concur in the universality of the proposition that a disposition of movable property, effectual by the law of the country where that property might at the time be locally situated, was necessarily binding without exception in any country to which it might afterwards come.

Judgment affirmed.

INGLIS *v.* ROBERTSON, [1898] A.C. 616 (House of Lords)

Appeal from the Court of Session in Scotland.

Walter C. Goldsmith, a wine merchant in London, purchased in December 1893 from the respondents Robertson and Baxter, wine and spirit merchants in Glasgow, a quantity equal to 600 hogsheads of blended Scotch whisky deliverable in 1894. The whisky was stored in a bonded warehouse in Glasgow. Goldsmith had the whisky transferred to his name in the books of the warehouse company and obtained from them delivery orders in these terms: 'Warrant for 10 hogsheads whisky transferred in our books, and held to the order of Walter C. Goldsmith or assigns by indorsement hereon.'

In December 1894 Goldsmith borrowed £3,000 from the appellant, an English merchant, to whom he delivered a letter in England purporting to hypothecate part of the whisky lying in his name in the bonded warehouse at Glasgow as security for the loan. Goldsmith also indorsed to the appellant the delivery warrants which he held. The appellant did not give notice of his interest to the warehouse company.

Goldsmith having failed to pay to the respondents the sum of

INGLIS v. ROBERTSON.

£1,000 being the balance of the purchase price then remaining due to them, they in February 1895 arrested the whisky in the hands of the warehouse company. The appellant's title prevailed by English law, the respondent's by the law of Scotland. The majority of the Second Division of the Court of Session affirming the interlocutor of the Lord Ordinary sustained the claim of the respondents.

LORD WATSON: I do not find it necessary to consider, for the purposes of this appeal, whether, or in what circumstances, according to the law of England, a valid pledge of documents of title to goods stored in a bonded warehouse will enable the pledgee to defeat the right of a creditor of the person who in the warehouse books is entered as the owner of the goods. The present question does not arise between two Englishmen, nor does it arise in relation to mercantile transactions which can reasonably be characterised as English. The situs of the goods was in Scotland. The Scottish creditors who claim their proceeds did not make any English contract; and in order to attach them they made use of the execution which the law of Scotland permits for converting their personal claim against the owner into a real charge upon the goods themselves. It would, in my opinion, be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be according to the law of that country, but is not according to the law of Scotland, sufficient to create a real right in the goods.

I can see no reason to doubt that, by Scottish law as well as English, the indorsement and handing over of delivery orders in security of a loan, along with a letter professing to hypothecate the goods themselves, is sufficient in law, and according to mercantile practice, to constitute a pledge of the documents of title, whatever may be the value and effect of the right so constituted. In my opinion, the right so created, whether in England or in Scotland, will give the pledgee a right to retain the ipsa corpora of the documents of title until his advance is repaid. The crucial question in this case is whether the right goes farther, and vests in the pledgee of the documents, not a jus ad rem merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there

held in actual possession by a custodier for Goldsmith as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property of the whisky, or, in other words, a jus in re, in the pledgee.

LORDS HALSBURY, HERSCHELL, MACNAGHTEN, and MORRIS concurred.

Appeal dismissed.

NOTE O: THE TRANSFER OF TANGIBLE MOVABLES

THE English authorities on this subject are scanty and unsatisfactory. The only reliable cases are *Cammell* v. *Sewell* (*ante*, p. 270) and *Inglis* v. *Robertson* (*ante*, p. 275), on which this Note is based.

(1) Modern writers are agreed that the validity of a transfer of tangible movables is governed either by the lex situs or by the proper law of the transfer. Hence, if these two laws coincide, e.g. if goods in France are sold by a contract the proper law of which is French, it is clear that the validity and effect of the transfer are governed by French law.

(2) Disagreement begins when the two laws do not coincide, e.g. if goods in Germany are transferred by a contract the proper law of which is English, the title passing by English law at the date of the contract, by German law not until delivery. In this situation, most writers think that the lex situs governs; but Dr. Cheshire prefers the proper law of the contract. Of course the proper law of the contract determines all contractual questions that may arise, e.g. whether the contract includes these goods, or whether the seller is liable for defects in their quality. And of course the seller may be contractually liable to deliver the goods to the buyer, and so to make him owner. But we are concerned not with the law of contract, but with the law of property. It is no use saying that the seller is contractually liable to deliver the goods to the owner if, e.g., he has fraudulently sold and delivered the goods to a third party, or if the transaction is by way of gift, so that there is no contract at all. Accordingly, it is submitted that the lex situs, and not the proper law of the transfer, govern the proprietary as opposed to the contractual effects of the transfer. *Inglis* v. *Robertson* is a clear decision in this sense: the whisky was hypothecated in England by one English merchant to another; the proper law of the transfer was therefore English law; but Scots law was held to govern, and Lord Watson (the only Lord who discusses the conflict of laws) twice says that the whisky was in Scotland.

(3) The claims of the lex situs are less strong when the goods are in transit and the parties do not know precisely where they are: in such circumstances, no doubt a transfer which was valid and effective by its proper law would be upheld.

(4) More complicated questions arise if a title to goods is validly acquired in one country (X) and then the goods are taken to another country (Y). Even if

the circumstances are such that the title acquired under the law of X would not have been acquired under the law of Y, it is clear that the title acquired in X will be upheld, for the goods were in X at the material time. 'If, according to [Norwegian] law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing the property to England can alter the position of the parties': *Cammell* v. *Sewell*, *ante*, p. 271. It follows that if there is a transaction in X (e.g. a hire-purchase contract) whereby the possession of goods passes to B, but the title is validly retained by A in accordance with the law of X but not in accordance with the law of Y, and B takes the goods to Y and sells them there to a third party C, the title of A will prevail, unless the sale in Y has the effect by the law of Y of overriding prior titles: for the general principle is nemo dat quod non habet.

(5) If, however, B, having no title to goods in X by the law of X, brings the goods to Y and sells them there to a third party C in circumstances which by the law of Y override all prior titles (e.g. a sale in England in market overt), then the title of C will prevail, for the goods were in Y at the material time: *Cammell* v. *Sewell*. It makes no difference that the original owner of the goods did not consent to their being brought to Y: 'We do not think that goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England': *Cammell* v. *Sewell*, *ante*, p. 273.

CHAPTER III

ASSIGNMENT OF INTANGIBLE MOVABLES

The validity or invalidity of an assignment of a chose in action on the ground of lack of capacity is governed by the proper law of the assignment.

LEE *v.* ABDY (1886), 17 Q.B.D. 309 (Queen's Bench Division)

ACTION against the trustees of the Reliance Mutual Life Insurance Society on a policy of insurance upon the life of Ellis Laurence Lee, deceased, by an assignee of the policy.

The defence (inter alia) stated as follows: At the date of the alleged assignment of the policy the said Ellis Laurence Lee was, and he remained till his death, a merchant domiciled in Cape Colony, and the plaintiff was his wife. The title to the policy money is governed by the law of the said colony, according to which the alleged assignment, if executed, was and is void both by reason of the alleged assignee being the wife of the said Ellis Laurence Lee, and by reason that the said Ellis Laurence Lee was, and remained till his death, insolvent, and that his creditors are entitled to the policy moneys.

The plaintiff in her reply objected that the above statements of the defence shewed no defence in law. It was ordered by Wills J., that the question of law whether, assuming the facts stated in the defence to be true, the rights of the plaintiff under the assignment of the policy were governed by the law of Cape Colony or by that of England should be disposed of before the trial, and that the policy should be produced on the argument. It appeared in the course of the argument to be an admitted fact that the assignment was executed in Cape Colony, though it was not expressly so stated on the pleadings.

It appeared from the policy that it was effected by the deceased Ellis Laurence Lee, who was described therein as resident at Kimberley, in South Africa, with the society, which was a life insurance company in London. It recited that the proposal for assurance and the usual declaration by the assured had been delivered at the office of the society by him, and that the truth of the statements therein were to form the basis of the contract. The policy money, together with such further sum, if any, as might be apportioned by way of bonus to the policy, was to be paid within three calendar months after proof satisfactory to the directors had been given of the death

LEE v. ABDY.

of the assured having happened within the term of the insurance. The policy contained the usual clause to the effect that the funds of the society should alone be answerable for any demand under the policy.

DAY J.: If it were necessary to determine where the assured was domiciled when the policy was entered into, or where the policy must be considered as having been made, or where it is payable, there might be some difficulty in doing so upon the facts so far as they at present appear before us; but in the view I take it is unnecessary to go into those questions. It seems to me that quite independently of those considerations the assignment of the policy was invalid. The subject-matter of the assignment is a chose in action which has no locality. The general rule, subject to exceptions which do not seem to me to apply to the present case, is that the validity and incidents of a contract must be determined by the law of the place where it is entered into. The assignment here in question is an assignment that exists if at all by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment. Now the contract in fact entered into by the parties to the assignment was entered into in Cape Colony, and the parties were domiciled there, and, as I have said, it had relation to a chose in action which has no locality. It is argued that the validity of this contract must be determined by the law of England. Why should that be so? The reason given is that the parties are contracting with reference to a contract which is affected by the law of England. That consideration seems to me to be immaterial. They are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract must be determined. It was urged upon us that this conclusion would occasion great inconvenience to insurance companies. But I cannot see that much greater difficulty would arise in ascertaining whether an assignment was good according to foreign law than in the ordinary case of an assignment under English law. No doubt people are theoretically bound to know the law of their country, but in point of fact in many cases they do not, and there might often be difficulties in ascertaining whether an alleged assignment according to English law had been validly effected. I do not think that any additional difficulty occasioned by the assignment being governed by foreign law is of so much moment as was suggested. We were pressed with the authority of the case of *Lebel* v. *Tucker* (1867), L.R. 3 Q.B. 77, but the decision

there had relation to a bill of exchange, and I do not think that case is analogous to the present. It seems to me that the question which really arises here is one of the validity of a contract which is purely foreign, though such contract has relation to a chose in action which possibly arises upon an English contract. For these reasons I think our judgment must be for the defendants.

LEE v. ABDY. — Day J.

WILLS J. delivered judgment to the same effect.

Judgment for the defendants.

The validity or invalidity of an assignment of a chose in action on the ground of lack of form is governed by the proper law of the assignment.

REPUBLICA DE GUATEMALA *v.* NUNEZ, [1927] 1 K.B. 669 (Court of Appeal)

REPUBLICA DE GUATEMALA v. NUNEZ.

Appeal from a judgment of Greer J. (95 L.J.K.B. 955).

In 1906 Manuel Estrada Cabrera, the then president of the republic of Guatemala, deposited with Messrs. Lazard Bros., bankers of London, a sum of money which with interest amounted by the end of the year 1920 to 21,533*l.* In April 1920 Cabrera was deposed and imprisoned by his political opponents. Subsequently the money so deposited with Lazard Bros. was claimed on behalf of the republic of Guatemala. Lazard Bros. refused to pay it over, as they had received notice that it was also claimed by one Nunez, an illegitimate son of Cabrera. In October 1921 an action was commenced on behalf of the republic of Guatemala against Lazard Bros. to recover the money, whereupon the defendants took out an interpleader summons. They were ordered to pay the money into court, and were dismissed from the action, Nunez being substituted in their place as defendant.

The action then proceeded as between the republic of Guatemala as plaintiffs and Nunez as defendant. The plaintiffs alleged that the money was the money of the Republic misappropriated by Cabrera and that Cabrera had transferred it to the republic as public funds by letters dated 12 July and 11 October 1921.

The defendant Nunez claimed the money as the assignee of his father Cabrera. In support of his claim a letter was produced on behalf of the defendant Nunez, dated 24 July 1919, signed by Cabrera, and addressed to Messrs. Lazard Bros. in New York, in which Cabrera requested them to transfer the balance of his account with their London house to Nunez. This letter Greer J. held to be a genuine document signed before July 1921, and intended to operate as an assignment of the funds in question by Cabrera to his son Nunez. On

REPUBLICA DE GUATEMALA v. NUNEZ.

20 July 1921 the defendant Nunez and his solicitor gave oral notice of this assignment to Messrs. Lazard Bros. of New York, and on 22 July wrote to Messrs. Lazard Bros., London, giving them written notice of the assignment, which notice was received in London on 4 August and acknowledged on that date.

Evidence was given that by Guatemalan law an assignment of money exceeding $100 in amount if without consideration was void, unless made by a written contract before a notary, duly stamped, and unless the assignee signed before the notary to signify his acceptance. These formalities had not been complied with in the present case. Further, by Guatemalan law a minor cannot accept a voluntary assignment; it must be made to and accepted by a tutor or legal representative appointed by a judge to act on his behalf. At the time of the assignment in question Nunez was a minor, and no legal representative had been appointed to act for him.

Greer J. held that, the assignment having been executed in Guatemala, its validity must be determined by the law of that country, and by that law it was bad. He therefore dismissed the defendant's claim. He dismissed the plaintiff's claim also on the ground that the two documents on which they relied had been extorted by duress from Cabrera while he was in prison and that apart from those two documents there was no evidence that the money had been wrongfully appropriated by Cabrera.

The defendant appealed. The plaintiffs also appealed, and their appeal was dismissed, but it is not reported.

SCRUTTON L.J.: This appeal raises a question of some difficulty. Freed from the picturesque facts, which do not assist the court to determine the dry question of law, the problem which emerges is this. (His Lordship stated the facts and continued:) It will be seen, therefore, that if Guatemalan law, being both the law of the domicile of both parties and the lex loci actus, is to be applied, the document was a nullity. If English law, as the law of the situs of the debt assigned, or the lex loci solutionis of the contract to pay, is to be followed, the document was effective. It is to be assumed, however, that in any case it is English law which the English courts enforce; the question is whether English law directs them to ascertain the validity of the assignment by the law of Guatemala, or by the law of England applicable to such documents.

On the question of the law applicable to an assignment of personal

property invalid by the law of the country where the transaction takes place, or by the lex domicilii of the parties to the transaction, but valid by the law of the country where the property is, or is deemed to be, situate, the English authorities are scanty and unsatisfactory. Channell J., in *Dulaney* v. *Merry*, [1901] 1 K.B. 536, 'had not found any clear case of a transfer, good according to the law of the domicile of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate'. Mr. Dicey has not found any clear case in reference to individual assignments by gift or sale as to the validity of an assignment good by the lex domicilii of the owner, but bad in the country where the goods are situate. Conversely, I have not been able to find, nor could counsel refer me to, any clear statement of the principles governing the question whether a transaction in personal property, as distinct from land, invalid by the law of the country where the transaction takes place, may be valid by the law of the place where the property is situate. Mr. Foote (*Private International Law*, 5th ed., p. 293) points out that in most of the judgments where general statements are made the transaction took place in the country where the property was, and a conflict between the lex loci actus and the lex loci rei sitæ was not dealt with.

There seem to me, however, in this case to be two clear matters which help to a conclusion. First, in cases of personal property, the capacity of the parties to a transaction has always been determined either by the lex domicilii or the law of the place of the transaction; and where, as here, the two laws are the same it is not necessary to decide between them. In *Lee* v. *Abdy* (*ante*, p. 279) an assignment was made in Cape Colony by a man there domiciled to his wife of a policy issued by an English company, and it was assumed for the purposes of the case that such an assignment was invalid by the law of the Colony, husband and wife not being capable of entering into such a transaction. A Divisional Court, composed of Day and Wills JJ., held that, on that assumption, the assignment, though valid by the law of England, could not be enforced against the company in England. Neither judge draws a distinction between the lex domicilii or the lex loci actus. The Court of Appeal, in *Sottomayor* v. *de Barros* (*ante*, p. 76), a case of marriage, laid down in general terms: 'It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile'; and Lord Halsbury says, in *Cooper* v. *Cooper* (1888),

REPUBLICA DE GUATEMALA v. NUNEZ. — Scrutton L.J.

13 App. Cas. 88, 99, that 'incapacity to contract by reason of minority . . . is regulated by the law of domicile'. Lord Macnaghten, in the same case, is more doubtful, treating the question as not finally settled, but with a preponderance of opinion in favour of the lex domicilii. 'But,' he says, 'when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper (the infant) could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled.' Lord Watson declines to decide the point, as the two laws are the same. The opinion of the Court of Appeal, in *Sottomayor* v. *de Barros*, in favour of the lex domicilii, was criticized by the same court in *Ogden* v. *Ogden* (*ante*, p. 64) and by Sir James Hannen in the later *Sottomayor* case (1879), 5 P.D. 94. But most of the authorities seem to agree that capacity to contract depends either on the lex domicilii or the lex loci actus, and here they are the same: see also per Lord Eldon in *Male* v. *Roberts* (1799), 3 Esp. 163, as to infancy. It seems to me, therefore, that Nunez, being a minor incapable by the law of his domicile or the law of the place where the transaction takes place, of receiving a valid donation, so that a gift to him, without the intervention of a next friend judicially appointed to receive it, would be void and a nullity in Guatemala, cannot claim that he has received a good title to the deposit by such an invalid donation.

This view would support the judgment of Greer J., but is not the express ground on which he puts his decision, which is, I think, that a contract void in the place where it is made, by reason of the omission of formalities required by the law of that place, is void elsewhere; the case of void contracts being distinguished from that of contracts merely inadmissible in evidence by reason of the absence of formalities, such as the requirements of stamp laws, not invalidating the contract itself. This seems to me a second point on which the authorities are fairly clear—namely, that where a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to the omission of formalities or stamp, it will not be recognized in England. In *Bristow* v. *Sequeville* (1850), 5 Exch. 275, 279, Rolfe B. agrees 'that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here', distinguishing it from a case where the contract is not void but only not admissible in evidence. To a similar effect are the judgments of Lord Ellenborough in *Clegg* v. *Levy* (1812), 3 Camp. 166, and of Lord

Kenyon in *Alves* v. *Hodgson* (1797), 7 T.R. 241, which is explained by Pollock C.B. and Rolfe B. in *Bristow* v. *Sequeville* as being a decision that, if the transaction be not a valid contract at the place where it is made, it is no contract at all. It seems to me that the principles laid down in *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, 283, that the effect of a transaction must be determined by the law of the place where it was effected, have the same result. The negotiable instrument cases of *Alcock* v. *Smith* (*post*, p. 293) and *Embiricos* v. *Anglo-Austrian Bank* (*post*, p. 298) appear to proceed on the same principle. In each case a bill of exchange, accepted and payable in England and therefore representing an English debt, was dealt with in another country; in *Alcock's Case* by execution in Norway; in *Embiricos' Case* by purchase for valuable consideration in Vienna after theft and forgery of indorsement. In each case the foreign transaction would not have legal effect in England, but in each case it was held that, being valid by the lex loci actus, the English law would give effect to it. I cannot think that the suggested difference between the piece of paper and the chose in action represented by it is satisfactory. I refer to the judgments of Romer J. and of Kay L.J. in the former case. In the present case the private unstamped donation made in Guatemala from one Guatemalan subject to another was a nullity by the law of Guatemala. I think it was therefore a nullity by the law of England.

Reliance was, however, placed on the opinion of Mr. Dicey as stated in rule 153[1] of his work on the Conflict of Laws, to which great weight is, of course, added by the opinion of Cozens-Hardy J. in *In re Maudslay, Sons and Field*, [1900] 1 Ch. 602, that it is right. It is to be observed, however, firstly, that in this case the question was whether the English courts would give effect to seizure in France of a French debt as against English debenture-holders administering an English company's affairs; that is to say, the lex loci actus and, if debts have a situs, the lex loci rei sitæ were the same; and the learned judge's opinion was therefore not necessary for the decision. Secondly, while Cozens-Hardy J. thinks the opinion of Mr. Dicey right, he also thinks the authorities cited by the author for that opinion do not support it; and Greer J., after consideration, has come to the same conclusion....

We were also referred to *Kelly* v. *Selwyn* (*post*, p. 286), where, in the administration in England of the English estate of an English testator, priority was given to an English assignment, later in date

[1] See now rule 133 in the sixth edition.

REPUBLICA DE GUATEMALA v. NUNEZ. — Scrutton L.J.

but prior in notice, over an earlier New York assignment for which the law of New York did not require notice. Priorities have been said to be questions for the lex fori (*The Colorado*, [1923] P. 102), and I think this is the ground of the decision. It seems to me, therefore, that the authorities cited by Mr. Dicey do not support the proposition that a transaction as to an English debt, void by the law of the country where it takes place and by the law of the domicile of the parties to it, will be treated as valid in the country where the debt is deemed to be situated. In my opinion, both the capacity of the parties to enter into such a transaction and the validity and effect of such a transaction in form and results must be determined by one or other of those laws; and in this case they are the same.

For these reasons, I think the judgment of Greer J. dismissing the claim of Nunez should be affirmed on the grounds (1) that Nunez, as an infant, was not, by the law of Guatemala, capable of himself receiving a valid donation; and (2) that the transaction, apart from infancy, was void as not carried out in the way required by the law of Guatemala.

The result is that both claims on the fund in court fail. The court has notice that the trustee in bankruptcy of Cabrera claims the fund, and the fund must remain in court till that and any other claim made to the court is disposed of.

BANKES L.J. agreed that the assignment to Nunez was invalid, on the ground that Cabrera and Nunez were domiciled in Guatemala.

LAWRENCE L.J. held (1) that the validity of the assignment as regards form was governed by the lex situs (English law); (2) that the validity of the assignment as regards capacity was governed by the law of Guatemala.

Appeal dismissed.

Where there are two or more competing assignments of a chose in action, each valid by its own proper law, questions of priority are determined by the proper law of the original contract.

KELLY v. SELWYN.

KELLY *v.* SELWYN, [1905] 2 Ch. 117 (Chancery Division)

Under the will of his father A. H. Solomon, who died in March 1888, Arthur Hammond Selwyn was entitled to a protected life interest in a legacy of 20,000*l.*, and was also contingently entitled in reversion to certain other legacies bequeathed to various members of the testator's family. The will contained a trust for sale, under

which, at the time of the events hereinafter mentioned, all the real estate had been converted, and the whole estate was invested in English trust securities.

By an indenture of 8 June 1891, A. H. Selwyn, being then domiciled in the State of New York, assigned to his wife, an American lady, all his share and interest of what nature or kind soever which he then had or might thereafter have in the estate of his late father A. H. Solomon under or by virtue of his said will or otherwise (except his life interest in the 20,000*l.* legacy), whether in possession, reversion, remainder, or expectancy, for her sole and separate use absolutely. According to the law of the State of New York, notice to the trustees of the will was not necessary to complete an assignment of a chose in action or reversionary interest in personalty, and no notice of the deed of 8 June 1891 was sent to the English trustees.

By an indenture of 10 August 1894, A. H. Selwyn, being then in England, assigned all his share and interest in the estate of his late father, whether under his said will or otherwise, or whether in remainder, reversion, or expectancy (except his life interest in the 20,000*l.* legacy), to the plaintiff Thomas Kelly by way of mortgage to secure 400*l.* and interest. Notice of this assignment was forthwith given by the plaintiff to the trustees of A. H. Solomon's will.

A. H. Selwyn subsequently created various other incumbrances on his said reversionary interest of which notice was in due course given to the trustees of the will, one of the trustees being himself an incumbrancer.

In September 1903 notice of the assignment of 8 June 1891 was given to the trustees of the will on behalf of Mrs. Selwyn.

A reversionary interest in A. H. Solomon's estate having recently fallen in, a portion of which would have been payable to A. H. Selwyn or persons claiming under him, the plaintiff commenced the present action against the trustees of the will, Mrs. Selwyn, and the other incumbrancers, claiming a declaration that he was entitled by virtue of his security of 10 August 1894 to a first charge on A. H. Selwyn's interest in his father's estate in priority to any right or claim of Mrs. Selwyn under the assignment in her favour of 8 June 1891.

WARRINGTON J.: The important question in this case has resolved itself into one of law upon which there does not seem to be any direct authority, though the case, I think, comes within certain well-known principles. [Having stated shortly the facts, his Lordship continued:]

KELLY v. SELWYN. — Warrington J.

Under these circumstances the question I have to determine is which of these two assignments is to have priority. But for one circumstance, which I will mention directly, there can be no doubt, in the case of an English trust fund created by an English testator with trustees in England, that by the law of England, if that is the proper law to apply to this case, the mortgagee who first gave to the trustees notice of his security would take priority over the secret assignment (as I may call it) in favour of the wife, who did not give notice of it till later. But it is said on behalf of the wife (and this is the circumstance I referred to just now) that owing to the accident of the assignment in favour of the wife having been executed in the State of New York, where the English doctrines of notice are not recognised or are not in force, the law which I ought to regard myself as administering is not the law of England, but the law of New York, at any rate as far as that assignment is concerned.

A number of cases have been cited to me, none of which are actually in point; in fact, I do not think they were at all in point on the actual question which I have to determine. The first case, *In re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219, merely decided that where there is a chose in action owing from persons residing in a particular country (in that case in Scotland), an assignment in that case by process of law of those choses in action, valid according to the law of Scotland, would be valid elsewhere. I do not think that case decided anything more. If it is of any value in assisting me in the present case (I do not think it is) it is rather in favour of the defendant Mrs. Selwyn than in favour of the plaintiff; but I do not think that is the point which I have to decide. The assignment in New York is valid, but what I have to determine in administering an English trust fund, constituted by an English testator who may be taken to have made his will with the English law in his mind, is, in what order am I to treat the several claimants who come here with charges on the trust fund? The doctrine of notice, as I understand it, is that till notice is given, the assignee of a share in a trust fund is not completely constituted a cestui que trust, and that the order in which the fund is to be administered is the order in which the several claimants claiming to be assignees completely constituted themselves cestuis que trust. That is the point which I have to determine.

Another case that was cited and a good deal relied on is *Lee* v. *Abdy* (*ante*, p. 279), which seems to me like *In re Queensland Mercantile and Agency Co.*, and merely decided this: that if a question arises

whether an assignment of a chose in action is valid according to the law where it is executed, that question will be determined by the law of the place where it is executed. The question in *Lee* v. *Abdy* was whether an assignment made by a husband to his wife, which according to the law of Cape Colony was for that reason void, was to be treated as a good assignment of an English policy of assurance.

I have listened to the citations from Foote, Dicey, and Westlake, but I do not think there is anything in those passages that actually guides me in what I have to decide in this case. The ground on which I decide it is that, the fund here being an English trust fund and this being the court which the testator may have contemplated as the court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the court which is administering that fund. On that footing it seems to me that the assignment to the plaintiff of August, 1894, is entitled to priority over the assignment to Mrs. Selwyn of June, 1891, by reason of the notice given by the plaintiff to the trustees of the will, and I must make a declaration to that effect.

NOTE P: THE ASSIGNMENT OF INTANGIBLE MOVABLES

VARIOUS views have been suggested as to the law which should govern the assignment of intangible movables. The view of Story and Phillimore, that the law of the creditor's domicile is the test, is a relic of the outworn maxim 'mobilia sequuntur personam', and need not be taken seriously to-day. Westlake (s. 152) and Dicey (3rd ed., rule 153) thought that the lex situs of the debt is the test. This view has been overruled by the majority of the Court of Appeal (*Republica de Guatemala* v. *Nunez*, *ante*, p. 281) and by Maugham J. in *Re Anziani*, [1930] 1 Ch. 407, at any rate so far as voluntary assignments are concerned. The objection to it is that though a debt may be regarded as situated in the place where it is properly recoverable (*New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101), that is presumably where the debtor resides and may be sued, the debtor may reside in more places than one and may be sued in places where he does not reside under R.S.C. Order XI. Cheshire, Wolff, and Falconbridge think that the proper law of the debt is the test. This view avoids problems of priorities between competing assignments, and also avoids the necessity for distinguishing between questions arising between debtor and creditor and questions arising between assignor and assignee. In most cases, however, the proper law of the debt coincides with the lex situs of the debt, and hence this view is inconsistent with the most recent authorities.

It is submitted that the key to the problem lies in distinguishing between (1) questions of assignability, governed by the proper law of the debt; (2) questions of the intrinsic validity of the assignment, governed by the proper

law of the assignment; (3) questions of priorities, governed by the proper law of the debt; and (4) questions of attachment or garnishment (involuntary assignment), governed by the lex situs of the debt. All the cases are consistent with this view.

(1) *Assignability.* The proper law of the debt determines whether the debt is assignable. English authority for this proposition is scanty, but it is clearly reasonable in principle, and is neatly illustrated by two American cases. In *Northwestern Mutual Life Insurance Co.* v. *Adams* (1914), 155 Wis. 335, it was held that a policy of life insurance made in Wisconsin was validly assigned in Minnesota, although by Minnesota law life insurance policies could not be assigned. Conversely, in *Coleman* v. *American Sheet and Tinplate Co.* (1936), 285 Ill. App. 542, it was held that an assignment in Illinois of future wages due under a contract of employment governed by Indiana law was invalid, since by Indiana law such assignments are prohibited. The proper law of the debt also determines whether the assignee takes subject to equities and whether notice of the assignment must be given to the debtor (*Kelly* v. *Selwyn*, *ante*, p. 286).

(2) *Intrinsic validity of assignment.* The intrinsic validity of an assignment is governed by the proper law of the assignment. Thus, that law determines whether the assignment must be in writing (formalities), whether an assignment to an infant or to the wife of the assignor is valid (capacity), and whether consideration is necessary (essential validity). These propositions are supported, not by the dicta, but by the decisions in *Lee* v. *Abdy* (*ante*, p. 279) and *Republica de Guatemala* v. *Nunez* (*ante*, p. 281). They are corollaries of the principle stated by Day J. in the former case that an assignment is a contract. It is true that the judges speak of the law of the domicile of the assignor and assignee and of the law of the place where the assignment was made. But it is submitted that this language must be interpreted broadly as meaning the proper law of the assignment. It can scarcely be doubted that Cape law and Guatemala law respectively were the proper laws of the two assignments in question.

Two qualifications must be noted. First, there is no reason to doubt that an assignment, like a contract, which complied with the formalities prescribed by either the proper law of the assignment or the law of the place where the assignment was made would be formally valid in England. Secondly, the question whether the assignee can sue in his own name or whether he must join the assignor is no doubt a question of procedure, and therefore governed by the lex fori, whatever be the proper law of the assignment or the proper law of the debt.

(3) *Priorities.* The priorities of competing assignments are governed by the proper law of the debt: *Kelly* v. *Selwyn*, *ante*, p. 286. Questions of priorities arise if there are two or more assignments, each intrinsically valid by its proper law, of a debt capable of assignment by its proper law. This was not the case in *Republica de Guatemala* v. *Nunez*, because each of the assignments was, for different reasons, invalid, and the money went to President Cabrera's creditors. It was the case in *Kelly* v. *Selwyn*, but there is some doubt as to the ratio of that case. Scrutton L.J. in the *Guatemala* case (*ante*, p. 286) thought that the ratio was that priorities are governed by the lex fori; but Warrington J. applied 'the

law of the court which is administering the fund', which is at least equally consistent with the proper law of the debt. In *Le Feuvre* v. *Sullivan* (1855), 10 Moo. P.C. 1, an English policy of insurance on the life of an assured domiciled in Jersey was assigned first in England to a creditor of the assured and then in Jersey to the wife of the assured. It was held that priorities were governed by English law, because the policy was 'in every sense an English instrument forming or evidencing an English contract'—i.e. clearly because English law was the proper law of the debt. In this case Jersey law was the lex fori, and therefore it is inconsistent with Scrutton L.J.'s explanation of *Kelly* v. *Selwyn*.

(4) *Attachment and garnishment.* The validity and effect of an attachment or garnishment of a debt are governed by the lex situs of the debt: *Re Queensland Mercantile Agency Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219.

CHAPTER IV

TRANSFER OF NEGOTIABLE INSTRUMENTS

BILLS OF EXCHANGE ACT, 1882, s. 72

Rules where laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance suprà protest, is determined by the law of the place where such contract was made.

Provided that—

(*a*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

(*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance suprà protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. Rules where laws conflict.

ALCOCK *v.* SMITH, [1892] 1 Ch. 238 (Court of Appeal) ALCOCK *v.* SMITH.

Appeal from a decision of Romer J.

LINDLEY L.J.: The question in this case is which of two persons is entitled to a sum of £350, being the produce of a certain cheque for £235 and a bill of exchange for £115. It will not be necessary to draw any distinction between the cheque and the bill, and, therefore, I will allude only to the bill. Lindley L.J.

The bill was drawn in the English language in England by an Englishman named Ellison on Messrs. Smith, Payne, & Smith, of London, bankers, and was made payable in London. It was drawn to the order of Messrs. Andresen & Co., who were merchants in Christiania, in Norway. The history of the bill is this. It was indorsed by Messrs. Andresen to a Mr. Meyer, and it was on the 11th of March indorsed by Mr. Meyer in blank, and was given by him to a gentleman of the name of Schiender for Arthur Alcock and the firm of J. F. Alcock & Co., which last firm consisted of John Forster Alcock and Arthur Alcock. It is important to bear in mind that it was a bill which, as it then stood with Meyer's indorsement upon it, was a negotiable instrument transferable to bearer. The Alcocks then held it by their agent Schiender. In that state of things, under a judgment obtained in Norway against Mr. John Forster Alcock, one of the judicial officers or ministerial officers in Norway (a person whom I will allude to for the sake of shortness as a sheriff) seized in execution, according to the law of Norway, this bill indorsed as it was, and sold it in accordance with the law of Norway. It was bought by a person of the name of Schjödt for Meyer, and on the 9th of May, Meyer sold it to Köpmansbank. It did not require any further indorsement, because it was sold as a negotiable instrument payable to bearer, and was bought by Köpmansbank as a negotiable instrument payable to bearer; and they bought it in the ordinary course of business bonâ fide and for value. At that time the bill was unquestionably overdue. One point which we have to consider is, what was the effect of the purchase by Köpmansbank of this bill in its then state and under the circumstances I have mentioned, bearing in mind that it was an overdue bill of exchange? Now, according to Mr. Schiender's

ALCOCK v. SMITH. Lindley L.J.

evidence, which is not contradicted or disputed, it is plain that, under the law of Norway, the judicial sale of that negotiable instrument 'transferable to bearer' (a circumstance to which I attach great importance) conferred a good title upon the purchaser. It is also proved by the other evidence that, according to the law of Norway, a person who bonâ fide purchases for value a bill of exchange, which bill is overdue, is not affected in regard to title as he would be affected by the law of England.

That being the state of things, and Köpmansbank having become the holders of that bill for value, I proceed to consider whether they are or are not entitled to recover and hold for themselves the money represented by the bill. It has been argued by Mr. Haldane and Mr. Farwell, that inasmuch as this was an inland bill transferred to them when it was overdue, although it was taken bonâ fide, they took it subject to all equities affecting the bill, and they say that Köpmansbank could not maintain an action in respect of that bill against the acceptor of it. That argument is based upon the fact that this was an English bill, and upon the combined operation of the Bills of Exchange Act, s. 72, sub-s. 2, which I will read presently, sect. 36, sub-sect. 2, and sect. 29, sub-sect. 2. Now, it is impossible in applying those sections to this bill and to the title of Köpmansbank to ignore the fact that they acquired their title under the judicial sale, and if due effect is given to that then it seems to me that, even looking at the matter in the narrowest possible point of view, Köpmansbank are entitled to recover this money from the acceptor.

Now, I will go through the sections with reference to the arguments which have been addressed to us. Sect. 72 of the Bills of Exchange Act relates to the conflict of laws, and the first part of it does not apply, but sub-s. 2 runs thus: 'Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill'—as this is—'is indorsed in a foreign country'—as this was—'the indorsement shall as regards the payer'—which I read as the acceptor—'be interpreted according to the law of the United Kingdom.' Now, this bill was indorsed in such a way, as it appears to me, that the indorsement was effectual whether you interpret according to English law or according to any other law. Then sect. 36, sub-s. 2, is important, because, treating this as an English bill covered by English law, it is applicable. Sub-sect. 2 says this: 'Where an overdue

bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.' That is to say, if you take an overdue bill you take it subject to any defect of title in the person from whom you got it. That gives rise to the question, Was there any defect in title in Meyer, from whom Köpmansbank got it? That must be considered. But Meyer got it under the judicial sale, and there was no defect at all. Now, 'defect of title' is a phrase introduced into the Bills of Exchange Act in lieu of the old expression 'subject to equities', which is an expression not adopted because the Act applies to Scotland as well as to England, and 'subject to equities' is an expression not known to Scotch law. Sect. 29, sub-sect. 2, says: 'In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.' The present case clearly does not come within those words. The only possible words under which it could come would be 'or other unlawful means'. But the means by which Meyer got the bill were not unlawful; they were lawful according to the law of the place where the transaction took place. Therefore, putting the case in the light most favourable to the appellants, Köpmansbank have a good title to this bill and the money represented by it, treating it as an English bill and applying the provisions of the Bills of Exchange Act, having regard, of course, to what took place in Norway.

Now, if that is so, we have only further to consider whether there are any equitable grounds for depriving those gentlemen of the money to which they have become entitled. The appellants put their case very forcibly in this way, that the judicial sale of the bill was subject to the claim of Arthur Alcock to eight-elevenths of this money; but how can that equity attach to a bill indorsed in blank, and so transferable to bearer? That may be a question between themselves, but it does not affect any person taking the bill. The bill is taken simply with notice that the sheriff, as I have called him, was selling. Now, what did the sheriff sell? He did not sell the bit of paper merely, but he sold the bill—that is to say, he sold the benefit of the contract represented by the paper which he handed over. What was that benefit, and what was the contract? The contract on

ALCOCK v. SMITH. Lindley L.J.

the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of England. I agree. But we must not ignore what took place in Norway. The argument on the part of the appellants is that we ought to shut our eyes to the mode and circumstances under which Meyer got the bill. If the mode and circumstances under which he got it were such as to give him a title in Norway, not only to the bill but to the benefit of the contract, then Köpmansbank are the lawful holders by the law of England, and there would be no defence to an action. The equity is displaced by the very same reasoning. You cannot enforce the equity as against the bonâ fide holder of a bill which is transferable to bearer, and of which he is the lawful holder.

With reference to the authorities, I do not think I need say much. The strength of the plaintiffs' case is that this was an overdue bill with notice of the defect in title. The answer is that there is no defect of title, and therefore there is nothing for the holders to have notice of. The cases of *Lebel* v. *Tucker* (1867), L.R. 3 Q.B. 77, *Lee* v. *Abdy* (*ante*, p. 279), and *Bradlaugh* v. *De Rin* (1868), L.R. 3 C.P. 538; 5 C.P. 473, do not appear to me to touch this case at all. We are asked to say on the authority of those cases that the court is to ignore a title which is good according to the law of the country where the bill has been sold. Those cases lay down no such principle. The difficulty of the appellants in this case arises from the fact that Alcocks, though they had been the lawful holders of the bill, had ceased to be so by the law of Norway. *Lebel* v. *Tucker* does not touch that, nor do any of the cases which have been referred to come near it.

On those short grounds, treating this to the fullest extent as a bill overdue when bought, and assuming that Köpmansbank are supposed to have had notice of any defect of title, the fact that there was no defect of title is a complete answer both at law and in equity. Therefore, I am of opinion that the learned Judge in the court below in this case was quite right, and that this appeal must be dismissed with costs.

KAY L.J.: It is admitted that if the bill and cheque had been Norwegian instruments the title of Köpmansbank would be unimpeachable. An overdue bill may be transferred according to Norwegian law without being subject to any undisclosed equities. As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the

law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicile. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law.

It has not been denied in argument that this is so. The cases on the subject are clear and consistent. In *Cammell* v. *Sewell* (*ante*, p. 270) the master of a Prussian vessel sold the goods of an Englishman, which were on board his ship in Norway, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of Norway, and it was held in the Exchequer Chamber that the law of Norway must govern the transaction, and that the property had passed to the purchaser. The authority of that decision was recognised in *Hooper* v. *Gumm* (1867), L.R. 2 Ch. 282, and by the House of Lords in *Castrique* v. *Imrie* (*post*, p. 359) and *Williams* v. *Colonial Bank* (1890), 15 App. Cas. 267.

Therefore, so far as the bill and cheque are to be considered as chattels, undoubtedly the property in them is now vested in Köpmansbank, and no one could recover the documents from them.

But the plaintiffs, admitting this, say, that this does not determine the right to the money due on the bill and cheque. They argue first, that the contract of the acceptor was to pay to the lawful holder according to the law of this country, and that Köpmansbank are not such lawful holders, or, secondly, that if they are, still by the law of this country, as at the time of the transfer to them, the bill and cheque were overdue, the latter having been in circulation an unreasonable time (sect. 36 of the Bills of Exchange Act, 1882); and that they took subject to the rights of the plaintiffs, who had a superior equity. . . .

But there is a circumstance in this case which carries it beyond the case of a mere indorsement in Norway of an English bill. The bill when indorsed in blank, and therefore payable to bearer, has been seized and sold by a judicial proceeding in Norway, which undoubtedly by the law of Norway gave a perfect title both to the documents and to the money due on them, and free from any equities whatever. The plaintiffs were represented in that proceeding by Schiender as their advocate, who resisted on their behalf; but they

ALCOCK v. SMITH. — Kay L.J.

have not ventured to appeal, as I understand they might have done. Even if an indorsement in Norway of an English overdue bill would not be free from equities, such a sale as this in my opinion would; and on that ground I agree that this appeal fails, and must be dismissed with costs.

LOPES L.J. delivered judgment to the same effect.

Appeal dismissed.

EMBIRICOS v. ANGLO-AUSTRIAN BANK.

EMBIRICOS *v.* ANGLO-AUSTRIAN BANK, [1905] 1 K.B. 677 (Court of Appeal)

Appeal from a judgment of Walton J.

The action was brought by Messrs. L. & M. Embiricos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque. On 6 March 1903 a Roumanian bank drew a cheque at Braila, in Roumania, on a London bank payable to the plaintiffs or order. The same day the plaintiffs at Braila specially indorsed the cheque to G. Embiricos & Co., a London firm, and wrote to them a letter which, with the cheque, the plaintiffs placed in an envelope addressed to G. Embiricos & Co. in London. The cheque was stolen from the envelope by a clerk of the plaintiffs. On 9 March 1903 the cheque was presented at the bank of Messrs. Schelhammer & Schatterer, in Vienna, by a person who desired that it might be cashed. It then bore the indorsement G. Embiricos & Co., in addition to the special indorsement to that firm by the plaintiffs. The indorsements were apparently regular and in order, but that of G. Embiricos & Co. was in fact a forgery, though Messrs. Schelhammer & Schatterer were ignorant of the forgery. They telegraphed to the Roumanian bank, and, having ascertained from them that the cheque was in order, they cashed it, and on the same day they indorsed it to the defendants and posted it to them in London, where the defendants cashed it at the bank on which it was drawn.

According to an affidavit made as to the Austrian law by a doctor of law of the University of Vienna, 'the holder of a cheque which he has bought bonâ fide without gross negligence and for value is identified as the proprietor of the cheque, and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen, and notwithstanding that the indorsement has been forged'.

Walton J. gave judgment for the defendants. He held, upon the

authority of *Alcock* v. *Smith* (*ante*, p. 293), that the transfer of the cheque in Vienna was governed by Austrian law, and gave the Vienna bank a good title to the cheque, which title they transferred to the defendants.

The plaintiffs appealed.

VAUGHAN WILLIAMS L.J.: Walton J. decided the case in favour of the defendants on the ground that, by the transfer of the cheque to the Vienna bank, a good title to the cheque, which the English court was bound to recognise, passed to the Vienna bank, and that that bank gave an equally good title to the defendants who, when they presented the cheque for payment to the bank on which it was drawn, were dealing with their own property and not with the plaintiffs' property. He pointed out that the only question in this action is between the original payees and the subsequent holders of the cheque, who derived their title to the cheque through an indorsement which had been forged. And that, inasmuch as under the English law no title could be made under a forged indorsement, but under the Austrian law the bonâ fide holder of a cheque, for which he has given value in ignorance of any flaw in the title of the transferor, is entitled to the cheque, although it has been previously stolen and the indorsements upon it have been forged, it became necessary to decide whether the validity of the transfer of this cheque ought to be governed by Austrian or by English law. Walton J. held that the question of the validity of the transfer ought to be governed by Austrian law, first, because it was decided by Romer J., and on appeal by the Court of Appeal in *Alcock* v. *Smith*, that the ordinary rule as to the transfer of chattels which is thus stated in rule 140[1] of Dicey's Conflict of Laws, that 'Assignment of a movable which can be touched (goods) giving a good title according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid', applies to a bill of exchange, and, I suppose, to any negotiable instrument; and Walton J. also seemed to be of opinion that his judgment could be justified by the words of s. 72 of the Bills of Exchange Act, 1882. For the learned judge said that if the 'interpretation' of the indorsement means the legal effect of the transfer by indorsement, it would cover this case.

I think that the view taken by Walton J. of the effect of the decision in *Alcock* v. *Smith*, that the rule that the validity of the

[1] See now rules 129 and 130.

EMBIRICOS v. ANGLO-AUSTRIAN BANK. — Vaughan Williams L.J.

transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by indorsement, is right; although in the case of *Alcock* v. *Smith* the transfer was not by indorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by the payee against an indorsee, who claims under a forged indorsement giving him a good title in the country where the indorsement was made.

But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby. I do not think that *Alcock* v. *Smith* decides this question; on the contrary, it seems to me that the judgments of Romer J. and the Court of Appeal both disclaim so doing; and, further, it seems to me that the law as laid down by Pearson J. in *In re Marseilles, &c., Land Co.* (1885), 30 Ch. D. 598, and by Lush J. in *Lebel* v. *Tucker* (1867), L.R. 3 Q.B. 77, 83, is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognised by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on indorsements valid by the English local law an argument might be raised that, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument

from whom he could not have recovered by process of law. User of a chattel by a person entitled to possession in such a manner would perhaps give a right of action for money had and received.

EMBIRICOS v. ANGLO-AUSTRIAN BANK. — Vaughan Williams L.J.

I, however, have come to the conclusion that as between the payees and these indorsees there is no cause of action for conversion, and that the judgment of Walton J. must be affirmed.

It is to be observed that our decision in the present case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of sub-s. 2 of s. 72 of the Bills of Exchange Act, 1882, that section is conclusive of the present case, and I do not think that s. 24 governs the case of an indorsement abroad.

ROMER and STIRLING L.JJ. delivered judgments to the same effect.

Appeal dismissed.

KOECHLIN *v.* KESTENBAUM, [1927] 1 K.B. 616, 889 (Court of Appeal)

KOECHLIN v. KESTENBAUM.

Appeal from a decision of Rowlatt J.

A bill of exchange was drawn in France by E. Vigderhaus upon the defendants in London to the order of M. Vigderhaus. It was sent to London, accepted there by the defendants payable at a London bank, returned to Paris, indorsed there by E. Vigderhaus, and discounted by the plaintiffs. On presentation for payment the defendants refused to meet it on the ground that it did not bear the indorsement of M. Vigderhaus as required by s. 32 (1) of the Bills of Exchange Act, 1882, but merely the indorsement of E. Vigderhaus in his own name.

Evidence was given that M. Vigderhaus had given authority to his son E. Vigderhaus to sign and indorse all cheques, bills, or commercial documents in his own name for account of M. Vigderhaus, and that by French law a duly authorized agent may indorse a bill in his own name and need not add the words 'per pro'.

Rowlatt J. gave judgment for the defendants. The plaintiff appealed.

SARGANT L.J.: As regards the first question, it seems to me that the judge had ample material upon which he was entitled to come to the conclusion that French law was as contended for by the appellants. It is quite clear, according to the evidence of the French expert, who is also a member of the English bar and who knew what he was talking about, that by French law an indorsement may be in the form employed in this case. That view is strengthened by the

KOECHLIN v. KESTENBAUM. — Sargant L.J.

evidence of the constant practice of M. Vigderhaus and in similar concerns, as given by the bank manager and by M. Vigderhaus.

The second point, I think, is really concluded by the decision in *Bradlaugh* v. *De Rin* (1868), L.R. 3 C.P. 538, adopted, as I think it is, by s. 72 of the Bills of Exchange Act, 1882. That decision, so far as the point of law is concerned, was not affected by the reversal of the decision in the Exchequer Chamber (1870), L.R. 5 C.P. 473, where the question was entirely one of fact. The decision of the Court of Common Pleas drew a marked distinction between a foreign bill, such as was there in question, and an inland bill, such as was being dealt with in *Lebel* v. *Tucker* (1867), L.R. 3 Q.B. 77, and it seems to me that the Legislature in 1882 adopted that view, and drew the marked distinction which had been thus recognized by the Court of Common Pleas in *Bradlaugh* v. *De Rin*. The result was that any one dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom he was originally liable as acceptor not merely a person to whom the transfer would have been good if made in England, but a person to whom the transfer by indorsement would be good if made according to the law of the country in which it was made. That is rendered perfectly clear by s. 72, sub-ss. 1 and 2, of the Act. The matter was carried probably further than was contemplated by the actual language of the sub-sections by the decision in *Embiricos* v. *Anglo-Austrian Bank* (*ante*, p. 298). Here we have a case which does not go nearly as far as that. In my judgment the question whether this bill could properly be indorsed in the name of the payee M. Vigderhaus only or could rightly be indorsed by the son, E. Vigderhaus, in his own name if he had authority in fact to do so is purely a question of form, and is therefore covered in terms by s. 72, sub-s. 1; but if it is not covered by that sub-section it is covered by sub-s. 2, in view of the very wide effect of the decision in *Embiricos* v. *Anglo-Austrian Bank*. It is said on behalf of the respondents that the contract of acceptance itself was merely to pay the original payee or some person to whom a transfer had been made by him personally. In my view that is to deal with the matter as if we were concerned with an inland bill and to neglect entirely the provisions of s. 72 with reference to foreign bills. If the indorsement in fact made is, according to the law of the place where it is made, sufficient to give a title to the indorsee, it appears to me that by the express terms of the Act the

indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce those liabilities can be transferred from the person originally entitled to them to some subsequent indorsee. In conclusion I wish to say that the decision of Rowlatt J. practically amounted to this, that, in order that there may be an effectual transfer entitling the indorsee to sue, it was necessary to have an indorsement which should be good both by the law of the place where it was made and by the law of England construed in the narrow sense of the municipal law of England. In my judgment that is unsound, and would in many cases introduce insuperable difficulties. The solution is to be found in this, that it is only requisite that the transfer should be made in accordance with the total law of England, which includes not only the municipal law but the law of the foreign country which is by the law of England and by the very terms of s. 72 recognized as being a law which the law of England will itself recognize.

BANKES L.J. and AVORY J. delivered judgments to the same effect.

Appeal allowed.

NOTE Q: NEGOTIABLE INSTRUMENTS

(i) Sub-ss. (1) and (2) of s. 72 of the Bills of Exchange Act, 1882, lay down the general principle that the validity of a bill of exchange and of each supervening contract associated with it depends on the lex loci contractus. Sub-s. (1) relates to form and sub-s. (2) to interpretation. The Act does not deal in express terms with matters such as capacity of parties or essential validity, nor with the proprietary as opposed to the contractual aspects of bills, notes, and cheques. In *Alcock* v. *Smith* (*ante*, p. 293) Romer J. held that 'interpretation' in sub-s. (2) is wide enough to cover legal effect, but this opinion was not adopted by the Court of Appeal in that case or (semble) in *Embiricos* v. *Anglo-Austrian Bank* (*ante*, p. 298). However, in *Koechlin* v. *Kestenbaum* (*ante*, p. 301) a wider effect was given to the sub-section. It is still arguable, however, that the transfer of a bill is governed not by s. 72 (2) of the statute, but by the general principles of the conflict of laws relating to tangible movables, i.e. the lex situs, which in the case of a negotiable instrument must necessarily coincide with the lex loci actus. The question whether the transfer is governed by s. 72 (2) or by the general rule of the lex situs would assume practical importance in cases where the proviso to the sub-section might apply: if the question in *Alcock* v. *Smith* had arisen 'as regards the payer' and not (as it did) as between indorsees, the court would have had to apply English law if it had regarded s. 72 (2), and not the lex situs, as applicable. Whatever justification there may have been in *Koechlin* v. *Kestenbaum* for treating the question as one of interpretation, it is hard to see how that term can be stretched to cover the effect of a forged indorsement (*Embiricos* v. *Anglo-Austrian Bank*) or of the indorsement of an overdue bill (*Alcock* v. *Smith*).

Sub-ss. (1) and (2) have undoubtedly altered the principle underlying the cases decided before the Act, under which the validity of indorsements of negotiable instruments was tested by the proper law of the original contract made by the acceptor of the bill or the maker of the note, i.e. the law of the place where the bill was drawn or the note was made. Thus in *Trimbey* v. *Vignier* (1834), 1 Bing. N.C. 151, the validity of an indorsement in France of a note made in France was governed by French law quâ the law of the place where the note was made; in *Lebel* v. *Tucker* (1867), L.R. 3 Q.B. 77, the validity of an indorsement in France of a bill of exchange drawn, accepted, and payable in England was governed by English law; and in *Bradlaugh* v. *De Rin* (1868), L.R. 3 C.P. 538, reversed on a point of fact, L.R. 5 C.P. 473, the validity of an indorsement in France of a bill of exchange drawn in France and accepted in England was governed by French law quâ the law of the place of drawing. There can be little doubt that if the converse case to *Lebel* v. *Tucker* had arisen before 1882 (i.e. a bill drawn, accepted, and payable in France, indorsed in England), the validity of the indorsement would have been tested by French law. But if such a case were to arise now the validity of the indorsement would be held to depend on English law, because the proviso to sub-s. (2), which states what the draftsman conceived to be the effect of *Lebel* v. *Tucker*, is limited to inland bills, i.e. to bills which are drawn within the British Islands and either payable therein or drawn upon some person resident therein (Bills of Exchange Act, 1882, s. 4). The result is that the law loses the harmony which it hitherto possessed by reason of the fact that analogous principles were held to apply to inland bills and foreign bills. It seems clear that the draftsman of the section misinterpreted the effect of the older cases, especially *Lebel* v. *Tucker*.

(ii) The provisos to sub-ss. (1) and (2) are exceptions to the main principles enunciated therein.

Proviso (*a*) to sub-s. (1) illustrates the refusal of English private international law to enforce the revenue laws of foreign countries.

Proviso (*b*) to sub-s. (1) may be illustrated thus: A bill issued in France does not express the value received as required by French law. The bill is sent to A in England who indorses it to B. B can sue A on the bill but cannot sue any of those who became parties to it in France.

The proviso to sub-s. (2) is an attempt to state the effect of *Lebel* v. *Tucker*, and still further narrows its ratio by introducing a new limitation to questions arising 'as regards the payer'. The effect was considered in *Alcock* v. *Smith*: if the question arises between two indorsees and the liability of the acceptor is not in question, the proviso is inoperative and the case falls within sub-s. (2).

(iii) The words 'subject to the provisions of this Act' at the beginning of sub-s. (2) refer to sub-ss. (3), (4), and (5).

(iv) The obscurity of the language used in sub-s. (3) has often been noticed: see e.g. Westlake, s. 231; Dicey, p. 697; Cheshire, p. 363.

(v) Sub-s. (5) may be illustrated thus: French law does not allow days of grace, as English law does. Consequently a bill drawn in Paris on London is entitled to three days of grace, while a bill drawn in London on Paris is not entitled to any.

For a full discussion (highly critical of the drafting of the Act) see Falconbridge, pp. 269–308; Dicey, pp. 678–701.

CHAPTER V

BANKRUPTCY

The fact that a debtor has been adjudicated bankrupt abroad does not preclude the court from making a receiving order against him in England, though it may be a discretionary ground for refusing to make such an order.

In re ARTOLA HERMANOS (1890), 24 Q.B.D. 640 (Court of Appeal)

In re ARTOLA HERMANOS.

THE firm of Artola Hermanos consisting of five brothers had its head office in Paris and carried on a banking, discount, foreign exchange, and general commercial business in France and elsewhere (including England). There was no evidence as to the domicile of the partners, but the court inferred that their domicile of origin was Spanish. In 1889 two partners resided in England, two in Paris, and one in Spain. In December 1889 the firm was declared bankrupt by the Tribunal of Commerce of the Seine in Paris and the appellant was appointed syndic. In January 1890 a creditor of the firm filed a petition in bankruptcy against the debtors in England and the official receiver was appointed interim receiver of the debtors' estate. The debts and assets of the debtors in England were both considerable. The French syndic moved to discharge the order appointing an interim receiver and to stay all further proceedings. The registrar dismissed the motion. The French syndic appealed.

FRY L.J.: The application made by the French syndic is of a double character. In the first place, he applies for the rescission of a receiving order. In the next place he asks for a stay of all further proceedings, and that the assets in the English bankruptcy may be handed over to the French syndic. Now, with regard to the receiving order, it appears to me plain that this court had jurisdiction, because the 6th section of the Bankruptcy Act, 1883, refers to the domicile of the debtor or his ordinary residence or permanent place of business for a year before the date of the presentation of the petition. It is not denied that the circumstance of residence in England is present in the case of two of the brothers. Is there then any ground on which it would be improper to exercise the jurisdiction of the court in pronouncing a receiving order? I will not say that a receiving order would be ex debito justitiae; but I think a receiving order ought to be pronounced where the conditions of the Act have been satisfied, unless there be some valid reason to the contrary.

In re ARTOLA HERMANOS. — Fry L.J.

Now in the present case no such reason has been made out. On the contrary, the presence of assets of the firm to a large extent in this country seems to me, as it seemed to Baggallay L.J., in *Ex parte Robinson* (1883), 22 Ch.D. 816, to be a strong circumstance in favour of the making of a receiving order. I think, therefore, that, on the merits, the receiving order ought not to be rescinded; but I further express at least my doubt whether the French syndic has any locus standi whatever, either to oppose the pronouncing of a receiving order in this country, or to apply for its rescission after it has been pronounced.

Turning to the second portion of the application, namely, that all proceedings in the English bankruptcy may be stayed, I will confess the difficulty which this class of case appears to me to create. Lord Eldon, I think, on more than one occasion described these cases as being very distressing cases, and something of the distress which he felt has, I think, remained to successive judges who have had to deal with these concurrent bankruptcies.

Three views with regard to what was the proper procedure of the court seem to me to have come out during the course of the discussion of the cases. One of those views is this, that where there are concurrent bankruptcies each forum is to administer the assets locally situated within its jurisdiction, each forum of course allowing all the creditors, wherever resident, to prove, but applying the doctrine of hotchpot so as to produce, so far as may be, equality between the proofs of the various creditors. Now no doubt in that mode of procedure there are several inconveniences, especially the possibility of double or triple proofs, but it may be that those inconveniences are less than the inconveniences of any other course. It certainly seems to me that the decision of the House of Lords in the case of *Ewing* v. *Orr-Ewing* (1883), 9 App. Cas. 34, tends to establish a similar principle with regard to the assets to be administered in administration actions, because in that case they asserted, if I understand the decision rightly, the jurisdiction of the forum in which the assets might be locally situate to administer those assets, although it may be that the law of the domicile may govern the mode of distribution. Now if that rule be applied, it is obvious the application to stay the proceedings must fail.

Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicile, that the forum of every foreign country, every country not of the domicile, shall act only as

accessory and in aid of the forum of the domicile. That, it is said, is the forum concursus, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it. If that view were to prevail then this present application fails.

Then there is a third view, which is the only one in which the application could be successful, and it is this, that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicile, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicile and yielding to the forum of the first country which happens to pronounce a man bankrupt: personal property is said to follow the person, and from that it follows that the forum of domicile has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgment, pronounced by the forum of the domicile, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicile but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction.

It seems to me, therefore, that the contention which, as I have already said, is the only one on which the application can succeed—that every other forum must yield to the forum of a country, in which there are assets, which first pronounces the bankruptcy—is one inconsistent with well-known principles of law. . . .

LORD COLERIDGE C.J. delivered judgment to the same effect.

Appeal dismissed.

The discharge of a debt under the bankruptcy law of a foreign country does not discharge the debt in England unless the foreign law was the proper law of the contract or unless the bankruptcy took effect under an Imperial statute (e.g. a Scottish or Irish bankruptcy).

GIBBS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

GIBBS *v.* SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX (1890), 25 Q.B.D. 399 (Court of Appeal)

Appeal from a decision of Stephen J.

The plaintiffs agreed through a London metal-broker to sell copper to the defendants, a French company. In an action by the plaintiffs for non-acceptance of the copper, the defendants pleaded that by a judgment of the Tribunal of Commerce of the Seine they had been pronounced to be in judicial liquidation; and that by French law the judgment operated to discharge the defendants from liability under the contracts.

LORD ESHER M.R.: It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say 'applicable to it as a contract' to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the

principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith* v. *Buchanan* (1800), 1 East, 6, it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicile is altogether outside the general principle that governs such matters, and cannot be supported. Is there any authority to that effect? I

GIBBS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX. — Lord Esher M.R.

think that the point has been decided by what Lord Kenyon said in *Smith* v. *Buchanan*. I agree with the observation of Mr. Westlake, who says that Lord Kenyon's view was that the defendant's domicile was immaterial, and I think that he put the case upon the principle that the law of the country of the contract was the law that governed not only the interpretation of the contract, but also the subsequent conditions by which it was affected as a contract. . . . It seems to me that in this case the plaintiffs were not bound by the French law; and therefore, assuming that the defendants would be discharged by French law, this case must be determined by the law of England. For these reasons I am of opinion that the judgment was right and should be affirmed.

LINDLEY and LOPES L.JJ. delivered judgments to the same effect.

Appeal dismissed.

CHAPTER VI

EFFECT OF MARRIAGE ON MOVABLES

Where there is a marriage contract or settlement, it governs the rights of husband and wife over all movables comprised within its terms which are then possessed or afterwards during the coverture acquired, even if there is a change of domicile, and even if the contract is implied by law.

DE NICOLS *v.* CURLIER, [1900] A.C. 21 (House of Lords)

IN 1854 Nicolas Daniel Thevenon, a Frenchman, married a Frenchwoman in Paris. In accordance with French law and custom the municipal officer who performed the ceremony formally called upon the parties to declare whether they had executed any contract of marriage, to which they both replied in the negative, when their answers were duly recorded on the usual 'Minute'; and it appeared from the evidence in the present case that no contract of marriage was executed.

At the date of the marriage the husband was a man of no means whatever, being a working coachmaker in Paris at wages. The wife was an assistant in a linen business, and had a little property of her own amounting altogether to about 120*l.* Soon after the marriage the husband and wife became managers of a wine and spirit business in Paris, which in a year's time they purchased from the proprietor for 240*l.*, the purchase-money being made up by the wife's property and the joint earnings realized by her husband and herself in carrying on the business. In December 1862 they sold that business for about 580*l.* In October 1863 they came over to England, and with a sum of about 400*l.*, which represented their sole property, set up in London a small restaurant, called the 'Café Royal', in Glasshouse Street, Regent Street. Ultimately under their joint management this restaurant expanded into a large establishment of the same name in Regent Street. Shortly after their arrival in England the husband changed his name to 'Daniel Nicolas de Nicols', and in 1865 took out letters of naturalization as a British subject under that name. He and his wife remained in England until his death, she actively assisting him in the management of the café. Out of that business, and from an interest in a valuable building site in London, the husband amassed a large fortune. On 28 February 1897 he died, having made a will dated 22 March 1895, in the English form, in which he described

DE NICOLS v. CURLIER.

himself as 'of the Café Royal, No. 68, Regent Street, in the county of Middlesex, and Regent House, Surbiton, in the county of Surrey, restaurant proprietor', and proceeded, 'I hereby declare that I am a domiciled Englishman naturalized in England in the year 1865.' Then, after appointing three persons his executors and trustees and bequeathing various legacies, he devised and bequeathed to them his residuary real and personal estate in trust for sale, and to hold the proceeds upon trust for his wife for life, and after her death upon trust for his daughter (the only child of the marriage), her husband and children. The testator was at his death possessed of property of the total value of about 600,000*l.*, comprising considerable freehold and leasehold properties, besides investments in numerous stocks and shares. It was said that he also had 100,000*l.* worth of wine in France. There was only one child of his marriage, a daughter, who was married and had several children, of whom one, a daughter, was now the wife of the Marquis de Bruille.

This was an originating summons taken out by Madame de Nicols, the testator's widow, against the executors and trustees of his will, his daughter and her children, to ascertain (amongst other things) what were the rights and interests of the plaintiff in the real and personal estate of her late husband, the testator, by reason of their having married without any marriage contract or settlement, the parties being at the time domiciled in France. Subsequently the question for decision was formulated in chambers as follows: 'Did the change of domicile alter the legal position of the parties to the marriage in reference to property?' The summons was then adjourned into court for argument on this question, and now came on for hearing. Upon the summons being opened it was arranged that the argument should, for the present, be confined to the effect of the change of domicile on the testator's 'movable goods' only.

Kekewich J. decided in favour of the widow, [1898] 1 Ch. 403. His decision was reversed by the Court of Appeal, [1898] 2 Ch. 60. The widow appealed.

LORD MACNAGHTEN: The question for your Lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand it is contended that the change of domicile from French to English destroyed the community altogether, and, therefore, that the testator's will operated upon the whole of the

property vested in him which, but for that change, would have been common. On the other hand it is said that the community continued notwithstanding the change of domicile, and that Mr. De Nicols remained bound by the article of the Code Civil, which provides that a testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley* v. *Hog* (1804), 4 Paton, 581, which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley* v. *Hog* for the moment, the only question would seem to be what was the effect according to French law of the marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an ante-nuptial contract in writing are placed and stand by the sole fact of the marriage precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in arts. 1401 to 1496 in Title V of the Code Civil, headed 'Of Marriage Contracts and the respective rights of spouses'.

In support of this conclusion, M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows:—'Tables Générales [Contrat de Marriage] paragraphe 8.' 'The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicile or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicile subsequently to the marriage.' The case was this: An Englishman and an Englishwoman, a Mr. and Mrs. Boyer, were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next of kin. An action was brought

DE NICOLS v. CURLIER. — Lord Macnaghten.

for the return of the duty. The tribunal of Lille ordered repayment, holding that 'the matrimonial compact in respect of property is as immutable as the marriage itself, of which it is an accessory'. The revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations —that 'the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property', and that 'the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune'.

Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley* v. *Hog* as to the effect of an English marriage without a settlement, it indicates, I think, the view which, according to French law, would be taken of the compact as to property constituted by a French marriage under the Code Civil without an ante-nuptial agreement.

The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavours to minimise its effect by treating it as a self-evident proposition—as in fact being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicile or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicile. Why should the obligations of the marriage law, under which the parties contracted matrimony, equivalent according to the law of the country where the marriage was celebrated to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicile and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman, having married in England without a settlement, go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicile the husband has 10,000*l.* of his own. Why should his ownership of that sum be impaired or qualified because he

settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods in France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And the community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley* v. *Hog* compelled them to decide in favour of the executors. Mr. and Mrs. Roger Hog, an Englishman by domicile and an Englishwoman, intermarried in England without a settlement. Mr. Hog made a fortune in England, settled in Scotland and became domiciled there. After this change of domicile the wife died in the lifetime of the husband. Some years later the husband died a domiciled Scotsman. There was a good deal of litigation as to the administration of Mr. Hog's estate, and there were appeals to this House. In one of these appeals, among other things, this House determined that Mrs. Lashley, who was one of the children of the marriage, had 'a claim in right of her mother the wife of the said Mr. Roger Hog, who at the time of her death had his domicile in Scotland, to a share of the movable estate of her father at the time of her mother's death'.

No doubt if the law had not been altered by the Act 18 Vict. c. 23, s. 6, that decision would be binding upon this House in a similar case. But when you are asked to apply the decision to a case where the circumstances are different, it seems to me that the proper course is to ascertain, if you can, the principle of the decision, and then to see if that principle is applicable to the circumstances of the case under consideration. This is the case of a French marriage with a settlement prescribed and constituted by the law of the land and followed by naturalization in a foreign country. *Lashley* v. *Hog* was the case of an English marriage without a settlement and a change of residence to another part of the United Kingdom.

Now, what was the principle on which Lord Eldon proceeded? After a long discussion Lord Eldon comes to the point by asking this question: 'Why should it be thought an unreasonable thing that where there is no express contract the implied contract should be taken that the wife is to look to the law of the country where the husband dies for the right she is to enjoy, in case the husband thinks

DE NICOLS v. CURLIER. — Lord Macnaghten.

proper to die intestate?' Then his Lordship goes on to say: 'This has been the principle, which it seems to me has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted, and not being aware that there has been any decision which will countervail this; thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me attending to the different sentiments to be found in the text-writers upon the subject that it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband whom by the marriage contract in this instance she is bound to obey.'

I may observe in passing that in that passage Lord Eldon was referring to the difference of practice in the administration of intestates' effects then prevailing in the different provinces of York and Canterbury, and also to a previous decision in the case of *Lashley* v. *Hog* on the question of legitim. It is not, I think, very easy to see how the principle which Lord Eldon selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicile be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next of kin of his wife. It seems to me that the result can only be reached by one or other of two alternatives. Either it must be held that the implied contract on the part of the husband is that in case of a change of domicile the wife shall enjoy all the rights of a woman married in the country where the new domicile is established, and that he will surrender in her favour so much of his rights as may be inconsistent therewith; or else it must be assumed that marriage in Scotland is not required to create communion of goods, but that communion of goods is incidental to the status of married persons in Scotland; or, as Lord Eldon puts it, 'the law of Scotland "recognises" communion of goods "in the married state" '.

Now, if that assumption be necessary in order to support Lord Eldon's conclusion in *Lashley* v. *Hog*, it is obvious that there is so wide a divergence between the law of Scotland, or what is assumed to be the law of Scotland, and the law of France as to make the decision inapplicable to the present case. If, on the other hand, Lord Eldon's conclusion is a legitimate extension or development of the

principle on which his argument is founded, it seems to me that there is no room for the application of the principle in the circumstances of the present case. The principle, as Lord Eldon explains, is founded on the notion that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicile of the husband. Lord Eldon admits, and it was conceded at the bar, that, if there had been a written contract dealing with the whole property of the spouses present and future, the principle of *Lashley* v. *Hog* could not apply. Now the effect of what took place on the occasion of the French marriage, so far as it amounted to a compact in respect of property, must, I think, be determined by French law; and it has been proved by the evidence in this case that what did take place was to all intents and purposes, according to the law of France, equivalent to a written contract.

It appears to me, therefore, that the case is not governed by the decision in *Lashley* v. *Hog*, and I think the appeal ought to be allowed.

LORDS HALSBURY, MORRIS, SHAND, and BRAMPTON delivered judgment to the same effect.

Appeal allowed.

The essential validity of a marriage settlement or contract is governed by its proper law. The proper law is presumed to be (but is not necessarily) the law of the matrimonial domicile.

DUKE OF MARLBOROUGH *v.* ATTORNEY-GENERAL, [1945] Ch. 78
(Court of Appeal)

Appeal from Vaisey J.

This originating summons taken out by the tenth Duke of Marlborough raised the question whether, on the true construction of a settlement, dated 6 November 1895, and executed in New York on the occasion of the marriage between the ninth duke and Miss Consuelo Vanderbilt (now Madame Balsan) and in the events which happened, estate duty became payable on or in respect of the funds therein comprised by reason of the death of the ninth duke on 30 June 1934. Miss Vanderbilt was the daughter of Mr. W. K. Vanderbilt, a citizen of the United States domiciled in New York. At the time of her marriage she was a minor. The settlement comprised a fund of two and a half million dollars in the stock of an American railway, and no English property at all. There was also a covenant by Mr. Vanderbilt to settle an annual sum of $100,000 for the wife's separate

DUKE OF MARLBOROUGH v. A.-G.

use without power of anticipation during the joint lives of himself and the wife, and a covenant for the payment by his executors on his death of a further $2,500,000. There was a covenant for the settlement of the wife's after-acquired property 'with a minimum of £10,000'. The trustees were Mr. Vanderbilt and the Hon. Ivor Churchill Guest (afterwards Lord Wimborne). The investment clause provided a wide range of British and American securities in which the trustees might invest. In fact, the funds had always been invested in American securities, and the administration of the trust had taken place in America, but it was the intention of the parties that Miss Vanderbilt should marry a domiciled Englishman and that the matrimonial domicile of the parties should be English. The settlement contained a covenant that the husband and wife would as soon as possible take all necessary steps to procure the approval of the Chancery Division of the English High Court of Justice under the Infants' Settlements Act, 1855. Provision was made for the case of the court refusing to approve, and for the possibility of the wife repudiating the settlement. On 27 January 1896 Chitty J. in chambers sanctioned the settlement. On the death of the duke the question arose whether for the purpose of succession duty (and therefore of estate duty) the settlement was to be treated as an American or an English settlement. Vaisey J. held that it was an English settlement, and that both succession duty and estate duty became payable thereon on the death of the ninth duke. The tenth duke appealed.

The judgment of the court (Lord Greene M.R., Finlay and Morton L.JJ.) was delivered by

LORD GREENE M.R.: . . . Counsel for the duke and for the Crown were in agreement in submitting that in the case of a marriage settlement the question whether succession duty is payable under s. 2 of the Succession Duty Act, 1853, is to be answered by reference to the law governing the settlement—in other words, the proper law of the settlement. They agreed that duty attaches if, and only if, the proper law of the settlement is English (or Scottish as the case may be). . . .

It may well be the case that the proper law of a settlement can be changed by subsequent events, but we do not see how this can happen without the concurrence of the beneficiaries agreeing to a change in the proper law and thereby, in effect, making a new settlement. It cannot, we think, be effected by a change in trusteeship. . . . In determining what is the proper law of the settlement the nature

and situation of the property settled is, no doubt, a matter to be taken into consideration, but the relevant date for this purpose can only be the date of the settlement itself since we do not see how a change, for example, from foreign investments to English investments can turn what was originally a foreign settlement into an English settlement. As in the case of trustees, so in the case of investments a change may be quite fortuitous and cannot affect the question what law governs the settlement. . . . We do not ourselves think that in the case of a marriage settlement what we may call the notional character or location of settled property (which, as we have said, is a relevant consideration) is to be ascertained by reference to the rule 'mobilia sequuntur personam'. That character and location is, we think, a relevant consideration for what it is in fact, not for what (for some purposes) it notionally is by virtue of a conventional rule of law. In the case of a wife who acquires the domicile of her husband on marriage it does not appear to us to be right to attribute to personal property which she settles a character and location by reference to her antenuptial domicile which ex hypothesi is going to be changed immediately after the marriage takes place. Moreover, in the case of both spouses, the matrimonial domicile is the one which must be taken to be in their contemplation when they execute the settlement. For these reasons, although, as we have said, the character and location of the settled property are relevant matters to be taken into consideration in deciding what is the proper law of the settlement they are not, in our opinion, to be ascertained by reference to anything but the true facts relating to the property. . . .

We have come to the conclusion that in the case of a marriage settlement succession duty is exigible only where the proper law of the settlement is English (or Scottish) law. The question, therefore, in the present case is whether that law is the law of England or the law of the State of New York. On what principle is it to be answered? On the same principle, as it seems to us, as a similar question arising in the case of any other personal contract. For this we cannot do better than quote the words of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202, 212: 'When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention it is necessary and legitimate to take

DUKE OF MARLBOROUGH v. A.-G. — Lord Greene M.R.

into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties.' At the outset of the inquiry in the present case lies a question as to the admissibility of certain direct evidence as to the actual intention of the parties, particularly the intention of Mr. W. K. Vanderbilt himself. We cannot see on what principle evidence of this character is admissible and counsel for the duke was unable to refer to any case in which it was admitted for the purpose of determining the proper law of a contract. The language of Lord Watson appears to us quite clearly to imply that such evidence is inadmissible. The question what law the parties to a contract contemplate as governing its meaning and operation is, we venture to think, a question of construction the answer to which depends, as Lord Watson says, on 'their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms'. For this purpose, all such evidence of the circumstances as is generally admissible for the purpose of construing a written contract is admissible to ascertain its proper law. Direct evidence of intention is, in our opinion, clearly inadmissible for that purpose.

When we turn to the settlement in this case and such circumstances as are admissible, we find the following matters to be considered. Miss Vanderbilt, the settlor of the railway stock, was at the date of the settlement domiciled in the State of New York but the matrimonial domicile of the parties was clearly to be English. The securities which she settled were American securities, but the terms of the settlement permitted their sale and the re-investment of the proceeds in English securities. Mr. W. K. Vanderbilt himself was domiciled in the State of New York. Of the two trustees, one was Mr. W. K. Vanderbilt, the other was Mr. Ivor Guest, a domiciled Englishman resident in England, so that, presumably, both the courts of the State of New York and the English court would have been competent to enforce the trusts of the settlement. The settlement was executed in New York in triplicate, one part being handed to the English trustee, who brought it to England. For some reason he did not have it stamped, but this can have no bearing on the question what is the proper law of the settlement. The settlement itself was drafted in English form. Taking into account these considerations alone and attaching particular weight to the fact of the matrimonial domicile being English, we should have had little hesitation in deciding that the proper law of the settlement was English, but there are certain provisions in the

settlement which appear to us to place this beyond all possible doubt. The first is the reference to 'the statutory power of appointing a new trustee', a phrase which would be quite meaningless if the law of the State of New York were contemplated. The next provision is the special indemnity given to the trustees 'in addition to the indemnity given by law to trustees'. The law referred to can only be the law of England since the evidence shows that the law of the State of New York, although it recognises the validity of a contractual indemnity to trustees, does not of itself provide for any indemnity. The last provision is that for the making of an application to the English courts under the Infants' Settlements Act with a view to making Miss Vanderbilt's settlement binding on her by English law. It is true that this only affects her own part of the settlement. It points, however, quite clearly to English law as being the proper law of the settlement so far as her part in it was concerned, and we can see no reason for thinking that Mr. W. K. Vanderbilt's part of the settlement was intended to be governed by a different law to that which was to govern the settlement of her property by his daughter. . . .

Appeal dismissed.

In re BANKES, [1902] 2 Ch. 333 (Chancery Division)

In 1877 Kate Gruinard Anderton, a widow, domiciled in England, became engaged to be married to Angelo Favaroni, an officer in the Italian army. At that time she was possessed of 4,000*l.*, and, in order to meet the requirements of the Italian Government with reference to the marriage of officers, she deposited 1,000*l.* with the military authorities in that country. On 28 March 1878 she and Favaroni executed in Italy a marriage settlement in English common form, whereby it was agreed that the trustee should hold the remaining sum of 3,000*l.* in trust after the marriage, to permit it to remain in its then state of investment or call in and invest it, and pay the income during the joint lives of herself and Favaroni to her for her separate use without power of anticipation; and after the death of either of them to the survivor, and then for the children of the marriage; and subject thereto, if Mrs. Favaroni survived her husband, upon trust after his death for her, her executors, administrators, and assigns; but if he survived her, then after his death as she should by will or codicil appoint; and in default of appointment, in trust for such person or persons as under the statutes for the distribution of the effects of

In re BANKES. intestates would have become entitled thereto at the decease of Mrs. Favaroni had she died possessed thereof intestate and without having been married.

The settlement contained a covenant by Mrs. Favaroni to settle her after-acquired property.

The marriage took place on 28 July 1878 at Florence, and Mr. and Mrs. Favaroni lived in Italy continuously after that time, and were domiciled there. There were no children of the marriage. By a decree dated the 8th and registered on the 28th of March, 1898, of the Civil and Criminal Court of Florence, the court approved of the official report, declared by the President of the Court, of the legal voluntary separation which had taken place between Mr. and Mrs. Favaroni, subject to certain conditions, and ordered the execution of the report. Since the date of the decree Mr. and Mrs. Favaroni had lived apart from one another.

On the death of her mother in 1899 Mrs. Favaroni became entitled to certain legacies bequeathed by the wills of her father and mother. Questions arose whether these legacies were caught by the agreement to settle after-acquired property contained in the settlement, or could be paid and transferred to Mrs. Favaroni on her separate receipt.

The trustee of the settlement commenced an action to determine these questions, and claimed a declaration that the 1,000*l.* legacy was subject to the covenant, and ought to be paid to him; and that the property bequeathed by Mr. Bankes was also subject to the clause. There was evidence that according to Italian law the settlement was void because it was not executed before a notary, and because it altered the order of succession under that law; that after marriage the husband and wife remained entitled to their respective fortunes as before; that this position could not be affected by a settlement unless it was attested by a notary; that the separation had no effect upon the individual rights of property; and that the marriage continued after the separation.

BUCKLEY J.: The question I now have to determine is whether to this settlement, which was executed on March 28, 1878, the English law or the Italian law is to be applied.

The relevant facts are these: the document is in the English form; it contains this covenant to settle after-acquired property, which would be wholly inoperative if Italian law were applicable to the

case. Beyond that the instrument as a whole would, according to the Italian law, have been perfectly invalid, for the evidence is that, inasmuch as it openly violates the legal order of succession established by Italian law, it can have no effect at all in Italy. The further fact is that the wife's domicile was English, and this document provides that the settled fund, which was an English mortgage, if realized and reinvested, should be reinvested in English investments. This is therefore an instrument dealing with the property of a lady who was English, dealing with property which was English, providing that in case that particular property changed its form the new form which it assumed should be English, the whole contained in a document which is in the common English form, with the further fact that unless the English law is to be applied the whole thing was invalid, and might have been put behind the fire the moment it was executed, because in Italian law it had no effect at all. It seems to me that upon those facts I ought to arrive at the conclusion that the parties intended to contract according to the English law. The general proposition, as stated in Dicey's Conflict of Laws, at p. 653, is this: 'A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicile.' The matrimonial domicile here was Italian, no doubt, so that primâ facie this ought to be construed with reference to the law of the matrimonial domicile. But is there reason to the contrary? It seems to me, on the facts I have mentioned, there is reason to the contrary. I therefore think the English law, and not the Italian law, ought to be applied.

Then this is further argued—that although according to the English law the lady covenanted that she would at a future time so dispose of her after-acquired property as that it would come within the settlement, yet when she married an Italian she acquired an Italian domicile, and according to the Italian law such a covenant is invalid, and that therefore, upon the doctrine of *Viditz* v. *O'Hagan* (*post*, p. 324), she could not when the covenant fell to be performed be called upon to perform it. It seems to me that is not so. In *Viditz* v. *O'Hagan* the point was that the settlement was executed by an infant who could not bind herself, and the question was whether, by acts done after attaining majority, and after a foreign domicile had been acquired, there had been such an affirmation of the settlement as that it became binding; in other words, the settlement when executed was nothing, and, unless the English law as to affirmation and confirmation

In re BANKES. — Buckley J.

applied, it never became binding. Now, here, if I am right, the settlement at the outset was binding because it was executed by a person competent to bind herself. Then, if I am entitled to treat the English law as being applicable to it, she could according to our law bind herself in respect of her after-acquired property, and although it took the form of a covenant and not of an assignment, that would make no difference. On that ground it seems to me the covenant was effectual. I therefore hold that this matter is throughout to be governed by English law.

Capacity to make a marriage settlement contract is governed by its proper law.

VIDITZ v. O'HAGAN.

VIDITZ *v.* O'HAGAN, [1900] 2 Ch. 87 (Court of Appeal)

Appeal against the decision of Cozens-Hardy J.

In November 1864 the Honourable Frances Netterville, then aged 18, the only child of Viscount Netterville, an Irish peer, was married at Bern in Switzerland to Mr. Viditz, an Austrian. By marriage articles under seal in English form dated 24 November 1864, and executed before the marriage at the British Legation at Bern, and made between Mr. Viditz of the first part, the Honourable Frances Netterville of the second part, trustees of the third part, and Viscount Netterville of the fourth part, it was declared and agreed that all personal property to which the wife was then entitled or to which she might become entitled during the joint lives of the husband and the wife should be vested in the trustees upon the usual trusts for the benefit of the wife for life, and after her death upon trusts for the issue of the marriage, with an ultimate trust for Viscount Netterville absolutely.

The husband was domiciled in Austria before and after the marriage and it was contemplated that the parties should live in Austria, as in fact they did. Mrs. Viditz attained 21 on 5 November 1867. Subsequently she became entitled to various sums of money and executed various documents appointing new trustees of the settlement of 1864 and, under a power in the settlement, appointing one fourth of the trust funds to one of her daughters.

In 1893 she and her husband executed in Austria and in accordance with Austrian law a notarial act by which they purported to revoke the deed of 1864 and to vest in Mrs. Viditz the unrestricted administration of all her property.

In 1896 Mr. and Mrs. Viditz and their four children commenced this action against the trustees of the settlement claiming a declaration that by virtue of the notarial act of November 1893 the deed of 1864 was revoked and was void by Austrian law.

Expert evidence was given to the effect that by Austrian law the marriage articles of 1864 were void, not having been executed as notarial acts; that children do not acquire vested interests under the marriage contracts of their parents, but only an expectancy; that a husband and wife have a right to revoke their marriage contract, notwithstanding the birth of issue and acts of ratification, and that this right of revocation cannot be waived and is not lost by lapse of time.

Cozens-Hardy J. held that the marriage articles were valid and were governed by English law, and that the wife, not having repudiated them within a reasonable time after she had attained twenty-one, was absolutely bound by them.

The plaintiffs appealed.

LINDLEY M.R.: Two questions arise. The first is, whether, upon the true construction of the marriage articles of November, 1864 (assuming that they are binding on the wife), the sum of 5,000*l.*, which is payable to her under the compromise of the probate action, is or is not comprised in the articles. (Having held that it was not, his Lordship continued:) This brings me to the second point, which is a much more difficult one, namely, whether the settlement has or has not become binding on the wife. She was an Irish lady, and was under twenty-one when she executed the marriage articles. They were executed in contemplation of her marriage with an Austrian gentleman, and it was contemplated that after their marriage they should (as they in fact did) live in Austria; in other words, that the wife should become domiciled in Austria, which was the domicile of the husband.

Now, according to English law, this settlement by her was a voidable contract in the sense explained by the House of Lords in *Edwards* v. *Carter*, [1893] A.C. 360. After the marriage she lived with her husband in Austria, and in 1867 she became of age. By the Austrian law she was unable to ratify or confirm this contract; she could always repudiate it, but could never ratify it, i.e., deprive herself of the right to repudiate it. This was the case in *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, but it was not so in *Edwards* v. *Carter*. We have to consider what is the consequence of that. In the course of her

VIDITZ v. O'HAGAN. — Lindley M.R.

married life she executed some documents which, if they are to be governed by English law, clearly amounted to a ratification of the settlement. By the Austrian law these documents were invalid in so far as they purported to be irrevocable ratifications.

The position is a simple one. This lady never had, either before or after her marriage, power to make an irrevocable settlement. Can we in those circumstances hold that the settlement has become irrevocable? That is the paradox put to us. Cozens-Hardy J. has taken this view of it. He says, first, that, upon the authority of *Van Grutten* v. *Digby* (1862), 31 Beav. 561, this was an English settlement to be governed by an English law, and that by the English law as expounded by the House of Lords in *Edwards* v. *Carter* (which affirmed a decision of this court) a covenant in a marriage settlement by an infant or a settlement made on his marriage by an infant is voidable, and it is binding on him unless it is repudiated within a reasonable time after he attains twenty-one. It is said that this lady always had at all events power to repudiate the settlement—she could do that by Austrian law—and that, inasmuch as she did not repudiate it within a reasonable time after she attained twenty-one, the contract has become irrevocable. Is that reasoning sound? I think it is not, and for this reason. In the first place, as regards *Van Grutten* v. *Digby*, the point which we have now to consider did not arise for determination. There was no question there about incapacity to contract. There was a settlement made by persons of mature age and binding upon them when it was made. Romilly M.R. was clearly right in saying that that contract must be governed by the law of England, regardless of any change of the domicile of the parties afterwards. But in the present case the difficulty arises from the incapacity to contract, and that difficulty, as it seems to me, is not touched and still less governed by *Van Grutten* v. *Digby*.

Now, what is the effect of the English law as expounded by the House of Lords in *Edwards* v. *Carter*? What is the theory of it? The theory is, I apprehend, this—that there are some contracts of infants which by English law are absolutely void. There are a few (not a great many) contracts which in the view of English law cannot possibly be for the benefit of the infant—take a bond with penalties as an illustration—and they are void. An infant cannot so contract. The great bulk of infants' contracts are only voidable. What does that mean? It means that when the infant comes of age he can elect either to affirm or to disaffirm the contract. If he does nothing within

a reasonable time after he attains twenty-one, the presumption is that he has affirmed the contract. The contract is binding and has been binding on him ever since he attained twenty-one, unless he proves the contrary by repudiating it within a reasonable time. But I think it would be an entire mistake to apply that part of English law which relates to repudiation within a reasonable time if you shut out the other part which relates to the ability to ratify.

Now, by the alteration of the wife's domicile in this case her ability to ratify her contract was lost. Ought we then to apply what I may call the mutilated English doctrine relating to infants, and to say that this contract has become irrevocable because it was not repudiated within a reasonable time? It seems to me that this would be contrary to good sense, and it would land us in the paradox which I have already mentioned, namely, that the contract had become irrevocable although the lady never had, either before or after she was married, the capacity to enter into an irrevocable contract.

As to the authorities, the nearest case to the present which has been cited, and the nearest which I know, is *Cooper* v. *Cooper*, in which a very similar difficulty had to be met by the House of Lords, but the question of reasonable time did not receive attention. In that case a lady did succeed in repudiating a marriage settlement made when she was an infant after the lapse of much more than a reasonable time, if you shut out of consideration the change of her domicile between the execution of the settlement and the repudiation. The question of reasonable time was not discussed there, but so far as it goes the case is in favour of the present appellants.

In my opinion, the effect of the change of domicile was that the English doctrine of reasonable time became inapplicable by reason of the impossibility after that change of the wife's effectually ratifying her contract. An alternative view of the case (perhaps it is only the same view in another shape) is that the effect of the change of domicile was to enlarge the reasonable time for repudiation. This may not perhaps be quite so satisfactory a way of putting it; but I confess I do not see how it can be said that a reasonable time for repudiation had expired when there was no possibility of her doing anything else but repudiate. However, I think the former is the truer view, and any other view would be difficult to reconcile with *Cooper* v. *Cooper*.

I may refer to the observations of Lord Watson in that case. He said: 'Being of opinion that the capacity of the appellant to bind

VIDITZ v. O'HAGAN. — Lindley M.R.

herself by the marriage contract must be determined by the law of England, I agree with your Lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot, during minority, effectually subject herself to any contractual obligation which cannot be shewn to have been for her benefit. She may ratify the contract, after attaining majority, and so become liable to implement it, but, in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation inter virum et uxorem.' That, so far as it goes, although it does not quite touch the point, appears to me an authority in favour of the conclusion at which I have arrived.

I think, therefore, that the appeal must be allowed, and a declaration made in accordance with the plaintiffs' claim.

RIGBY and COLLINS L.JJ. concurred.

Appeal allowed.

NOTE R: THE EFFECT OF MARRIAGE ON MOVABLES

THE effect of marriage on the movable property of the spouses differs in accordance with whether there is, or is not, a marriage contract or settlement.

1. *When there is no contract or settlement*

The governing principle here is that the effect of marriage on the rights of the husband and wife to each other's movables, whether possessed at the time of the marriage or subsequently acquired, is determined by the law of the matrimonial domicile, i.e. the law of the husband's domicile at the moment of the marriage. Dr. Cheshire prefers to say that the law of the intended matrimonial home governs. 'Everything should hinge on intention' (p. 652). It is submitted that there are serious practical difficulties in this view, which is not supported by any English authority. It substitutes the vague conception of 'home' for that of domicile, which, however difficult it may sometimes be to determine, is at least a term of art. Moreover, what if the husband and wife do not implement their intention to change their 'home' until a month—or a year—after the ceremony? Where is the line to be drawn? *Collis* v. *Hector* (1875), 19 Eq. 334, is no authority for Dr. Cheshire's view, for in that case there was a marriage contract.

What happens if the domicile changes during the marriage? It used to be thought that the law changes too. But this view rested on the unsatisfactory Scots case of *Lashley* v. *Hog* (1804), 4 Paton 581, which was adversely criticized in *De Nicols* v. *Curlier* (*ante*, p. 311). It is now generally agreed that a change of domicile does not necessarily affect the rights of the parties. Whether it does so or not depends on whether the effect of marriage according to the law of the

matrimonial domicile is to confer vested rights (e.g. the old rule of English common law) or merely inchoate rights (e.g. a spes successionis). In the former case a change of domicile is irrelevant: rights have vested, and ought not to be divested by an act which one party (the husband) can effect without the consent of the other. But new acquisitions made since the change of domicile will be subject to the law of the new domicile, since there can be no vested rights in hypothetical future acquisitions. If, however, the effect of marriage according to the law of the matrimonial domicile is to confer a mere spes successionis, the rights of the spouses will depend on the law of the domicile at death of the one who dies first: it is really a question of succession (*Re Groos*, [1915] 1 Ch. 572). The distinction between vested and inchoate rights is accepted by Dr. Cheshire, but *Chiwell* v. *Carlyon* (1897), 14 S.C. 61, the case on which he relies, is scarcely an impressive authority, because it dealt with land.

2. *Where there is a contract or settlement*

Here the terms of the contract (assuming it to be valid) govern the rights of husband and wife to all movables within its terms which are then possessed or subsequently acquired, notwithstanding any change of domicile. This is logical, because the contract creates vested rights. The rule applies even if the contract is implied by law: *De Nicols* v. *Curlier* (*ante*, p. 311). Whether it is so implied is a question of foreign law and therefore a question of fact.

The essential validity of the contract is governed by its proper law, which is presumed to be (but is not necessarily) the law of the matrimonial domicile. Circumstances which, singly or together, have been held to rebut this presumption (in cases where the husband and wife were domiciled in different countries before their marriage) are the language and form of the settlement; the fact that its provisions are invalid by the law of the matrimonial domicile; the fact that the settled property belonged to the wife or her family; the place of management of the trust; the place of residence of the trustees; the place of investment of the securities. The relevant time for giving effect to the last two factors is the date of the settlement: subsequent changes are disregarded. *Duke of Marlborough* v. *A.-G.* (*ante*, p. 317) illustrates the application of the presumption in favour of the law of the matrimonial domicile; *Re Bankes* (*ante*, p. 321) illustrates its rebuttal. The former case is very near the line: see 61 L.Q.R. 223.

Formal validity. The settlement will be formally valid in England if it complies with the formalities prescribed by either the law of the place of contracting (*Guépratte* v. *Young* (1851), 4 De G. & Sm. 217) or the proper law (*Van Grutten* v. *Digby* (1862), 31 Beav. 561).

Capacity. On principle, capacity to make a marriage settlement contract should be governed by its proper law: Dicey, pp. 790–2. That is the law which governs capacity to make a commercial contract, and there is no reason why a different principle should apply here. It is usually said, however, that capacity to make a marriage settlement is governed, not by the proper law (which is presumed to be the law of the matrimonial domicile), but by the law of the domicile of the party alleged to be incapable. According to this view, the capacity of an English girl under 21 to make an ante-nuptial settlement prior to her marriage with a domiciled foreigner would be governed by English law. It must

be admitted that very strong dicta favouring this view are to be found in *Cooper* v. *Cooper* (1888), 13 App. Cas. 88, where the widow of a domiciled Scotsman was allowed to repudiate a marriage contract on the ground that when she executed it she was an infant by the law of her domicile. But it is impossible to take the statements of the House of Lords in that case at their face value. The law of the woman's domicile at the date when she executed the contract was Irish law, which throughout the case was treated as the same as English law. Lord Halsbury said that by the law of England the contracts of an infant are void; Lord Macnaghten said that Mrs. Cooper's contract was voidable in the sense that it was binding on her until she repudiated it, which she had elected to do.

Yet in *Edwards* v. *Carter*, [1893] A.C. 360, the House of Lords held that an infant's marriage settlement contract was neither void, nor voidable whenever the infant chose to repudiate it, but voidable only within a reasonable time after the infant had attained his majority. The House further held that it was too late for the infant to repudiate at the age of 26, and yet Mrs. Cooper had been allowed to repudiate her contract 33 years after she attained 21. It is plain that there is a direct inconsistency between *Cooper* v. *Cooper* and *Edwards* v. *Carter* which cannot be resolved unless we assume that Scots law as the law of the matrimonial domicile as well as Irish law as the lex domicilii at the date of the contract exerted an influence on the decision in the former case. The true position would appear to be that by Irish law the contract was voidable for a short time only, but by Scots law it was voidable for ever, because any ratification by Mrs. Cooper would have been revocable as a donation inter virum et uxorem: see per Lord Watson in the passage cited in *Viditz* v. *O'Hagan*, *ante*, pp. 327–8.

In *Viditz* v. *O'Hagan* the Court of Appeal expressly adopted this view of *Cooper* v. *Cooper*. It is hard to see how the Court of Appeal could have arrived at their decision unless they were able to distinguish *Cooper* v. *Cooper* on the ground that Scots law as well as Irish law played its part in the decision. Two passages from Lord Lindley's judgment make this point clear. Speaking of the case before him, he said: 'By the Austrian law she was unable to ratify or confirm this contract; she could always repudiate it, but could never ratify it, i.e. deprive herself of the right to repudiate it. *This was the case in Cooper* v. *Cooper, but it was not so in Edwards* v. *Carter*' (*ante*, p. 325). And speaking of *Cooper* v. *Cooper* he said: 'In that case a lady did succeed in repudiating a marriage settlement made when she was an infant after the lapse of much more than a reasonable time, *if you shut out of consideration the change of her domicile between the execution of the settlement and the repudiation*' (*ante*, p. 327). The clear inference from the concluding words in this passage is that in Lord Lindley's view the House of Lords in *Cooper* v. *Cooper* did not shut out of consideration the law of Scotland. If so, *Cooper* v. *Cooper* is no authority for the proposition that capacity to make a marriage settlement contract depends upon the lex domicilii at the date of the contract.

Nor does the latter proposition derive much support from *In re Cooke's Trusts* (1887), 56 L.T. 737. An English girl made a notarial contract in French form prior to her marriage with a domiciled Frenchman. Her children attacked her will on the ground (inter alia) that the contract gave them vested rights

in her property. Stirling J. rejected their claim on the ground that the contract was 'void' by the English lex domicilii of the lady at the date of its execution, since she was then an infant. But the contract made no disposition of the lady's property; it merely excluded the French doctrine of communauté des biens and gave her 'the entire administration of her property and the free enjoyment of her income'. By no stretch of imagination could such a contract have restricted the lady's testamentary capacity, even if she had not changed her domicile from France to New South Wales before the date of her death. It is clear that the decision must have been the same if she had been of mature age when she executed the contract.

The cases are fully discussed in an article in 54 L.Q.R. 78 (1938).

CHAPTER VII

ADMINISTRATION AND SUCCESSION TO MOVABLES

Section A: ADMINISTRATION OF ESTATES

In the administration of the English estate of a deceased person domiciled abroad, foreign creditors are entitled to dividends pari passu with English creditors.

In re KLŒBE.

In re KLŒBE (1884), 28 Ch. D. 175 (Chancery Division)

THIS was an action for the administration of the estate in England of Charles Jules Alexander Klœbe, a domiciled Greek, who died at Syra on the 15th of February 1882, intestate and insolvent. The deceased carried on business in England in partnership under the style of Charles Klœbe & Co., and was possessed of property in England. It did not appear whether there were any foreign assets. The Chief Clerk had certified that the assets consisted of a sum of £1,710. 19*s.* 2*d.*, the balance of the administrator's account in court, and a sum of £1,837. 11*s.* 9*d.* Consols also in court. That there was one separate debt of £50. 7*s.* due to a foreign creditor, and that the partnership debts amounted to £3,432. 4*s.* 7*d.* due to English creditors, and £8,456. 18*s.* 3*d.* due to foreign creditors. The action now came on on further consideration.

PEARSON J.: At the end of the argument I stated I had no doubt what my decision should be, but in consequence of my being told that there were decisions of learned Judges to whom I am bound to pay, and do pay, the greatest respect, who had supported a contrary contention, I thought it better to look at those judgments to see if they really supported that contention, and I am glad to find that they do not. It appeared to me, if that contention had anything in it, it must have been the practice of the court to inquire in actions for the administration of deceased persons domiciled abroad as to the nationality of creditors, and I can find no case in which the court in distributing assets has made an inquiry as to the nationality of different creditors, or ordered that English creditors should be paid in priority to others. There is not a fragment of authority for such a practice. I think Mr. Westlake in a passage cited lays down the law perfectly correctly. In sect. 102 of the last edition of his work on

Private International Law, he says: 'Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or of the assets is prescribed by the laws of the jurisdiction from which the grant issued.' All that is there said, and no doubt correctly, is that although mobilia sequuntur personam, in the collection, the lex fori must be observed: so also is it to be observed in the administration of those assets when collected. Therefore, if a man dies domiciled in England, possessing assets in France, the French assets must be collected in France, and distributed according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the lex fori, and for no other reason. But if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected must be distributed according to the law of England. No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners. On the other hand the rule is they are all to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come, and in the case cited by Mr. Cookson of *De La Vega* v. *Vianna* (1830), 1 B. & Ad. 284, Lord Tenterden says: 'A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.' And that has been the rule in this country, as far as I know, from the earliest time.

Three cases have been cited by counsel for the plaintiffs to establish a different rule. (His Lordship referred to *Cook* v. *Gregson* (1854), 2 Drew. 286, *Eames* v. *Hacon* (1881), 18 Ch. D. 351, and *Blackwood* v.

In re KLOEBE. — Pearson J.

The Queen (1882), 8 App. Cas. 92, and continued:) The law of England has always been that you must enforce claims in this country according to the practice and rules of our courts, and according to them a creditor, whether from the furthest north or the furthest south, is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country, and which I must say, for the sake of honesty, I hope will always be the law of this country.

If in the administration of the English estate of a deceased person domiciled abroad there remain surplus assets in the hands of the administrator after all debts recoverable by English law have been duly paid, the surplus assets must be beneficially distributed in accordance with the law of the deceased's domicile, and not paid to the domiciliary administrator for the benefit of creditors whose claims are statute-barred by English law, but not by the law of the domicile.

In re LORILLARD.

In re LORILLARD, [1922] 2 Ch. 638 (Court of Appeal)

Appeal from a decision of Eve J.

LORD STERNDALE M.R.: This is an unusual question arising in certain administration proceedings in this country and in the United States of America. It seems to me to be entirely a matter of discretion, and I do not see my way to differ from the decision of Eve J. The testator, who was domiciled in America, died in this country. Administration proceedings are going on both in America and in England. In England there are no debts. There are debts in America which according to English law are statute barred, but not so according to the law of New York. If claims in respect of these debts had been made here they would rightly have been rejected. The English administrator asked for the directions of the court as to what course he ought to pursue. For the beneficiaries in England it was contended that the American creditors were completely barred, the debts being over twenty years old. For the creditors in New York it was contended that as the testator was at the time of his death domiciled there the American administration was the principal proceeding to which the English administration was merely ancillary, and that accordingly the applicant as administrator in New York was entitled to receive the surplus assets in England remaining after the satisfaction of the testator's debts in order that they might be applied in paying the debts of bona fide creditors in any part of the world and

for this purpose they ought to be transferred to America. The authorities do not throw much light upon the question as to the duty of the English administrator. It would seem to be his duty to see that the debts are paid—i.e., debts which are due according to English law. Eve J. has made an order giving the American creditors a period of two months within which to bring in their claims in this country, and intimating that if they did not do so the surplus assets would be distributed among the beneficiaries. The American creditors, however, did not present their claims, presumably knowing that if they did so they would be rejected. It is argued that it is still the duty of the English administrator to transfer the moneys in his hands to the American administrator. I cannot see any principle under which it is necessary for the English court in such circumstances to order the administrator here to hand over the surplus assets to the American administrator. No authority has been cited in favour of such a course, and I cannot say that Eve J. has wrongly exercised his discretion in the matter. The appeal must therefore be dismissed.

WARRINGTON L.J.: I am of the same opinion. The principle is that the administration of the estate of a deceased person is governed entirely by the lex loci,[1] and it is only when the administration is over that the law of his domicile comes in. Here the administrator is acting under the direction of the court in an administration action, and the master has certified that no debts remain unpaid. It is certainly a matter of discretion for the learned judge whether he should direct the administrator to pay over the balance in his hands to the American administrator. The persons entitled to the unadministered residue are in this country, and the court will not order these moneys to be sent to an administrator abroad. The learned judge was informed that there were debts owing by the deceased in America, but that these were all debts which here might be barred by the Statutes of Limitation. Opportunity has been given to the American creditors to come in and prove their debts, but they have not chosen to do so.

Under these circumstances, there being no authority conflicting with what the learned judge has done in the exercise of his discretion, I am of opinion that we ought not to interfere with that exercise.

YOUNGER L.J. delivered judgment to the same effect.

Appeal dismissed.

[1] *Sic*: lex fori was meant (*Ed.*).

Section B: WILLS OF MOVABLES

In general, succession to movables is governed by the law of the testator's domicile at the date of his death.

In re COHN, [1945] Ch. 5 (*ante*, p. 1)

In re ANNESLEY, [1926] Ch. 692 (*ante*, p. 4)

In re ROSS, [1930] 1 Ch. 377 (*ante*, p. 6)

The question whether a will is revoked by the subsequent marriage of the testator is governed by the law of his domicile at the date of the marriage.

In re MARTIN.

In re MARTIN, [1900] P. 211 (Court of Appeal)

In 1870 the testatrix, an unmarried Frenchwoman then in England in the domestic service of an English family, made a holograph will in one of the forms recognized as valid by French law which was not attested as required by the Wills Act, 1837. By that will she gave the residue of her property to the plaintiff, her sister.

In 1874 the testatrix left domestic service, established a laundry business in London, and married a French refugee named Louis Guillard, known in London as Martin, who was then fifty-one years old.

Prior to 1868 Guillard, then a Professor of French in France, fled to Belgium to escape prosecution for an offence alleged to have been committed by him in connexion with his professorship. In his absence he was convicted and sentenced by a French court to ten years' imprisonment, and in 1868 or 1869, after the date of his conviction, he came over from Belgium to England.

After the marriage the husband joined his wife in carrying on the laundry business. In 1890, the period of prescription of twenty years under French criminal law having expired, he separated from his wife and returned to France, where he remained and where he was still living at the date of the action.

In 1895 the testatrix, who had continued to carry on the laundry in London, died in a fire which occurred at the business premises.

Her next of kin were her sister, the plaintiff, and her brother, the defendant. As it was believed that she had died intestate, the brother took out letters of administration in England to her estate, the hus-

band renouncing. Subsequently the sister propounded the will of 1870, claiming a grant of administration with the will annexed, and asking that the letters of administration granted to the brother should be revoked. There was evidence that by French law marriage does not revoke a will.

All the Judges held that at the date of the testatrix's death the domicile of the husband, and therefore of the testatrix, was French; but there was a difference of opinion as to the domicile of the husband at the date of the marriage, Sir F. H. Jeune P. and Lindley M.R. holding that it was French, and Rigby and Vaughan Williams L.JJ. that it was English.

Sir F. H. Jeune P. held that the husband and wife, though domiciled in France, intended to marry in accordance with English matrimonial law, but that s. 18 of the Wills Act, 1837 (by which a will is revoked by the subsequent marriage of the testator), is part of the testamentary law of England and not part of the matrimonial law. He therefore held that the will was not revoked. The defendant appealed.

LINDLEY M.R.: The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognised in this country are part of the law of England; and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicile of the testatrix when she died. The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306; see pp. 359 et seq.;

In re MARTIN. — Lindley M.R.

Doglioni v. *Crispin* (1866), L.R. 1 H.L. 301, and *In re Trufort* (1887), 36 Ch.D. 600. In each of the last two cases a foreign court had determined the domicile and the English court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the English court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made and on its subsequent revocation if that question arises. These questions may or may not turn on the domicile of the testator as understood in this country. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicile may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns.

By whatever court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicile, must be considered. If this view be ignored, the effect of the marriage will be inadequately and, indeed, erroneously ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be: 1 Jarman on Wills, c. 7; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must, therefore, depend on the English view of his domicile. It would be useless, and, indeed, entirely misleading, to ask a French expert what effect the French law would give to an English marriage, without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicile of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial.

(His Lordship referred to the facts and continued:) Upon the question of domicile (in the English sense) my own conclusions are that the domicile of the testatrix was French when she made her will; French up to the time she married; French by her marriage; and French when she died. Her domicile was French by and after marriage because, in my opinion, her husband's domicile was French.

The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if, in order to ascertain this, it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicile, in the English sense, of the husband; and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial régime the parties intended to adopt. It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. This being clear the will was not revoked; and if not revoked it was clearly valid as regards the wife's movable property. Sect. 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad, and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not, on principle, apply to French spouses married in England, but (according to English views) domiciled in France when they married.

In my opinion the will has been properly admitted to probate; but

In re MARTIN. — Lindley M.R.

it will not apply to leasehold property, for that is not regarded as movable property, to which the lex domicilii is applicable. . . .

VAUGHAN WILLIAMS L.J.: I agree in the conclusion of Sir F. Jeune that the husband and wife intended to keep up an establishment in England, and that they intended to marry under English law, and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Sir F. Jeune does not accept, that at the date of the marriage the husband had an English domicile, for I find no other evidence of an agreement embodying that intention, unless it be as an inference from the actual domicile at the date of the marriage. . . .

Sir F. Jeune has held that, according to English law, the wife had a French domicile, and that on the marriage she acquired the domicile of her husband, and that, his domicile of origin being admittedly French, he had done nothing to acquire any other domicile. I certainly should have drawn the conclusion myself that as far as the wife was concerned there was ample evidence of the animus manendi, and that at the date of the marriage she had, according to English law and French law, acquired an English domicile. This, of course, is not enough, because on marriage she would acquire the domicile of her husband. But even in the case of the husband I should draw the inference that he abandoned his French domicile of origin and intended to adopt a new domicile, that is, an English domicile, and thus lost his French domicile and acquired an English domicile.

(His Lordship referred to the facts and continued:) This, in my judgment, is sufficient to show that his actual domicile at the time of the marriage was, according both to English and French law, English.

I gather, however, from the judgment of Sir F. Jeune that his view is that England became the matrimonial domicile by the agreement of the husband and wife at the time of the marriage; but I do not quite understand where he finds such an agreement unless it is to be inferred from a change of the husband's domicile. There is no express agreement, and I know of no English decision in which such an agreement has been inferred inconsistently with the fact of domicile. Husband and wife cannot by mere tacit agreement choose a matrimonial domicile.

Mr. Westlake, in Private International Law, 3rd ed., p. 68, says: 'By the matrimonial domicile is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any

other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it.'

If this exception can be supported, for which there is no English authority, no doubt there is evidence from which one may infer that the actual English domicile after marriage was in pursuance of an ante-nuptial agreement.

I doubt, however, if domicile can be directly affected by the marriage contract. Such an agreement as to the intended matrimonial place of residence may no doubt be evidence, and cogent evidence, of adoption of a new domicile as from a date anterior to the marriage; or it may be evidence of an agreement as to the law which shall govern the movable property of the parties marrying; but I can find no case in which an inferred agreement, as distinguished from an express agreement, has been allowed to outweigh the prima facie inference that the law of the country of the husband's domicile is to govern the movable property of the married couple.

If my conclusion is right, and if one ought to come to the conclusion—from the evidence of the husband's conduct in making his home in England for an indefinite time and going into such a business as by French law put an end to his French domicile and gave him an English domicile—that he adopted an English domicile at the time of his marriage, then at that time his wife's movables became his property; and I think that, his wife's property in the movables having thereby ceased, it follows, quite independently of the 18th section of the Wills Act, that this loss of the power of disposition put an end to her will while it was still ambulatory, and rendered it of no effect, and that nothing but republication could revive it.

If, however, the French domicile of the husband continued at and after the marriage and down to the wife's death, then it would follow that the French law, by which alone this will can be supported (for it is not in the form required by the English Wills Act), must govern the testamentary validity of this will, and also the rights of property of the husband and wife, unless there can be found some binding marriage contract determining the relative rights of the property of the husband and wife.

Sir F. Jeune has found, as I understand, that there is such an agreement or contract. Assuming that there is, I differ from his conclusion in law on this assumption, for I think that the rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law, and not of the testamentary

In re MARTIN. — Vaughan Williams L.J.

law, and that probate of this will ought not to be granted; but as I am not sure that we ought to infer that there was at the time of the marriage an agreement that the English law should govern the matrimonial property, I prefer to ground my judgment on the change of the husband's domicile at the time of marriage; and I think that, if he did change it from a French to an English domicile, then his subsequent reversion to a French domicile will not prevent English law continuing to govern the matrimonial property.

In my opinion, the effect of the husband's domicile on the matrimonial property is based on the presumption that you must read the law of the husband's domicile into the marriage contract as a term of it, unless there is an express agreement to the contrary.

I think, therefore, that the decision of the Court below ought to be reversed, and the grant of letters of administration with the will annexed revoked.

RIGBY L.J. delivered a judgment concurring with the conclusions of Vaughan Williams L.J.

Appeal allowed.

LORD KINGSDOWN'S ACT, 1861

An Act to amend the law with respect to Wills of Personal Estate made by British subjects.

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same. Change of domicile not to invalidate will.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act. Nothing in this Act to invalidate wills otherwise made.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act. Extent of Act.

Note S: Lord Kingsdown's Act, 1861

It was decided in 1857 that the will of a British subject domiciled (in the English sense) in France was void because it did not comply with the formalities prescribed by French domestic law: *Bremer* v. *Freeman*, 10 Moo. P.C. 306. This was merely an application of the rule that wills of movables must comply with the formalities prescribed by the law of the testator's last domicile. The results of such a rule might be unfortunate. It meant that a will valid when made might turn out to be invalid, either because the testator changed his domicile, or because the law of his domicile changed. It meant, too, that a testator who was taken mortally ill when travelling outside the country of his domicile had to make his will in accordance with the formalities prescribed by the law of his domicile, although it would have been much easier to have obtained the help of a local lawyer.

Lord Kingsdown's Act was passed to remedy this situation. It is plain what the statute ought to have provided. It ought to have provided in general terms that any will of movables should be formally valid if it complied with the formalities prescribed by the law of the place of execution, or by the law of the testator's domicile at the date of execution, or by the law of the testator's domicile at the date of his death. Unfortunately, however, the statute concentrated on the particular situation in *Bremer* v. *Freeman*, and as a result sections 1 and 2 appear to be unduly restricted in their terms, while section 3 is drafted much too widely. The following criticisms are submitted:

1. There is no conceivable reason why sections 1 and 2 should be confined to the wills of British subjects, for the evil which the legislature set out to cure is not confined to them, and nationality has normally no significance in the conflict of laws.

2. There is no conceivable reason to differentiate between wills made inside and outside the United Kingdom, or to allow a wider choice for the latter than for the former.

3. The leading distinction in the conflict of laws relating to property is, as we have seen, the distinction between movables and immovables and not the distinction between realty and personalty (*ante*, p. 235). Consequently, to speak of 'personal estate' instead of 'movables' seems unfortunate, and renders it

necessary to make a tiresome excep tion to the rule that a will of immovables must comply with the formalities prescribed by the lex situs (*ante*, p. 266). Moreover, the term 'personal estate' has no meaning in Scots law, and yet the Act applies to Scotland.

4. Even more formidable objections can be made to the wording of section 3, which is drafted in extraordinarily vague terms, and raises more problems than it solves. Three questions arise under this section: (*a*) is it limited to the wills of British subjects? (*b*) is it limited to cases where the domicile is changed and no further act is done which might revoke the will? (*c*) is it limited to formal validity and construction? To each question it is submitted that the answer should be yes.

(*a*) Is section 3 limited to the wills of British subjects? Sections 1 and 2 are expressly so limited. The Act is entitled 'An Act to amend the law with respect to wills of personal estate made by British subjects'. Parliament cannot have intended to provide that no will in the world should be revoked by a change of domicile. Some limitation must therefore be placed on the language of section 3. The limitation which harmonizes best with sections 1 and 2 is that section 3 applies only to the wills of British subjects. It is submitted that the section should be read as if it said 'No *such* will . . .'.

It is true that in *Re Groos*, [1904] P. 269, the opinion was expressed that section 3 applies to the wills of aliens. But this opinion was not necessary to the decision of the case. The question was whether the will of a Dutch lady domiciled in Holland was revoked by her subsequent marriage to a domiciled Dutchman, the Dutch law not revoking the will. The decision that the will was not revoked was in accordance with the general principle laid down in *Re Martin* (*ante*, p. 336), that the question whether a will is revoked by subsequent marriage depends on the law of the domicile of the testatrix's husband at the moment of the marriage. It is significant that section 3 did not save the will in *Re Martin* from revocation, though the point was not argued.

(*b*) Is section 3 limited to cases where the domicile is changed and no further act is done which might revoke the will? or does it apply to cases where the domicile is changed and some such further act is done? It is submitted that the former is the correct view, and that the section should be read as if it said 'No such will shall be revoked by reason *only* of any subsequent change of domicile.' Three illustrations may serve to elucidate this point.

(i) A British subject domiciled in England makes a will which is formally valid by English law, and dies domiciled in Italy leaving an unattested holograph will, valid by Italian law but void by English law, in which he revokes all former wills. In these circumstances it has been decided that the English will is revoked: *Cottrell* v. *Cottrell* (1872), L.R. 2 P. & D. 397. Section 3 would appear to have nothing to do with the matter.

(ii) A British subject domiciled in England makes a will which is formally valid by English law. He dies domiciled in Italy having while so domiciled purported to revoke his will in a manner which is effective by Italian law but ineffective by English law, e.g. by directing it to be destroyed in his absence. It is submitted that section 3 would not save the will from revocation.

(iii) A female British subject domiciled in France makes a will which is formally valid by French law, and marries a domiciled Englishman. It is sub-

mitted that section 3 would not save the will from revocation. At any rate it did not in *Re Martin*, where, however, the testatrix was not a British subject and this point was not argued.

In these three cases it is not the subsequent change of domicile which revokes the will, but the execution of the second will, the direction to destroy, and the subsequent marriage.

It is true that in *In bonis Reid* (1866), L.R. 1 P. & D. 74, and *Re Groos*, [1904] P. 269, section 3 was invoked to prevent the revocation of a will by subsequent marriage. But in both cases the decision was correct quite apart from section 3 on the general principle enunciated in *Re Martin*. And *Re Martin* must be an authority either for the proposition that section 3 does not apply to the wills of aliens, or for the proposition that section 3 does not apply to revocation by subsequent marriage.

The question may be asked, if section 3 has the restricted effect suggested above, what does it add to sections 1 and 2? The answer is that it would save from revocation the unattested holograph will made in England of a British subject domiciled in France or Scotland at the time of making his will and in England at the time of his death. Such a will would not be valid under sections 1 or 2.

(*c*) Is section 3 limited to formal validity and construction, or does it extend to essential validity and capacity? It is submitted that the former is the correct view, and no case suggests that this view is wrong. Essential validity is governed by the law of the testator's domicile at the date of his death, and it is unlikely that the legislature meant to alter this rule in a statute dealing mainly with form. Personal capacity is probably governed by the law of the testator's domicile at the time of making his will (Cheshire, pp. 681–2; Dicey, pp. 818–20; *Re Lewal's Settlement Trusts*, *post*, p. 352). Therefore, if the testator has personal capacity at that time but not at the date of his death, the will is valid on general principles, and it is unnecessary to have recourse to section 3.

Section C: POWERS OF APPOINTMENT

A will is a valid exercise of a power of appointment over movables conferred by an English instrument if it complies with the formalities prescribed by either (*a*) *the Wills Act, 1837*; *or* (*b*) *the lex domicilii of the testator at the date of his death; or* (*c*) *any other system of law which may be applicable under sections 1 or 2 of Lord Kingsdown's Act, 1861.*

In re PRICE, [1900] 1 Ch. 442 (Chancery Division)

In re PRICE.

Dame Elizabeth Price, by her will, dated 28 March 1876, bequeathed a sum of 2,000*l.* to trustees upon trust for investment and payment of the income to 'Maria the wife of Monsieur Adolphe Gay' during her life. The will then proceeded: 'And from and after her decease to pay and transfer the last-mentioned sum of 2,000*l.* in such manner as she the said Maria Gay shall by her last will appoint, and, in default of such appointment, then to such person or persons as

In re PRICE.

would at the time of her decease be the next of kin of the said Maria Gay in case she had died intestate and without being married.'

Lady Price died on 18 March 1878.

At the date of the will Maria Gay was the wife of Adolphe Gay, a French subject domiciled in France. Monsieur Gay died on 12 October 1882; and in October 1886, Madame Gay married Monsieur Auguste Dié Forfillier, also a French subject domiciled in France.

On 2 June 1887 Madame Forfillier made a holograph will in the French language, of which the following is a translation:—

'I the undersigned declare that I bequeath to my dear husband Auguste Dié Forfillier, everything which I possess at the present moment, and which I hereafter may possess. . . . And I declare that this will annuls all the others, as I have informed Mr. Archibald Willett, solicitor, Bromley, Kent, and that it shall thus be considered in England the same as in France, and I repeat that I leave everything which I possess at the present moment and which I may come to possess afterwards to my dear husband.'

The will was unattested.

On 16 February 1898 Madame Forfillier died, and on 30 October 1898 letters of administration with the will annexed were granted by the Probate Division to the defendant Edward Latter as the attorney of Monsieur Forfillier. At the date of her death Madame Forfillier had no interest in any property in England except the property subject to the power of appointment.

This summons was taken out by the trustees of the will of Lady Price to have it determined who was entitled to the fund of 2,000*l.*

Madame Forfillier was at the time of her death a French subject by virtue of the Naturalization Act, 1870, s. 10, sub-s. 1. She was also domiciled in France. The law of France was stated in the evidence to be that the will of Madame Forfillier was a complete testamentary disposition of the whole of the property which the testatrix might have at her death or which she might by law dispose of; that the mode of disposition by appointment was not practised in France; and that if a French court had to consider the effect of the will in this respect it would inquire into and apply the English law bearing on this point; and would also take cognizance of and give effect to the fact that the testatrix had no interest in any property in England except that which was subject to the power of appointment.

STIRLING J.: Under the will of Lady Price the fund is to be paid

and transferred in such manner as Madame Forfillier 'shall by her last will appoint'. The first question arises as to the word 'will' which there occurs—whether it means any instrument recognised by the law of England as a will or a will executed in accordance with the law of England. I shall first consider the three authorities which have been cited to me as bearing on this subject. The first is the case of *D'Huart* v. *Harkness* (1865), 34 Beav. 324. There, under the will of an English lady, a sum of Consols was held upon trust for her daughter for her separate use for life, and after her decease upon trust for such persons as her said daughter 'by her last will and testament in writing duly executed' should direct or appoint. The daughter was an Englishwoman by birth, but she married a domiciled Frenchman and resided in France till her death; she made a will, which was not attested, whereby she bequeathed the sum of Consols to her husband. This will was valid by the law of France and had been admitted to probate in this country. It was held by Lord Romilly that the will was a valid execution of the power. It will be observed that, as regards the facts, that case is as near to the present case as one case can be to another. The material portion of the judgment is this: 'A sum of money is given simply, to such person as the Baroness shall by her last will duly executed appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate, first, those which follow the forms required by the Wills Act, 1837, s. 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute.'

The next case is that of *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, which came before Kay L.J. when a judge of first instance. The facts of that case require some attention. The power there was by deed or

In re PRICE. — Stirling J.

will to be executed in the presence of two or more witnesses to appoint amongst children. The donee of the power was an English subject. His testamentary disposition consisted of two instruments—first, a will executed in accordance with English law, but invalid according to French law, and, secondly, a codicil not executed in accordance with English law, but valid according to the law of France. In order to have both will and codicil proved here, it was necessary to have recourse to Lord Kingsdown's Act, and the will and codicil, which together made the testamentary disposition, were admitted to probate by virtue of that statute. Now, the instrument which purported to execute the power was the codicil, which was unattested, and consequently, was not an instrument falling within the terms of the power. Neither did it satisfy the requirements of the Wills Act. Upon that Kay J. says: 'Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the Wills Act, 1837, but it was a good testamentary document under Lord Kingsdown's Act, 1861. . . . This being a good testamentary instrument by the law of the domicile of George Saint Lo Kirwan, which I understand was France at the time, although not executed as required by the Wills Act, 1837, has under the Act which I have referred to been admitted to probate in England, and the documents admitted to probate are two, i.e., the will of the 3rd April, 1862, and the codicil of the 9th of May, 1871.' Then, after considering the effect of that, he goes on to say: 'It is a good testamentary instrument, and its only defect is its want of attestation. But the Wills Act says that "no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required", that is to say, in the presence of and attested by two witnesses. The later Act, Lord Kingsdown's Act, does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this. It makes a will executed abroad by a British subject a good will if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the Wills Act, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil as being a good and valid appointment either at law or in equity.' Now, I pause there to remark that the facts of that case are different from those of the present case in two respects: first, the power was of a different kind,

and, secondly, the testamentary disposition was admitted to probate only by virtue of Lord Kingsdown's Act, whereas here Lord Kingsdown's Act does not come into operation. Unfortunately, *D'Huart* v. *Harkness* was not cited in *In re Kirwan's Trusts*, and I have not the benefit of any observations of Kay J. upon it, but it has been considered by Kekewich J. in the recent case of *Hummel* v. *Hummel*, [1898] 1 Ch. 642. The facts stated in the head-note are as follows: 'A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law'; and it was held that the writing, even if admissible to probate under s. 1 of Lord Kingsdown's Act, did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by ss. 9 and 10 of the Wills Act. The question which I have to decide really did not arise there, because the document relied on as an execution of the power had not been admitted to probate; but Kekewich J. does consider the question whether, supposing it could be proved, it would be a good execution of the power, and he proceeds on the footing that the will could only be proved under Lord Kingsdown's Act. He says this: 'It is, I will assume, . . . a valid will according to the law of France; but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay J. in *In re Kirwan's Trusts* is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart* v. *Harkness*, where Sir J. Romilly M.R. decided that a power to appoint "by a will duly executed" is well exercised by a will good according to the law of the country of the testator's domicile, though ill-executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts*; but the latter is cited in a note on p. 308 of 1 Williams on Executors, 9th ed., as the authority for the proposition that in the case of a will which is only valid by reason of Lord Kingsdown's Act, ss. 9 and 10 of the Wills Act must be complied with. That appears to me to form the distinction between the two cases.' Then he refers to Lord Kingsdown's Act. The opinion there expressed by the learned judge appears to me to be that *D'Huart* v. *Harkness* was

In re PRICE. — Stirling J.

not inconsistent with *In re Kirwan's Trusts*, upon the ground that the latter decision only applied to a case in which the will was proved under the provisions of Lord Kingsdown's Act. That Act only applies to the wills of British subjects. Madame Forfillier was not a British subject but a French subject, and as a matter of fact the grant of letters of administration with the will annexed was not under Lord Kingsdown's Act at all. Therefore, looking at the authorities and having regard to the view taken by Kekewich J., I am of opinion that I ought to follow *D'Huart* v. *Harkness* and not *In re Kirwan's Trusts*. But I go further. I think that on principle *D'Huart* v. *Harkness* was well decided. The general rule on the subject is, as stated by Mr. Dicey (Conflict of Laws, p. 684), that 'Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid' in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England.

In *Bremer* v. *Freeman* (1857), 10 Moo. P.C. 306, it appears to have been contended that the provisions of s. 20 of the Wills Act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale in delivering the judgment of the court said that for reasons referred to by him it was unnecessary to consider the point, but added: 'Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, Conflict of Laws, § 473), nor any that the Wills Act, 1837, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law.'

Sect. 9 of the Wills Act prescribes that 'no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned'. Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognise as valid the wills of persons domiciled abroad, although not executed as prescribed by the Act. The present case affords an instance of this being done. I fail to see why the provisions of s. 10 of the Wills Act should apply to the will of Madame Forfillier any more than those of s. 9.

There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to

the law of the domicile of the testator at the time of his death: see *In the Goods of Alexander* (1860), 29 L.J. (P. M. & A. 93); *In the Goods of Hallyburton* (1866), L.R. 1 P. & M. 90; *In the Goods of Huber*, [1896] P. 209. These cases, however, do not lay down that a power to appoint by will (without special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicile of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case.

In the view which I take I am not concerned to deal with *In re Kirwan's Trusts*, which is distinguishable in its facts from the present case; but I may say that the decision in that case may be rested on these grounds. First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had no application, inasmuch as the testator was domiciled abroad: and although the instrument was not invalidated by the prohibitory portion of s. 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the Wills Act. Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay J., that statute does not contain any enactment dealing with wills made in exercise of powers. Although some of the language used by that learned judge may be susceptible of a different interpretation, I am not sure that he intended to decide anything inconsistent with the principle I have stated.

In my opinion, therefore, it was competent for Madame Forfillier to exercise the power conferred on her by Lady Price's will by such a will as has been recognised by the Probate Division. It remains to be considered whether she has done so. This question is one of construction.

In general a will is to be construed according to the law of the domicile of the testator: 'but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country': Dicey, Conflict of Laws, p. 695. Considering first the law of France, according to which primâ facie the will is to be construed, the evidence shews that the will of Madame Forfillier is a complete disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a

In re PRICE. — Stirling J.

French court had to consider the effect of the will in this respect it would apply the English law. It is contended with regard to the law of England that the provisions of the Wills Act including s. 27, are inapplicable, and that consequently the law of England applicable is the law as it existed before that Act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the Wills Act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says, 'I declare that this will annuls all the others . . . and that it shall thus be considered in England the same as in France.' I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by s. 27 of the Wills Act.

No question arises between Monsieur Forfillier and the daughter of his wife by her first marriage, who by the law of France might have a claim if this fund had been part of Madame Forfillier's property; for she appears and supports the claim of Monsieur Forfillier.

In my opinion, therefore, the husband, Monsieur Forfillier, is entitled to the fund.

A general bequest in the will of a testator domiciled abroad exercises a general power of appointment conferred by an English instrument unless a contrary intention appears in the will.

A testator has capacity to exercise by will a power of appointment over movables conferred by an English instrument if he has testamentary capacity at the time of making his will (a) by the law of his domicile, or (b) by English domestic law.

In re LEWAL'S SETTLEMENT TRUSTS.

In re LEWAL'S SETTLEMENT TRUSTS, [1918] 2 Ch. 391 (Chancery Division)

By an antenuptial settlement made in 1907 upon the marriage of Gertrude Loyd, an infant aged 19, to the defendant Maxime Lewal, an officer in the French Army, certain property belonging to the intended wife was settled after her death, and in the event (which

happened) of there being no child of the marriage, upon trust for such person or persons as the wife should by deed or will (executed in such manner as to be valid by the law of her domicile) appoint, with a gift over in default of appointment. The settlement contained a statement that it should be construed, and that the rights of all parties claiming thereunder should in all respects be regulated, according to English law. The settlement was duly sanctioned by the court under the Infants' Settlement Act, 1855. The marriage was solemnized on 15 April 1907. The husband was at all material times a French citizen domiciled in France.

Immediately after the marriage the wife, then 19 years of age, signed at Versailles an unattested French holograph will as follows: 'J'institue mon mari pour mon légataire universel.' The wife died in June 1917 in the lifetime of the husband. Letters of administration with the French will annexed were granted in England to the wife's mother as attorney for the husband.

The trustees of the settlement took out a summons to determine whether and to what extent the will exercised the general power of appointment given to the wife by the settlement.

The evidence showed that the will was in point of form a valid will according to French law, and that as the wife at the time of making the will was a married woman over 16 but under 21 years of age, she was, under French law, competent to dispose by will of one-half of the property which she could have disposed of if she had been 21 years of age.

PETERSON J.: . . . It was contended, in the first place, that as she was, when she made her will, under twenty-one years of age, she could not thereby exercise the power of appointment at all, and reliance was placed on the provision that the rights of all parties claiming under the settlement were to be regulated by the law of England in the same way as if both husband and wife had throughout been domiciled in England. It could not be disputed that a holograph French will might operate as an exercise of the power, as it was expressly within the terms of the settlement, and if it had not been expressly provided for it would, on the authorities, be a will which was recognised in England as valid and therefore a will capable of exercising the power. But it was urged that the provisions in the settlement only related to the form of this will and did not affect the question of testamentary capacity, and that this question must be

In re LEWAL'S SETTLEMENT TRUSTS. — Peterson J.

determined by English law, as the rights under the settlement were to be regulated by English law as if the husband and wife had been domiciled in England. This argument, in my opinion, is unsound. The settlement expressly enables the power of appointment to be exercised by Madame Lewal by a will executed in such manner as to be valid according to the law of her actual domicile as well as by a will executed in such manner as to be valid as such according to the law of England. It obviously contemplated that she should be able to exercise the power by a French will which might not comply with the requirements as to wills of the English law. Nor do I think that this provision related merely to the form of the will and to the presence or absence of attesting witnesses. What the settlement contemplated was a will which should be valid according to French law or a will which would be valid according to English law. This will is a good will according to French law notwithstanding the fact that Madame Lewal was under twenty-one years of age when she made it. This objection therefore, in my opinion, fails.

The next objection was that the will did not, in fact, exercise the power. It does not refer to the settlement or to the property comprised in the settlement, and it was said that s. 27 of the Wills Act cannot be invoked for the purpose of interpreting a French will. This contention has given rise to a considerable difference in judicial opinion. In *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898, Buckley J. held that a will by a domiciled Frenchwoman, which appointed her husband her universal legatee and bequeathed to him all her personal estate, did not operate as an exercise of a general power of appointment, and that reference could not be made to s. 27 of the Wills Act for the purpose of interpreting the will, as the section was intended as a statutory rule for the interpretation of English wills and could not be applied to the interpretation of foreign wills, which must be construed according to the law of the domicile. This decision was followed by Kekewich J. in *In re Scholefield*, [1905] 2 Ch. 408. These two cases were, however, subjected to a very destructive criticism by Neville J. in *In re Simpson*, [1916] 1 Ch. 502, where it was held that an unattested holograph will of a British subject domiciled in France, by which she disposed of all the property and rights comprised in her estate, effectually exercised a general power of appointment which she had over the trust funds under the English settlement, the learned judge expressly dissenting from the decisions in the two earlier cases. In *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, Sargant J. (although

the point seems to have been unnecessary for the decision of that case) agreed with the opinion of Neville J. and added some further reasons for disagreeing with the view of Buckley J. and Kekewich J. In these circumstances I am at liberty to express my own opinion. The judgment of Buckley J. is summarized in the following passage from his judgment ([1903] 1 Ch. 903): 'Then it is said that I must take this French document and read it, not as a will in the sense in which I have explained, but as if the directions contained in it were introduced into the instrument which contained the power. That is quite right: but how must I read it? I have, referentially, to introduce into the instrument which contains the power a foreign document. I have to see whether the power was exercised, and therefore to find out the meaning of what is expressed by the donee of the power. Now how am I to ascertain the meaning of the donee of the power? I must ascertain it according to the law of the place applicable to the document executed by the donee and to the domicile of that person, and that law is to be taken as the law governing its construction. If I do that, I have to read the French will and say what its meaning is according to the principle of French construction, excluding, therefore, s. 27, which is a rule for English construction.' With all respect to the learned judge, it appears to me that his conclusion does not necessarily follow from his premisses. If the French will was to be interpreted according to the principles of French construction it did not follow that s. 27 of the Wills Act was to be excluded. As pointed out by Neville J., the French court does not know anything of powers of appointment and would require to be informed what a general power of appointment was and in what manner it might be exercised, and the answer to this question must involve the effect of s. 27. A further argument indicated, I think, by Sargant J. in *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, against the view of Buckley J. may be put in this way. Prior to the Wills Act the exercise of a general power of appointment by will had to refer either to the power or to the property subject to the power. After that Act the power could be exercised by a will which disposed of the personal estate of the appointor. This, in effect, amounted to a provision that every general power of appointment by will should be read as a power to appoint by a will which referred to the power, or to the property subject to the power, or disposed of the personal estate of the appointor in general words. The result then would in the present case be that the power authorised the appointment by a valid French will which disposed of

In re LEWAL'S SETTLEMENT TRUSTS. — Peterson J.

the appointor's estate in general terms and the will of Madame Lewal would be an exercise of the power. I agree with the opinions of Neville J. and Sargant J., and therefore hold that the general power of appointment was exercised by the will of Madame Lewal.

I may add that in the present case there seems to be an additional reason why a French court, on being asked to determine whether the will operated as an exercise of the power of appointment, would be bound to ascertain what the English law on the subject was. In order to determine the question it would be necessary to refer to the settlement which contained the power in order to see what was authorised by the power, and it would then be found that the settlement contained a provision that the rights of all parties claiming under it should be regulated in the same way as if the husband and the wife were and continued to be domiciled in England—a clear reference to English law.

The question, however, remains whether the will of Madame Lewal effectively appoints the whole of the fund subject to the power. On the evidence Madame Lewal, when she made her will, had only a limited testamentary capacity. She could only dispose of one-half of the property which she could have disposed of if she had been twenty-one. It appears to me that I am not concerned with the fact that one-quarter of her property went to her mother under art. 14 of the Civil Code. Her mother cannot claim a share of the settled funds unless they have been appointed to her or she takes under the settlement in default of appointment.

The result, in my opinion, is that, as Madame Lewal's testamentary capacity was limited in the way which I have mentioned, her will only operated on one-half of the funds which were subject to the power, and that the other half goes as in default of appointment.

NOTE T: EXERCISE BY WILL OF POWERS OF APPOINTMENT

AT first sight it might be supposed that the validity of a will exercising a power of appointment depended on the same considerations as the validity of any other will. But for two reasons this is not so. In the first place, the donee of the power is (especially in the case of special powers) strictly speaking not disposing of his own property, but that of the donor. Secondly, the laws of many foreign countries do not recognize powers of appointment at all, so that it is necessary to have recourse to the law governing the instrument of creation. It is necessary therefore to look not only at the law governing the instrument of appointment but also at the law governing the instrument of creation (which in all the

English cases is English law): sometimes the exercise of the power is valid if either law is complied with. It is, however, necessary to consider separately (1) formalities, (2) construction, (3) essential validity, (4) revocation, and (5) capacity.

1. *Formalities. Re Price* (*ante*, p. 345) decides that a will executed in accordance with the formalities prescribed by the law of the testator's last domicile is a good exercise of a power to appoint movables. That a will executed in accordance with the Wills Act, 1837, is a good exercise of a power, even though the donee is domiciled abroad, was finally established by the House of Lords in *Murphy* v. *Deichler*, [1909] A.C. 446, after fluctuation of judicial opinion. No case expressly decides that a power may be validly exercised by a will complying with the formalities prescribed by any system of law which may be applicable under Lord Kingsdown's Act, 1861, where that system is neither English law nor the law of the testator's last domicile. But there is little doubt that the courts would so decide: see *In re Simpson*, [1916] 1 Ch. 502, and *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, where *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, and *Hummel* v. *Hummel*, [1898] 1 Ch. 642, were not followed. *In re Kirwan's Trusts* may be distinguished on the grounds that the appointment was a fraud upon the power, and that it did not comply with the additional formalities prescribed by the donor (see below). *Hummel* v. *Hummel* must be either misreported or wrongly decided, for the testatrix had lost her British nationality by marrying an alien and therefore section 1 of Lord Kingsdown's Act was inapplicable.

If the will is executed in accordance with the Wills Act, 1837, it need not comply with any additional or other formalities prescribed by the donor of the power: Wills Act, 1837, s. 10. But if the will is executed in accordance with a foreign system of law any such formalities must be complied with. This rule leads to fine distinctions. Thus if the donor requires the power to be exercised by a will 'duly executed', an unattested holograph will which is valid by the law of the testator's last domicile is a good exercise of the power: *D'Huart* v. *Harkness* (1865), 34 Beav. 324. But if the donor requires the power to be exercised by a will 'executed in the presence of two witnesses', such a holograph will is not a good exercise of the power: *Barretto* v. *Young*, [1900] 2 Ch. 339. Moreover the court possesses an equitable jurisdiction to aid the defective execution of powers by testators domiciled abroad, so that in a proper case an unattested holograph will may be a good exercise, even if the donor prescribed the presence of witnesses: *In re Walker*, [1908] 1 Ch. 560.

2. *Construction.* The rules laid down in the preceding note indicate when a will is capable of exercising a power as a matter of form: they do not indicate when a will does execute a power as a matter of construction. This matter arises in connection with s. 27 of the Wills Act, 1837, which provides in effect that a general bequest shall include property over which the testator had a general power of appointment, unless a contrary intention appears in the will. After a conflict of judicial opinion it has now been decided that this canon of construction applies to the wills of testators domiciled abroad. This is so notwithstanding the fact that the will fails to comply with the formalities prescribed by the Wills Act, 1837: *In re Price*; *In re Simpson*; *In re Lewal's Settlement* (*ante*, p. 352); *In re Strong* (1925), 95 L.J. Ch. 22. Apparently the mere fact that

the doctrine of powers is unknown to the lex domicilii is sufficient to import the English canon of construction into the will. This construction can never be applied to special powers, which are not within s. 27 of the Wills Act 1837.

3. *Essential validity.* The system of law which governs the essential validity of the testamentary exercise of a power depends on whether the power is general or special. If the power is special, the bounty is that of the donor and the appointor is merely his agent. It follows that the essential validity of a will exercising a special power depends upon the law governing the instrument of creation, so that the donee is free from restrictions imposed by the law of his last domicile (e.g. restrictions requiring him to leave a legitima portio to his children): *Pouey* v. *Hordern*, [1900] 1 Ch. 492. But other considerations apply to a general power, at any rate when the exercise of the power throws the appointed fund into the appointor's estate as one mass. In such a case the essential validity of his appointment is governed by the law of his last domicile: *In re Pryce*, [1911] 2 Ch. 286.

4. *Revocation.* A testamentary exercise of a power which is valid by a foreign lex domicilii may be revoked in a manner sufficient by that law though insufficient by English law, e.g. by destroying the will by the testator's direction but not in his presence: *Velasco* v. *Coney*, [1934] P. 143. It seems a legitimate inference from *Murphy* v. *Deichler* that the exercise of the power may also be revoked in a manner sufficient by English law but not by the law of the testator's domicile.

5. *Capacity.* To the extent that the appointor has capacity by the law of his domicile at the time of making his will, to that extent the will may be a good exercise of the power: *Re Lewal's Settlement Trusts* (*ante*, p. 352). Conversely, it is a legitimate inference from *Murphy* v. *Deichler* that if he has capacity by English law but not by the law of his domicile at the time of making his will, to that extent the will is a good exercise of the power.

PART V
LAW OF PROCEDURE

CHAPTER I
FOREIGN JUDGMENTS

Section A: JURISDICTION: JUDGMENTS IN REM

A foreign judgment which decrees the sale of a chattel in satisfaction of a claim against the chattel itself is a judgment in rem.

A foreign court has jurisdiction to pronounce a judgment in rem against a chattel if the chattel was in the territory of the foreign state at the time of the action.

CASTRIQUE *v.* IMRIE (1870), L.R. 4 H.L. 414 (House of Lords) CASTRIQUE *v.* IMRIE.

ERROR from the Court of Exchequer Chamber (8 C.B.N.S. 1, 405).

During the year 1853, and up to the 30th of November 1854, John George Claus, a British subject, was the registered owner of the ship Ann Martin, registered at Liverpool. In December 1853 the ship sailed from Liverpool on a voyage to Melbourne, under the command of one William Benson. At Melbourne the ship was supplied by Messrs. Levien & Stenetz with necessaries, and, in payment for them, Benson drew a bill on Claus for the sum of £601. 16*s.* 6*d.* This bill did not arrive in England until Claus's bankruptcy, and was never accepted, and when at maturity was dishonoured. On the 30th of November 1854 (the ship being then in due prosecution of its voyage), Claus executed, in England, a bill of sale of the ship to Louis Castrique, who did not at that time take any steps to register himself as owner. On the 4th of May 1855 the ship, according to instructions received by the master while he was at Melbourne, went to Havre. On the 10th of May 1855, while the ship was at Havre, Claus became bankrupt. The bill for £601. 16*s.* 6*d.* had, in the meantime, been indorsed to Messrs. Trotteux & Co., of Havre, French subjects, and they, whilst the ship was still in that port, commenced, in the Court of the Tribunal of Commerce there, a suit against Benson on the bill. Benson was cited and appeared, but did not defend the suit; but allowed judgment to be taken against him, and on the 15th of May 1855 the judgment was formally recorded. This judgment declared: 'The Tribunal condemns Benson in his quality of captain of the vessel

CASTRIQUE v. IMRIE.

Ann Martin, and *by privilege on that vessel* ('et par privilège sur ce navire'), to pay to the plaintiffs the sum of £601. 16*s.* 6*d.*, the amount of the bill', &c., with interest and costs. No summons in the suit had been served on Claus or Castrique. The ship was, under this judgment, seized in the port of Havre, and detained in the custody of the court. The ship, however, could not be sold till this judgment of the Tribunal of Commerce had been ratified by the Civil Tribunal of the same district; and the persons appearing by the ship's papers to be the owners of the ship were entitled to appear and be heard before the Civil Tribunal. Claus, and his official assignee Bird, as well as Benson, the master, accordingly received notice to appear; they did not appear, and the judgment of the Tribunal of Commerce was, on the 15th of August 1855, confirmed, and a sale of the ship ordered. Notice of this final judgment was served upon Bird, the official assignee of Claus, but he never appeared, in person or otherwise, before the Tribunal. After the delivery of this final judgment, Castrique (who had, though not formally, been made aware of these proceedings), upon the 22nd of September 1855 commenced a suit in the Civil Tribunal of Havre, in the nature of a suit to replevy the ship; the facts were then fully proved, and evidence of the law of England on the subject was given to the Civil Tribunal.

The Civil Tribunal on the 19th of April 1856 gave judgment against Castrique. Castrique appealed against this judgment to the Court of Appeal at Rouen, which confirmed the judgment of the Civil Tribunal of Havre. Castrique effected a registry in his own name as owner on the 13th of April 1857. The sale took place on the 29th of May 1857; he attended it, but did not lodge any formal protest against it. The defendants became the purchasers, and registered themselves on the 15th of July 1857 as owners.

When the vessel arrived in this country Castrique formally demanded possession of it, and then brought an action in the Court of Common Pleas to recover it, on the ground that the sale in France was illegal and void as against his earlier title.

The Court of Common Pleas, were of opinion that Castrique was entitled to recover. The Court of Exchequer Chamber reversed that judgment. The case was then brought up to this House on Error.

The Judges were summoned, and Mr. Baron Bramwell, Mr. Justice Blackburn, Mr. Justice Keating, Mr. Justice Mellor, Mr. Baron Cleasby, and Mr. Justice Brett attended.

The following question was put to the judges:

Whether, under the circumstances stated in the special case, the plaintiff is entitled to recover from the defendants the ship in question and her appurtenances?

With the exception of Keating J. the judges answered this question in the negative, on the ground that the French judgment was a judgment in rem.

Keating J. gave the same answer to the question put on the ground that, though in his opinion the French judgment was a judgment in personam, the case was concluded by *Cammell* v. *Sewell* (*ante*, p. 270).

LORD CHELMSFORD: My Lords, in order to entitle the plaintiff to recover the ship in question it was necessary for him to shew that the judgment in the French court might be questioned, and to prove it to be one that our courts will not recognise. It is admitted that if the judgment of the court at Havre was a judgment in rem, the plaintiff cannot recover in this action unless he can impeach the judgment on the ground of fraud, or as being contrary to natural justice. We cannot look out of the special case for an explanation of the nature of the judgment.

In the description of the original proceeding the case states that while the ship was in the port of Havre, Trotteux & Co. commenced and prosecuted a suit against William Benson, the master of the ship, in the Court of the Tribunal of Commerce at Havre, and 'against the said ship'. It was argued for the appellant that from the other facts stated in the case, the words 'against the said ship' may be understood that the ship being available for payment of a bill given by the master for necessaries supplied during a voyage, the suit was against the master personally, and only indirectly and by consequence against the ship.

But assuming this to be so, it is stated in the case that according to the law of France a sale of the ship could take place only after the judgment of the Court of Commerce was confirmed, and the sale of the ship ordered by a judgment of the Civil Tribunal of the district in which the said Court of Commerce was situated. And the case states a judgment in the Court of Commerce, and the seizure of the ship and her appurtenances in pursuance of the judgment. And that 'proceedings were afterwards instituted in the Civil Tribunal of Havre (being the Civil Tribunal of the district in which the Court of Commerce is situate), and in default of the appearance of the parties summoned a judgment by default was given, and duly recorded in

CASTRIQUE v. IMRIE. — Lord Chelmsford.

the said Civil Tribunal of Havre, by which the seizure of the ship and its appurtenances was confirmed'. And it was ordered that the ship and its appurtenances should be sold by public auction to the highest bidder at the sittings for sales of the Civil Tribunal. This order for the sale of the ship, whatever may be thought of the original proceeding, appears to be a judgment in rem. Without, however, looking to this ultimate order, I think that the original proceeding being for the purpose of enforcing a maritime lien, which by the law of all foreign codes founded on the civil law exists for money advanced for repairs and necessaries on a voyage, was a proceeding in rem.

But, then, it is said that the law to be applied to this case was the English law, and by that law there is no charge or lien on the ship for necessaries supplied to the master during a voyage, and the courts at Havre acted erroneously and in ignorance of the law they were administering. But no proof was offered to the French courts whether by the law in existence at Melbourne, where the bill was drawn by the master of the ship, there was or was not a lien on the ship for necessaries, and they might well assume, in the absence of evidence, that the general maritime law of lien prevailed and attached upon the master's contract.

Assuming that there was a mistake of the law, still this error will not render the French judgment void in this country. Even if evidence had been offered to the French courts of the English law applicable to the case, and they had honestly come to an erroneous conclusion upon the subject, their judgment could not be impeached in our courts.

To sum up my opinion in the words of Mr. Justice Blackburn, and the other learned Judges who concurred with him, 'I think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.'

For the reasons thus shortly expressed, I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORDS HATHERLEY L.C. and COLONSAY delivered judgment to the same effect.

Judgment affirmed.

Section B: JURISDICTION: JUDGMENTS IN PERSONAM

No action lies in England on a foreign judgment in personam unless the defendant either submitted to the jurisdiction or was present in the foreign country at the date of the issue of the writ.

SCHIBSBY *v.* WESTENHOLZ (1870), L.R. 6 Q.B. 155 (Court of Queen's Bench)

SCHIBSBY *v.* WESTENHOLZ.

The judgment of the court (Blackburn, Mellor, Lush, and Hannen JJ.) was delivered by

Blackburn J.

BLACKBURN J.: This was an action on a judgment of a French tribunal given against the defendants for default of appearance.

The pleas to the action were, amongst others, a plea of never indebted, and, thirdly, a special plea asserting that the defendants were not resident or domiciled in France, or in any way subject to the jurisdiction of the French court, nor did they appear; and that they were not summoned, nor had any notice or knowledge of the pending of the proceedings, or any opportunity of defending themselves therefrom. On these pleas issue was joined.

On the trial before me the evidence of a French avocat was given, by which it appeared that by the law of France a French subject may sue a foreigner, though not resident in France, and that for this purpose an alien, if resident in France, was considered by the French law as a French subject. The mode of citation in such a case, according to the French law, is by serving the summons on the Procureur Impérial. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on the merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government is, in such a case, to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this, as was explained by the avocat, is not required by the French law, but is simply done by the imperial government voluntarily from a regard to fair dealing.

It appeared by other evidence that the plaintiff in this case was a Dane resident in France. The defendants were also Danes, resident

SCHIBSBY v. WESTENHOLZ. — Blackburn J.

in London and carrying on business there. A written contract had been made between the plaintiff and defendants, which was in English, and made in London. By this contract the defendants were to ship in Sweden a cargo of Swedish oats free on board a French or Swedish vessel for Caen, in France, at a certain rate for all oats delivered at Caen. The plaintiff asserted, and the defendants denied, that the delivery at Caen was short of the quantity for which the plaintiff had paid, and the plaintiff made some other complaints as to the condition of the cargo which were denied by the defendants. The plaintiff very plainly told the defendants that if they would not settle the claim he would sue them in the French courts. He did issue process in the manner described, and the French consulate in London served on the defendants a copy of the citation.

The following admissions were then made, namely: that the judgment was regular according to French law; that it was given in favour of the plaintiff, a foreigner domiciled in France, against the defendants, domiciled in England, and in no sense French subjects, and having no property in France.

I then ruled that I could not enter into the question whether the French judgment was according to the merits, no fraud being alleged or shewn.

I expressed an opinion (which I have since changed) that, subject to the third plea, the plaintiff was entitled to the verdict, but reserved the point.

The jury found that the defendants had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. I then directed the verdict for the plaintiff, but reserved leave to enter the verdict for the defendants on these facts and this finding.

A rule was accordingly obtained by Sir George Honyman, against which cause was shewn in the last term and in the sittings after it before my brothers Mellor, Lush, Hannen, and myself. During the interval between the obtaining of the rule and the shewing cause the case of *Godard* v. *Gray* (*post*, p. 382), on which we have just given judgment, was argued before my brothers Mellor, Hannen, and myself, and we had consequently occasion to consider the whole subject of the law of England as to enforcing foreign judgments.

My brother Lush, who was not a party to the discussions in *Godard* v. *Gray*, has, since the argument in the present case, perused

the judgment prepared by the majority in *Godard* v. *Gray* and approves of it; and, after hearing the argument in the present case, we are all of opinion that the rule should be made absolute.

It is unnecessary to repeat again what we have already said in *Godard* v. *Gray*.

We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B., in *Russell* v. *Smyth* (1842), 9 M. & W. at p. 819, and again repeated by him in *Williams* v. *Jones* (1845), 13 M. & W. at p. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act, 1852, ss. 18 and 19, conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called 'comity', we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, mutatis mutandis, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down.

Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American

SCHIBSBY v. WESTENHOLZ. — Blackburn J.

courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.

Again, it was argued before us that foreign judgments obtained by default, where the citation was (as in the present case) by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country because such a mode of citation was contrary to natural justice, and if this were so, doubtless the finding of the jury in the present case would remove that objection. But though it appears by the report of *Buchanan* v. *Rucker* (1807), 1 Camp. 63, that Lord Ellenborough in the hurry of nisi prius at first used expressions to this effect, yet when the case came before him in banco in *Buchanan* v. *Rucker* (1808), 9 East, 192, he entirely abandoned what (with all deference to so great an authority) we cannot regard as more than declamation, and rested his judgment on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction. 'Can', he said, 'the island of Tobago pass a law to bind the rights of the whole world?'

The question we have now to answer is, Can the empire of France pass a law to bind the whole world? We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case.

Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.

In the case of *General Steam Navigation Company* v. *Guillou* (1843), 11 M. & W. 877, 894, on a demurrer to a plea, Parke B., in delivering the considered judgment of the Court of Exchequer, then consisting of Lord Abinger C.B., Parke, Alderson, and Gurney BB., thus expresses himself: 'The substance of the plea is that the cause of action has been already adjudicated upon, in a competent court, against the plaintiffs, and that the decision is binding upon them, and that they ought not to be permitted again to litigate the same question. Such a plea ought to have had a proper commencement and conclusion. It becomes, therefore, unnecessary to give any opinion whether the pleas are bad in substance; but it is not to be understood that we feel much doubt on that question. They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or temporary presence by the decision of a French court, and they did not select the tribunal and sue as plaintiffs, in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey.'

It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment, merely by appearing to defend themselves against it. On the other hand, in *Simpson* v. *Fogo* (1863), 1 Hem. & M. 195, where the mortgagees of an English ship had come into the courts of Louisiana, to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued in the case seem all to have

SCHIBSBY v. WESTENHOLZ. — Blackburn J.

taken it for granted that the decision of the Court in Louisiana would have bound the mortgagees, had it not been in contemptuous disregard of English law. The case of *General Steam Navigation Company* v. *Guillou* was not referred to, and therefore cannot be considered as dissented from; but it seems clear that they did not agree in the latter part of the opinion there expressed.

We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301, is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound.

In *Douglas* v. *Forrest* (1828), 4 Bing. at p. 703, the court, deciding in favour of the party suing on a Scotch judgment, say: 'We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it.' Those circumstances are all negatived here. We should, however, point out that, whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest*, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France. As to this, see *London and North Western Railway Company* v. *Lindsay* (1858), 3 Macq. 99.

We think, and this is all that we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal.

Judgment for defendants.

The possession of property in a foreign country is not sufficient to give the courts of that country jurisdiction in personam over the owner thereof.

EMANUEL *v.* SYMON, [1908] 1 K.B. 302 (Court of Appeal)

Appeal from the judgment of Channell J. ([1907] 1 K.B. 235).

In 1895 the defendant, who was then residing and carrying on business in Western Australia, entered into partnership with five other persons, whose interests were now represented by the plaintiffs, for the purpose of working and developing a gold mine situate in that colony and owned by the partnership. The defendant subsequently gave up his business in Western Australia, and in 1899 he left the colony permanently and came to live in England.

In November 1901 a writ was issued by the plaintiffs against the defendant in the Supreme Court of Western Australia, claiming a dissolution of partnership, a sale of the mine, accounts and inquiries, and other relief as in an ordinary partnership action. On 13 November 1901 that writ was served on the defendant in England, but he did not enter an appearance, or take any other step to defend the action. He was, however, kept informed from time to time of the proceedings in the action.

On 25 July 1902 the Supreme Court of Western Australia, in default of appearance by the defendant, pronounced a decree for the dissolution of the partnership as from that date, and ordered the mine to be sold and the usual accounts to be taken by the taxing officer. The sale was carried out and the accounts were taken, and the taxing officer issued his certificate shewing liabilities of the partnership amounting to a sum of 7,687*l.* 9*s.* 9*d.* In May, 1903, the final order of the court was pronounced, under which the plaintiffs paid the sum found to be due from the partnership. They subsequently issued the writ in this action to recover from the defendant the sum of 1,281*l.* 4*s.* 11*d.* as his share of the sum of 7,687*l.* 9*s.* 9*d.* paid by them as aforesaid.

The defendant denied that he was bound by the finding or order of the Colonial Court, on the ground that he was a British subject resident and domiciled in England; that neither at the commencement nor during the continuance of the action was he resident or domiciled in Western Australia, or subject to the jurisdiction of the courts of that colony; and that he had neither appeared to the process nor agreed to submit himself to the jurisdiction of those courts.

EMANUEL v. SYMON.

Channell J. held that by entering into a partnership in Western Australia relating to real estate in that colony the defendant had impliedly agreed to submit to the jurisdiction of the Colonial Court as to disputes arising during the continuance and on the termination of the partnership, and was therefore bound by the findings of that court. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

BUCKLEY L.J.: In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;[1] (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case. In *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351, at p. 371, Fry J., after enumerating the five cases above mentioned, added these words, 'and, possibly, if *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951, be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction'. The principle upon which this court proceeds in enforcing foreign judgments is stated by Blackburn J. in *Schibsby* v. *Westenholz* (*ante*, p. 365) in these words: 'We think that for the reasons there'—i.e., in the case of *Godard* v. *Gray* (*post*, p. 382)—'given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B. in *Russell* v. *Smyth* (1842), 9 M. & W. 810, at p. 819, and again repeated by him in *Williams* v. *Jones* (1845), 13 M. & W. 628, at p. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.' In other words, the courts of this country enforce foreign judgments because those judgments impose a duty or obligation which is recognized in this country and leads to judgment here also. Referring to *Becquet* v. *MacCarthy*, Mr. Dicey in his

[1] Query 'as the one in which he would sue'.

work on the Conflict of Laws has, at p. 373, the following comment: 'But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction?' That comment is justified, and the doubt there expressed recognized, if indeed a negative answer to the question was not given in a substantive form, and without any doubt, by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670. *Becquet* v. *MacCarthy* has been the subject of adverse comment—first, in *Schibsby* v. *Westenholz*, where Blackburn J. said: 'Whilst we think that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas* v. *Forrest* (1828), 4 Bing. 686, at p. 703, we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground'; secondly, by Fry J. in *Rousillon* v. *Rousillon*, where that learned judge said, 'and possibly, if *Becquet* v. *MacCarthy* be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction'; and, thirdly, by Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, where he said: 'Of *Becquet* v. *MacCarthy* it was said by great authority in *Don* v. *Lippmann* (1837), 5 Cl. & F. 1, that it "had been supposed to go to the verge of the law"; and it was explained (as their Lordships think correctly) on the ground that "the defendant held a public office in the very Colony in which he was originally sued". He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and, though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the Colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a Colonial Government, it would, in their Lordships' opinion, have been wrongly decided; and it is evident that Fry L.J. in *Rousillon* v. *Rousillon* took that view.' Lord Selborne then goes on to discuss the question whether it makes any difference that the defendant, at the time when the obligation was contracted, was resident in the foreign country, but left it before the suit was instituted; and, after observing that Blackburn J., delivering the opinion of the Court of Queen's Bench in *Schibsby* v. *Westenholz*, inclined to the view that the laws of the foreign country would bind

EMANUEL v. SYMON. — Buckley L.J.

the defendant, though he declined to decide that point without further argument, Lord Selborne said: 'Their Lordships do not doubt that, if he'—i.e., Blackburn J.—'had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.' Having regard to these passages, *Becquet* v. *MacCarthy*, if and in so far as it decides that a person, who merely possesses property or enters into a contract in a foreign country, binds himself to submit to the jurisdiction of the foreign country, can, I think, no longer be sustained; and the proposition on which Channell J. based his judgment, namely, that inasmuch as the defendant had become a party to a contract of partnership in Western Australia he must be taken to have bound himself to submit to the jurisdiction of the courts of that colony, is not sound. This appeal must therefore be allowed.

LORD ALVERSTONE C.J. and KENNEDY L.J. delivered judgment to the same effect.

Appeal allowed.

Where a defendant enters an appearance merely in order to protest the jurisdiction of a foreign court, it is doubtful whether he has submitted to its jurisdiction.

HARRIS v. TAYLOR. — Buckley L.J.

HARRIS *v.* TAYLOR, [1915] 2 K.B. 580 (Court of Appeal)

BUCKLEY L.J.: This is an appeal against a judgment of Bray J. given in an action brought to enforce a judgment obtained by the plaintiff against the defendant in an action in the Isle of Man. In that action the plaintiff claimed damages for criminal conversation by the defendant with the plaintiff's wife, and for the loss of the society and services of his wife. The plaintiff was domiciled and resident in the Isle of Man; the defendant was resident in England and prima facie was not subject to the jurisdiction of the Isle of Man Court, and the question which arises on this appeal is whether the defendant so acted as to submit to the jurisdiction of the Court of the Isle of Man. In order to decide this question it is necessary to consider carefully the rules of procedure which govern legal proceedings in the Isle of Man. An action in that island is not commenced by the issue of a writ.

Order II, r. 1, of the Rules of 1884 of the High Court of Justice, Isle of Man, provides that 'every action in the High Court, hereinafter called the "Court", shall be commenced by filing in the Rolls Office a concise statement of the nature of the claim made, or of the relief or remedy required in the action'. In this case the plaintiff by his legal adviser on December 17, 1912, made his statement of claim as follows: 'The plaintiff's claim is for damages for loss of the society and services of his wife Amy Margaret Harris and for criminal conversation with her.' That statement of claim was filed in court on December 27, 1912, and according to the practice of the Isle of Man that constituted the commencement of the action. The action is then listed and comes before the court on an appointed day. Order VIII, r. 2, provides that: 'In any case not of a criminal nature, if the summons be served personally upon a defendant, or it appear to the satisfaction of the Court that the fact of such summons having been issued and having been attempted to have been served, has come to the knowledge of a defendant three days at least before the day on which such summons required him to appear, the cause may proceed and be determined in his absence, or may be adjourned or otherwise as to the Court may seem fit.'

When this action first came into the list the defendant had not been served and he did not appear in court, and the plaintiff applied ex parte for leave to issue a writ and to serve it on the defendant out of the jurisdiction. Leave was given; a writ was issued on February 21, 1913; and it was duly served on the defendant in England. On March 17, 1913, the defendant by his advocate (Mr. Cruickshank) appeared in court, and the following is the official record of what took place: 'Mr. McWhannell for plaintiff. Mr. Cruickshank appears conditionally to set aside writ. Defendant to file motion to set aside writ.' The evidence given by the Isle of Man lawyers shows that in the Isle of Man an appearance in an action is not entered in the same way as in this country. When a cause has been entered in the list the defendant appears in court either in person or by his advocate and a note of his appearance is made by the Deemster in his book, and that is what was done in this case. On March 31 the defendant gave notice of motion 'to set aside the order for service out of the jurisdiction of this Court upon defendant granted by His Honour Deemster Callow on February 21, 1913, and the writ of summons issued thereunder on the following grounds:—1. That the Rules of the High Court of Justice, 1884, do not contemplate or authorise service out of the

HARRIS v. TAYLOR. — Buckley L.J.

jurisdiction in actions for tort. 2. That no cause of action arose or exists within the jurisdiction of this Court. 3. That defendant is domiciled in England and has no domicile in the Isle of Man and never has had such last mentioned domicile.' On April 23, counsel for the plaintiff and the defendant having been heard, this motion was dismissed with costs. Subsequently on May 19 the plaintiff gave notice of motion for interlocutory judgment and for an order for a special jury to assess the damages (if any) payable to the plaintiff under Order XIX, r. 4. The interlocutory judgment was delivered on June 30, and was in the following terms: 'Upon hearing the plaintiff's motion in the within-styled action for an interlocutory judgment against the defendant and for an order for a jury to assess the damages (if any) payable by the defendant to the plaintiff: and the defendant John Taylor having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him: and upon consideration had thereof It is ordered that the defendant John Taylor do pay to the plaintiff damages in respect of his claim for loss of the society and services of his wife Amy Margaret Harris and for defendant's criminal conversation with her.'

The case then came before a jury. The claim was confined to damages for criminal conversation, and the jury gave a verdict for 800*l.* damages. Final judgment was entered for the plaintiff in accordance with the verdict for 800*l.* and costs. The judgment contained the following recital: 'the defendant who is resident out of the jurisdiction but upon whom a writ of summons in the action has been duly served not having filed or delivered any defence nor appearing to the action.' That is the history of the proceedings in the Isle of Man Court.

The question which we have to decide on this appeal depends, as I have said, on whether the defendant submitted to the jurisdiction of the Isle of Man Court, and in order to decide that question it is necessary to consider what it was that the defendant did on March 17, when as the record states he appeared conditionally to set aside the writ. When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the court, and if he had done nothing, although the court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it,

he thought it was in his interest to do. He went to the court and contended that the court had no jurisdiction over him. The court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that court. If the decision of the court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so. The course adopted by the defendant's advocate on March 17 was either a qualified appearance or an unqualified appearance. If it can be regarded as a qualified appearance, it was an appearance for the purpose of getting a decision of the court on the question whether the defendant was bound by the jurisdiction of the court. The decision was against him, and thereafter it was not open to the defendant to say that he was not bound. The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign court, then the judgment is enforceable against him in this country: see *Schibsby* v. *Westenholz* (*ante*, p. 363). I think that in this case the defendant did submit himself to the jurisdiction of the Court of the Isle of Man, and, therefore, it was his duty to obey the judgment.

For these reasons I am of opinion that the defendant submitted himself to the jurisdiction of the Isle of Man Court, and this court will therefore recognize the judgment as one which was properly obtained against him and which can be enforced in this country. The appeal will be dismissed.

Appeal dismissed.

NOTE U: WHAT CONSTITUTES A VOLUNTARY APPEARANCE

DR. CHESHIRE submits ('though without conviction') that *Harris* v. *Taylor* is not an authority for the crude proposition that every form of protest against jurisdiction amounts to submission, because the defendant did more than protest the jurisdiction, he expressly pleaded that there was no cause of action against him by Manx law. This argument seems of doubtful validity, because although the defendant did suggest that he had a defence on the merits, he did not contest the case on that basis. A more convincing argument is adduced by Read (pp. 166–7), who points out that the Manx procedure only permitted a

general appearance; it had no process for a special appearance limited to a protest against the jurisdiction; and therefore the defendant could not be heard to say that his general appearance should have a special effect only. According to Read, it is 'a possible inference from *Harris* v. *Taylor* that protest to the jurisdiction of a foreign court will not amount to consent to its jurisdiction if there is a mode of procedure provided by its law whereby protest may be made without appearing generally, and that mode is used'.

If the defendant appears in the foreign proceedings merely to save property of his which the foreign court is about to seize, is his appearance voluntary? According to the English cases it is; but they indicate a doubt whether the position would be the same if the property was not threatened with seizure but had already been seized in order to found jurisdiction: *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301; *Voinet* v. *Barrett* (1885), 55 L.J. Q.B. 39; *Guiard* v. *De Clermont*, [1914] 3 K.B. 145. This distinction is obviously nebulous, because in both cases the property is within the effective control of the foreign court.

It is significant that s. 4 (2) (*a*) (i) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (*post*, p. 399) provides that submission is not to be inferred from an appearance intended to contest the jurisdiction or to protect property seized or threatened with seizure.

Section C: FINALITY OF JUDGMENTS

A foreign judgment cannot be sued on in England unless it is final and conclusive.

NOUVION *v.* FREEMAN.

NOUVION *v.* FREEMAN (1889), 15 App. Cas. 1 (House of Lords)

Appeal from a decision of the Court of Appeal (Cotton, Lindley, and Lopes L.JJ.) (37 Ch. D. 244) reversing a judgment of North J. (35 Ch. D. 704).

LORD HERSCHELL: My Lords, this appeal arises in an action brought by the appellant, the plaintiff below, for the administration of the estate of a deceased gentleman named Henderson. In order to found his claim to an order for the administration of that estate it became necessary for him to shew that he was a creditor of the deceased. The case presented by him for the purpose of making that out was that he had obtained a judgment of a foreign court upon which he was entitled to sue in this country, and which in this country established the existence of a debt. Under those circumstances the court ordered that there should be first tried the issue, 'whether the judgment or decree' upon which he relied, one pronounced on the 5th of April 1878, 'and the other judgments or decrees whereof particulars have been delivered, or any and which of them, are orders or judgments

upon which the claim of the plaintiff in this action or some and what part of it can be sustained'.

It appears that Mr. Henderson, the administration of whose estate is in question, had purchased certain properties in the district of Seville of the plaintiff, Mr. Nouvion, and that the deeds by which these properties were conveyed, and which contained an obligation to make certain payments, were registered in the registry of the district of San Roman, and where deeds of that description are so registered, according to the law of Spain, the person who is entitled to payment under them can obtain what is called an 'executive' judgment.

It is necessary to state distinctly what the nature of that judgment is; because I think it will be found that the decision of your Lordships must be determined by that consideration. In an action of this nature only a very limited number of defences can be raised by the person sued. He cannot impeach the instruments upon which the action is founded or shew that they were obtained by fraud, or that on any other ground they did not properly form the basis of an obligation on his part. He can only defend himself by such defences as are open to him on the assumption that the deeds were valid, and in the first instance did create the obligation. He may shew that there has been a waiver, or that he has discharged the obligation by payment or otherwise, but substantially I think those are the only defences open to him. It is open to either of the parties to such an instrument to sue in the same court in another form of action, which is called a declaratory or plenary action, and which is said to be the ordinary course, not as meaning that the other is a course which can only be taken under exceptional circumstances, but that the one conforms to the general and ordinary rules of procedure in an action in the Spanish courts, and that the other is a special procedure allowed in particular cases. In such a plenary action, to which either of the parties may have recourse, every defence which may be available is open as well as every consideration establishing the ground of action; and such a plenary action may be instituted by either of the parties to the executive action; that is to say, the party against whom the decision has been pronounced in the executive action, be he plaintiff or defendant, is at perfect liberty to sue in a plenary action for the purpose of obtaining a declaration of the rights of the parties; and in such a plenary action the fact that a judgment has been delivered in an executive action cannot be set up as at all affecting the rights of the parties, either in the way of proof or of title to succeed in the plenary

NOUVION v. FREEMAN. — Lord Herschell.

action. The same points which have been decided in the executive action can again be raised in the plenary action, as well as other questions which were not open in the executive action. No effect is given, in the court in which it was pronounced and in which afterwards the plenary action may be pending, to the judgment in the executive action as being res judicata and as finally concluding the rights of the parties upon any point whatever.

My Lords, in the present case the plaintiff, Mr. Nouvion, who was a party to the agreements which I have mentioned, and which had been duly registered, brought an executive action, and in that executive action a decree was pronounced in these terms: 'Let an order of execution be issued against the property and goods of Mr. William Henderson for the principal amount of 697,135 reales, 60 centimos, and also for the amount of the legal interests thereon from the date of default being made by not meeting' certain drafts which are there mentioned.

It appears that owing to the absence of Mr. Henderson from Spain it became necessary, in accordance with the procedure of the Spanish courts, to send letters requisitorial to this country, that is to say, to Scotland, where Mr. Henderson was resident, and to obtain from the Spanish consul in Scotland a return to those letters, which intimated that Mr. Henderson had not discharged, as he would then have had an opportunity of doing, the liability which was declared by the judgment. Thereupon Mr. Henderson having intervened and having alleged that the debt was not due by reason of a promise of the plaintiff not to sue him, and that point having been decided against him, a decree was made, which I think may properly be termed a final decree in that action, that the distraint be carried into effect, 'and in virtue thereof sale by auction be made of the property attached, and out of the proceeds thereof entire and complete payment to the executive plaintiff of the amount of the principal demanded' with interest and costs.

My Lords, the plaintiff relies upon that judgment as being sufficient to entitle him, when he sues upon it in the courts of this country, to a judgment for the amount of the debt for which it was ordered that execution should issue, and the only question in this case is whether, under the circumstances which I have mentioned, that judgment is sufficient to entitle him in the courts of this country to a judgment for his debt as being a creditor of the deceased person, Mr. Henderson.

Now, my Lords, there can be no doubt that in the courts of this

country effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by Parke B. and Alderson B. in the case of *Williams* v. *Jones* (1845), 13 M. & W. 628, 633, where the law is thus stated: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.' But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a court of competent jurisdiction, such judgment being final and conclusive. I shall of course have something to say upon the meaning which must be given to those words, but the general proposition in that form is not disputed by the learned counsel for the appellant. They contend that this judgment is final and conclusive, and no doubt in a certain sense that must be conceded. It puts an end to and absolutely concludes that particular action. About that there can be no manner of doubt—in that sense it is final and conclusive. But the same may be said of some interlocutory judgments upon which there can be no question that an action could not be maintained; they do settle and conclude the particular proceeding, the interlocutory proceeding, in which the judgment is pronounced. It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which arose in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action may be maintained in the courts of this country, when such judgment has been pronounced by a foreign court.

My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of

NOUVION v. FREEMAN. — Lord Herschell.

that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt.

The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the courts of this country would proceed in enforcing a foreign judgment altogether fails.

It has been suggested that a judgment obtained in an 'executive' action may be regarded as analogous to a judgment obtained in a common law action in the time prior to the Judicature Act, the execution of which might be restrained by a Court of Equity, so as to prevent the plaintiff who had succeeded in such an action from obtaining the fruits of his judgment. I do not think that such an analogy is a complete one; but even if it were more complete than I think it to be, it appears to me that it would afford very little assistance to your Lordships unless we could know what had been the course adopted with regard to such judgments in countries in whose system of law the same force and effect are given to foreign judgments as are given in the courts of this country. Upon that point we have had no information whatsoever.

Then, my Lords, it is said that such a judgment is analogous to a judgment which has been obtained upon which a suit may be instituted in the courts of this country, even although an appeal may be pending. It appears to me that there is a vital distinction between the two cases. Although an appeal may be pending, a court of competent jurisdiction has finally and conclusively determined the existence of a debt, and it has none the less done so because the right of appeal

has been given whereby a superior court may overrule that decision. There exists at the time of the suit a judgment which must be assumed to be valid until interfered with by a higher tribunal, and which conclusively establishes the existence of the debt which is sought to be recovered in this country. That appears to me to be in altogether a different position from a 'remate' judgment, where the very court which pronounced the 'remate' judgment (not the Court of Appeal) may determine, if proper proceedings are taken, that the debt for which this 'remate' judgment is sought to be used as conclusive evidence has no existence at all.

My Lords, the plaintiff in such a suit, an executive suit, is not, by the decision which is now under appeal, deprived of his rights. He may still sue upon the original cause of action. Of course it may happen, as in this particular case, that such a suit is barred by lapse of time, but that is an accident. The right of the plaintiff to sue on his original cause of action is not at all interfered with by the judgment which has been pronounced; and in such an action, if it were brought, all questions upon which the rights of the parties depend, and by the solution of which the obligation to pay must ultimately be determined, would be open to consideration and could be dealt with by the courts, and finally and conclusively settled. I do not, therefore, see that there is any wrong or any hardship done by holding that a judgment which does not conclusively and for ever as between the parties establish the existence of a debt in that court cannot be looked upon as sufficient evidence of it in the courts of this country.

Very ingenious arguments have been urged upon your Lordships by the learned counsel for the appellant, and they have strenuously contended that the proper course would be to permit such a judgment to be sued upon and that justice might be done by staying proceedings as might be done in the case of an English judgment sued upon, which was under appeal.

But no authority has been cited, no case has been referred to, which supports the view put forward on the part of the appellant that an action upon such a judgment as this could be maintained, and I certainly cannot advise your Lordships to make such a precedent, because it appears to me, after giving due weight to all the arguments of the learned counsel for the appellant, that on the whole the result would as a general rule be likely to be mischievous and to work injustice rather than justice between the parties.

NOUVION v. FREEMAN. — Lord Herschell.

For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORDS WATSON, BRAMWELL, and ASHBOURNE delivered judgments to the same effect.

Appeal dismissed.

Section D: DEFENCES

A foreign judgment cannot be impeached on its merits even if the foreign tribunal has proceeded on a mistaken view of English law.

GODARD v. GRAY. — Blackburn J.

GODARD *v.* GRAY (1870), L.R. 6 Q.B. 139 (Court of Queen's Bench)

BLACKBURN J.: In this case the plaintiffs declare on a judgment of a French tribunal, averred to have jurisdiction in that behalf.

The question arises on a demurrer to the second plea, which sets out the whole proceedings in the French court. By these it appears that the plaintiffs, who are Frenchmen, sued the defendants, who are Englishmen, on a charterparty made at Sunderland, which charterparty contained the following clause, 'Penalty for non-performance of this agreement, estimated amount of freight'. The French court below, treating this clause as fixing the amount of liquidated damages, gave judgment against the defendants for the amount of freight on two voyages. On appeal, the superior court reduced the amount to the estimated freight of one voyage, giving as their reason that the charterparty itself 'fixait l'indemnité à laquelle chacune des parties aurait droit pour inexécution de la convention par la faute de l'autre; que moyennant paiement de cette indemnité chacune des parties avait le droit de rompre la convention', and the tribunal proceeds to observe that the amount thus decreed was after all more than sufficient to cover all the plaintiffs' loss.

All parties in France seem to have taken it for granted that the words in the charterparty were to be understood in their natural sense; but the English law is accurately expressed in Abbott on Shipping, part 3, c. 1, s. 6, 5th ed., p. 170, and had that passage been brought to the notice of the French tribunal, it would have known that in an English charterparty, as is there stated, 'Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause, he cannot, in effect,

recover more than the damage actually sustained.' But it was not brought to the notice of the French tribunal that according to the interpretation put by the English law on such a contract, a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English contract made in England according to the English construction. No blame can be imputed to foreign lawyers for not conjecturing that the clause was merely a brutum fulmen. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point.

Still the fact remains that we can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law; and that, in consequence of that mistake, judgment has been given for an amount probably greater than, or, at all events, different from that for which it would have been given if the tribunal had been correctly informed what construction the English contract bore according to English law.

The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not, and that the plaintiff is entitled to judgment.

The following are the reasons of my brother Mellor and myself. My brother Hannen, though agreeing in the result, qualifies his assent to these reasons to some extent, which he will state for himself.

It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke B., in *Williams* v. *Jones* (1845), 13 M. & W. at p. 633: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to

GODARD v. GRAY. — Blackburn J.

pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may shew that the judgment was obtained by the fraud of the plaintiff, for that would shew that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor, in *Castrique* v. *Imrie* (*ante*, p. 359), and to leave those questions to be decided when they arise, only observing that in the present case, as in that, 'the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them they came to a conclusion which justified them in France in deciding as they did decide'. . . .

The decisions of the Court of Queen's Bench in *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717, of the Court of Common Pleas in *Bank of Australasia* v. *Harding* (1850), 9 C.B. 661, and of the Court of Exchequer in *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301, seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

'But there still remains a question which has never, so far as we know, been expressly decided in any court.

It is broadly laid down, by the very learned author of Smith's Leading Cases, in the original note to *Doe* v. *Oliver* (1829), 2 Sm. L.C. 2nd ed. at p. 448, that 'it is clear that if the judgment appear on the face of the proceedings to be founded on a *mistaken notion* of the English law', it would not be conclusive. . . . We think that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact.

It can make no difference that the mistake appears on the face of

the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a primâ facie duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shewn to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland but not in England.

If, indeed, foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can shew did exist.

The whole law was much considered and discussed in *Castrique* v.

GODARD v. GRAY. — Blackburn J.

Imrie, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was, that the defendant's title derived under that sale was good, notwithstanding that mistake: Lord Colonsay pithily saying, 'It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly, either as to their own course of procedure or their own law, nor whether under the circumstances they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is, whether under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship.'

The question in *Castrique* v. *Imrie* was as to the effect on the property of a judgment ordering a ship, locally situate in France, to be sold, and therefore was not the same as the question in this case as to what effect is to be given to a judgment against the person. But at least the decision in *Castrique* v. *Imrie* establishes this, that a mistake as to English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the judgment. . . .

For these reasons we have come to the conclusion that judgment should be given for the plaintiffs.

HANNEN, J., while expressing no final opinion on the question whether the French judgment might not be impeached on the ground that it appeared on its face to have proceeded on an incorrect view of English law, agreed in the result on the ground that the defendants should have taken steps to bring the English law to the notice of the French tribunal.

Judgment for the plaintiff.

A foreign judgment given by a court having jurisdiction is not void in England merely because the court mistook or misapplied its own procedure.

PEMBERTON v. HUGHES.

PEMBERTON *v.* HUGHES, [1899] 1 Ch. 781 (Court of Appeal)

This was an action by Mrs. Pemberton who claimed to be the widow of Francis Pemberton asking for a declaration that under a deed poll executed by him in 1891 she was entitled to a jointure or rentcharge of £200 p.a. issuing out of certain lands in Cambridgeshire

The lands were settled by the will of a testator who died in 1850 on Francis Pemberton for life with remainders over, with power for every tenant for life in possession by deed to appoint a rentcharge to any woman whom he should marry or have married, to commence from the death of such tenant for life. Francis Pemberton died in 1892.

The defence was that the plaintiff was married to one Holmes Erwin in Florida in 1884, both parties being domiciled in Florida; that in 1888 Erwin obtained a divorce from a Florida court on the ground of the plaintiff's violent and ungovernable temper; that this divorce was invalid because the rules of the Florida court required that ten days should intervene between the day on which process was issued and the day on which it was returnable, whereas in the present case only nine clear days had intervened; that Erwin was still living when the plaintiff went through a ceremony of marriage with Francis Pemberton; and that therefore the plaintiff's marriage with Francis Pemberton was void and she was not within the power of jointuring conferred by the settlement.

Kekewich J. held that the Florida divorce was void and dismissed the action with costs.

The plaintiff appealed.

LINDLEY M.R. (after stating the facts, and holding that the Florida court had jurisdiction because the plaintiff and Erwin were domiciled in Florida, and stating that he was not satisfied on the evidence that the alleged defect of procedure rendered the divorce void in Florida, continued:) Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to

PEMBERTON v. HUGHES. — Lindley M.R.

this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.

There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained—i.e., over the subject-matter or over the persons brought before them: *Schibsby* v. *Westenholz* (*ante*, p. 363); *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351; *Price* v. *Dewhurst* (1838), 4 My. & Cr. 76; *Buchanan* v. *Rucker* (1808), 9 East, 192; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670. But the jurisdiction which alone is important in these matters is the competence of the court in an international sense—i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country. This is pointed out by Mr. Westlake (International Law, 3rd ed. s. 328) and by Foote (Private International Jurisprudence, 2nd ed. p. 547), and is illustrated by *Vanquelin* v. *Bouard* (1863), 15 C.B. (N.S.) 341. That was an action on a judgment obtained in France on a bill of exchange. The court was competent to try such actions, and the defendant was within its jurisdiction. He let judgment go by default, and in the action in this country on the judgment he pleaded that by French law the French court had no jurisdiction, because the defendant was not a trader and was not resident in a particular town where the cause of action arose. In other words, the defendant pleaded that the French action was brought in the wrong court (see the 13th plea). The Court of Common Pleas held the plea bad, and that the defence set up by it should have been raised in the French action. The French action in *Vanquelin* v. *Bouard* was an action in personam, and the parties to the action in France were also the parties to the action brought in this country on the French judgment. The decision, therefore, does not exactly cover the present case, but it goes far to show that the defendants' contention in this case cannot be supported.

The defendants' contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view. But that distinction rests

on good sense, and is recognised by modern writers on private international law. . . .

It may be safely said that, in the opinion of writers on international law, and for international purposes, the jurisdiction or the competency of a court does not depend upon the exact observance of its own rules of procedure. The defendants' contention is based upon the assumption that an irregularity in procedure of a foreign court of competent jurisdiction in the sense above explained is a matter which the courts of this country are bound to recognise if such irregularity involves nullity of sentence. No authority can be found for any such proposition; and, although I am not aware of any English decision exactly to the contrary, there are many which are so inconsistent with it as to show that it cannot be accepted.

A judgment of a foreign court having jurisdiction over the parties and subject-matter—i.e., having jurisdiction to summon the defendants before it and to decide such matters as it has decided—cannot be impeached in this country on its merits: *Castrique* v. *Imrie* (*ante*, p. 359) (in rem); *Godard* v. *Gray* (*ante*, p. 382) (in personam); *Messina* v. *Petrococchino* (1872), L.R. 4 P.C. 144 (in personam). It is quite inconsistent with those cases, and also with *Vanquelin* v. *Bouard*, to hold that such a judgment can be impeached here for a mere error in procedure. And in *Castrique* v. *Imrie* Lord Colonsay said that no inquiry on such a matter should be made.

A decree for divorce, altering as it does the status of the parties and affecting, as it may do, the legitimacy of their afterborn children, is much more like a judgment in rem than a judgment in personam: see *Niboyet* v. *Niboyet* (*ante*, p. 94). And where there are differences between the two, the decisions on foreign judgments in rem are better guides for the determination of this case than decisions on foreign judgments in personam. The leading cases on foreign judgments in rem are *Doglioni* v. *Crispin* (1866), L.R. 1 H.L. 301; *Castrique* v. *Imrie*; *In re Trufort* (1887), 36 Ch. D. 600. There is nothing, however, in the decisions in these cases to assist the defendants. On the contrary, the judgments delivered in them are, in my opinion, adverse to the defendants' contention. . . .

RIGBY and VAUGHAN WILLIAMS L.JJ. delivered judgments to the same effect.

Appeal allowed.

A foreign judgment can be impeached on the ground of fraud, even if the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign court.

VADALA v. LAWES.

VADALA *v.* LAWES (1890), 25 Q.B.D. 310 (Court of Appeal)

The action in the present case was brought on a foreign judgment given for the plaintiff Giuseppe Vadala, in the Court of Palermo, for 101,343 lire and interest, in respect of certain bills of exchange.

The plaintiff was a stock and share broker at Messina, in Sicily. The defendant, Sir Bennett Lawes, carrying on business as a chemical manure manufacturer, appointed one Luigi Reynolds, by power of attorney, as his representative in Sicily. In 1881 Reynolds accepted on behalf of the defendant seventeen bills of exchange drawn by the plaintiff, amounting in the whole to 101,343 lire. In November 1881 Reynolds absconded, and the defendant was applied to by the plaintiff for payment of 95,000 lire. The defendant denied his liability, and demanded particulars, which however were not sent.

The plaintiff then brought an action against the defendant on the bills of exchange in the Royal Tribunal of Commerce of Messina, and obtained judgment against the defendant for 101,343 lire, on 3 October 1882. This judgment was affirmed by the Court of Appeal at Palermo on 6 July 1885.

On 12 October 1885 the plaintiff commenced the present action against the defendant for the sum awarded by the judgment of the Italian courts, with interest.

The defendant put in a statement of defence, in which he raised the defence that the judgment of the Italian courts had been obtained by fraud.

The 4th paragraph of the statement of defence, as amended, was as follows: 'The defendant never had any transactions with the plaintiff; but the said L. Reynolds had certain speculative and gambling transactions with the plaintiff, who sought to recover from him certain sums of money in respect of such speculative and gambling transactions, and subsequently the plaintiff made a claim against the defendant for moneys alleged to be due from the defendant to the plaintiff, but refused, although requested so to do, to give any particulars as to how the same was made up, or for what debt the same was alleged to be due. The plaintiff then, for the purpose of making out that the defendant was liable to the plaintiff, concocted certain bills of exchange purporting to be accepted by the said

L. Reynolds, but which were not in fact accepted by him, and commenced proceedings in the Italian Courts upon the bills of exchange hereinbefore mentioned.'

'5. Subsequently, for the purpose of defrauding the said Courts, the plaintiff and the said L. Reynolds fraudulently prepared other bills of exchange which the said L. Reynolds accepted. The said L. Reynolds had no authority to accept any bills of exchange by or on behalf of the defendant, as the plaintiff well knew.'

'7. The plaintiff, by fraudulently concealing from the Italian Courts the true transactions between the plaintiff and the said L. Reynolds hereinbefore mentioned, and by inducing the Courts to believe that the bills of exchange, fraudulently prepared, as in paragraph 5 hereinbefore mentioned, were accepted by the said L. Reynolds as the result of commercial transactions entered into by the said L. Reynolds on behalf of the defendant, obtained each of the said judgments in the statement of claim mentioned (if any such judgments or judgment were or was obtained, which is not admitted).'

In his reply, the plaintiff pleaded that the allegations as to the speculative and gambling transactions were made by the defendant in the action in the Italian courts, and were there gone into and adjudged against the defendant.

The action was tried before Charles J., on 20 November 1889. At the trial the plaintiff was called, and gave evidence; but the judge stopped the counsel for the defendant when cross-examining him as to his accounts with a view to showing that the transactions were gambling transactions and not genuine mercantile dealings, his lordship being of opinion that the only defence of fraud raised by the defendant was that the foreign judgment had been obtained by substituting bills signed by Reynolds for forged bills. A verdict was accordingly given for the plaintiff for the amount claimed.

On 5 February 1890 the defendant moved for a new trial before a Divisional Court, consisting of Denman and Wills JJ., who held that the second ground of defence, namely, that the Italian courts had been misled by the fraud of the plaintiff, and induced to believe that the bills were given for genuine mercantile dealings and not for gambling transactions, was open to the defendant on the pleadings, and granted a new trial. From this order the plaintiff appealed.

LINDLEY L.J.: This is an action brought by the plaintiff upon a

VADALA v. LAWES. — Lindley L.J.

judgment obtained in the Italian courts. The Italian action was brought upon certain bills of exchange, and the defence raised in the Italian action was, in substance, that those bills of exchange, which purported to be ordinary commercial bills, were given in respect of gambling transactions by an agent of the defendant, without his authority, and that the defendant was not liable upon them. That defence was tried on its merits; that is to say, the questions whether those bills were given for gambling speculations, and whether, if they were, the defendant was affected by notice of it—all that was fully gone into and decided, and it was decided in favour of the plaintiff. Judgment was accordingly given for the plaintiff for the amount of those bills; and it is upon that judgment that this action is brought.

(After holding that the second ground of defence was open to the defendant on the pleadings, his Lordship continued:) But we now come to another and a more difficult question, and that is, whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295. At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717, *Ochsenbein* v. *Papelier* (1873), L.R. 8 Ch. 695, and *Cammell* v. *Sewell* (*ante*, p. 270), all recognizing and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case* the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without reopening the merits, had never come forward for explicit decision. That point was raised directly in the case

of *Abouloff* v. *Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules, to which I have alluded, could be worked together, they said: 'Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country.' I cannot read that case in any other way. . . .

Therefore, it is competent in point of law for the defendant in this action to raise this defence, and to satisfy the jury, if he can, that the Italian court was misled by the fraud of the plaintiff, that fraud consisting in this—that the plaintiff knowingly placed before the Italian court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact, not only that the bills were for gambling transactions, but, further, that the Italian court has been imposed on by the fraud, that is a good defence according to the case of *Abouloff* v. *Oppenheimer*.

It appears to me, therefore, impossible, in the face of that case, to differ from the view taken by the Divisional Court; and consequently this appeal must be dismissed.

BOWEN L.J. concurred.

Appeal dismissed.

NOTE V: DEFENCES TO ACTIONS ON FOREIGN JUDGMENTS

1. *What are not defences*

(*a*) *Errors of fact or law.* The general principle is that it is no defence that the foreign judgment was wrong either on the facts or on the law. The merits cannot be reopened in England: interest rei publicae ut sit finis litium. Still less can the defendant in England allege that he has discovered fresh evidence the production of which in the foreign court would have led to a decision in his favour. It is his business to take all possible defences in the foreign court: *Ellis* v. *McHenry* (1871), L.R. 6 C.P. 228; *Re Trufort* (1887), 36 Ch.D. 600. Nor is it any defence that the foreign court, purporting to apply English law, made an obvious mistake in doing so: *Castrique* v. *Imrie* (*ante*, p. 359); *Godard* v. *Gray* (*ante*, p. 382); *Re Trufort, supra.* It would seem to follow that it is no defence that the foreign court applied its own domestic law when according to English conflict of laws rules it should have applied English domestic law. In *Simpson* v. *Fogo* (1863), 1 H. & M. 195, Page-Wood V.-C. declined to enforce a Louisiana judgment on the ground that it showed on its face a perverse and deliberate refusal to recognize the law of England. But this case has never been followed. On the contrary, it has twice been held that French decrees annulling marriages validly celebrated in England for failure to comply with French requirements as to form will be recognized in England: *De Massa* v. *De Massa* (*ante*, p. 119); *Galene* v. *Galene*, [1939] P. 237.

(*b*) *Defects of procedure.* It is no defence that the foreign court mistook or misapplied its own rules of procedure: *Pemberton* v. *Hughes* (*ante*, p. 386).

(*c*) *Lack of internal competence.* Is it a defence that though the foreign court had jurisdiction in the international sense, it lacked competence in the internal sense? This is a difficult question, and the authorities are in confusion.

In *Vanquelin* v. *Bouard* (1863), 15 C.B. N.S. 341, the defendant was sued in England on a French judgment in respect of a bill of exchange. The French court had jurisdiction in the international sense and the subject-matter of the action (bills of exchange) was within its internal competence. But the defendant pleaded that the particular French court had no internal competence over him because he was not a trader. This plea was overruled.

On the other hand, in *Castrique* v. *Imrie* (*ante*, p. 362) Lord Chelmsford, adopting a statement of Blackburn J. in the same case, regarded it as material 'whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction'. In that case the foreign judgment was a judgment in rem. And in *Pemberton* v. *Hughes* (*ante*, pp. 387–8) Lindley M.R. said that 'all that English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent, namely, its competence to entertain the sort of case which it did deal with and its competence to require the defendant to appear before it'. In that case the foreign judgment was a divorce decree which is analogous to a judgment in rem. If by 'competence' the learned Master of the Rolls meant internal competence, then his statement supports that of Blackburn J. without being inconsistent with *Vanquelin* v. *Bouard*. In *Bater* v. *Bater*, [1906] P. 209, another case of divorce, Sir Gorell Barnes P.,

having held that the husband and wife were domiciled in New York at the date of the proceedings there, seemed to think it was his duty to inquire whether the wife was resident in New York within the meaning of a New York statute so as to give the New York Court internal competence to grant her a divorce: but this seems contrary to principle. And in *Papadopoulos* v. *Papadopoulos*, [1930] P. 55, one reason for refusing recognition of a Cyprus decree of nullity was that the court had no internal competence to annul a marriage.

It is submitted that the best way of reconciling the authorities is to say that the English court will inquire whether the foreign court had internal competence to deal with the general subject-matter (e.g. contracts, torts, divorce, nullity); but not further or otherwise (e.g. as to the class of defendant). This mode of reconciliation is suggested by the carefully guarded language of Lindley M.R. in *Pemberton* v. *Hughes*. Another way of reconciling the authorities is to say that English courts will inquire into the internal competence of foreign courts in actions in rem, but not in actions in personam. This seems less satisfactory (though it is more clear-cut) because no one has suggested any reason for such a distinction.

The cases are discussed in an article by G. H. Lush in 10 Australian L.J. 10 (1936).

2. *What are defences*

(*a*) *Fraud.* It is settled that a foreign judgment, like any other, can be impeached for fraud. Such fraud may be either fraud on the part of the court, as where it is interested in the subject-matter of the suit; or fraud on the part of the successful party, as where he suppresses evidence or produces forged or perjured evidence; or fraud on the part of both court and party, as where one party bribes the court.

The difficult question is whether a foreign judgment can be impeached for fraud if, in order to prove the fraud, it is necessary to reopen the merits which have already been decided by the foreign court. Two principles are here in conflict, the principle that foreign judgments are impeachable for fraud, and the principle that the merits cannot be reopened. In this situation, four decisions of the Court of Appeal lay down in the clearest terms that it is the former principle which prevails: *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295; *Vadala* v. *Lawes* (*ante*, p. 390); *Ellerman Lines* v. *Read*, [1928] 2 K.B. 144 (a judgment in rem); and *Syal* v. *Heyward*, [1948] 2 K.B. 443. The last case adds two points: (1) a foreign judgment is impeachable for fraud even if the facts relied upon as amounting to fraud could have been raised in the foreign court, but were not; (2) the principles on which the registration of a foreign judgment must be set aside under s. 4 (1) (*a*) (iv) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (*post*, p. 398), if the judgment was obtained by fraud, do not differ from those whereby a foreign judgment can be impeached for fraud at common law. No one will quarrel with the second point, but it is a question whether the first point decided does not carry the principle of the fraud cases too far: see an article by Z. Cowen in 65 L.Q.R. 82 (1949).

The first three cases are criticized by Cheshire (pp. 814–16) and Read (pp. 275–81). It is submitted that these criticisms ignore the realities of the situation, and also the fact that law exists in order to promote justice.

(*b*) *Contrary to public policy.* An action on a foreign judgment, like any other action based on foreign facts, will fail if the enforcement of the plaintiffs' claim would be contrary to English public policy. Naturally, the limits of the doctrine are somewhat ill defined. Well-recognized grounds on which enforcement is refused are that the foreign judgment was enforcing a contract in restraint of trade: *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; or was penal: *Huntington* v. *Attrill* (*ante*, p. 20); or for rates: *Municipal Council of Sydney* v. *Bull*, [1909] 1 K.B. 7; or taxes: *Re Visser*, [1928] Ch. 879. In *Re Macartney*, [1921] 1 Ch. 522, an affiliation order made in Malta against a dead man's estate, granting maintenance to the mother of his illegitimate child without any provision for termination when the child reached the age of 16, was refused recognition in England on three grounds: (1) it was contrary to public policy to give an illegitimate child perpetual maintenance; (ii) the making of posthumous affiliation orders was unknown to English law; (iii) the order was not final and conclusive since it could be varied by the Maltese court in accordance with changes in the child's circumstances. It is submitted that the second ground, that the cause of action was unknown to English law, is an inadequate reason for refusing recognition of a foreign judgment. In *Burchell* v. *Burchell* (1926) 58 Ont. L.R. 515, a final alimony decree ordered by an Ohio court was enforced in Ontario, although alimony is apparently unknown in that province.

(*c*) *Contrary to natural justice.* This conception is even vaguer than that of public policy. A foreign judgment is not contrary to natural justice merely because it is obviously wrong. Most of the cases in which foreign judgments have been refused recognition on the ground that they were contrary to natural justice were cases where no notice of the proceedings was given to the defendant. If insufficient notice is given, that may be a matter of procedure and therefore immaterial, as in *Pemberton* v. *Hughes* (*ante*, p. 386). But if no notice at all is given, as in *Rudd* v. *Rudd*, [1924] P. 72 (a case of divorce), that may constitute a defect of natural justice. Even here, however, it will be otherwise if the defendant contracts in advance that no notice shall be necessary, as in *Copin* v. *Adamson* (1875), 1 Ex. D. 17. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, does not mention the requirement of natural justice, but does insist that the defendant should have received sufficient notice of the proceedings to enable him to defend them: s. 4 (1) (*a*) (iii).

Section E: DIRECT ENFORCEMENT

Foreign Judgments (Reciprocal Enforcement) Act, 1933

An Act to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom, for facilitating the enforcement in foreign countries of judgments given in the United Kingdom, and for other purposes in connection with the matters aforesaid.

PART I

Registration of Foreign Judgments

Power to extend Part I of Act to foreign countries giving reciprocal treatment.

1.—(1) His Majesty, if he is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts of the United Kingdom, may by Order in Council direct—

(*a*) that this Part of this Act shall extend to that foreign country; and

(*b*) that such courts of that foreign country as are specified in the Order shall be deemed superior courts of that country for the purposes of this Part of this Act.

(2) Any judgment of a superior court of a foreign country to which this Part of this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if—

(*a*) it is final and conclusive as between the parties thereto; and

(*b*) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(*c*) it is given after the coming into operation of the Order in Council directing that this Part of this Act shall extend to that foreign country.

(3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(4) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

Application for, and effect of, registration of foreign judgment.

2.—(1) A person, being a judgment creditor under a judgment to which this Part of this Act applies, may apply to the High Court at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the High Court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered:

Provided that a judgment shall not be registered if at the date of the application—

(*a*) it has been wholly satisfied; or

(*b*) it could not be enforced by execution in the country of the original court.

(2) Subject to the provisions of this Act with respect to the setting aside of registration—

(*a*) a registered judgment shall, for the purposes of execution, be of the same force and effect; and

(*b*) proceedings may be taken on a registered judgment; and

(*c*) the sum for which a judgment is registered shall carry interest; and

(*d*) the registering court shall have the same control over the execution of a registered judgment;

as if the judgment had been a judgment originally given in the registering court and entered on the date of registration:

Provided that execution shall not issue on the judgment so long as, under this Part of this Act and the Rules of Court made thereunder, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.

3. (*Power to make rules of Court.*)

Cases in which registered judgments must, or may, be set aside.

4.—(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—

(*a*) shall be set aside if the registering court is satisfied—

(i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or

(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or

(iv) that the judgment was obtained by fraud; or

(v) that the enforcement of the judgment would be con-

trary to public policy in the country of the registering court; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;

(*b*) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

(2) For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction—

(*a*) in the case of a judgment given in an action in personam—

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

(ii) if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

(*b*) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem

of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court;

(*c*) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (*a*) or paragraph (*b*) of this sub-section, if the jurisdiction of the original court is recognized by the law of the registering court.

(3) Notwithstanding anything in sub-section (2) of this section, the courts of the country of the original court shall not be deemed to have had jurisdiction—

(*a*) if the subject matter of the proceedings was immovable property outside the country of the original court; or

(*b*) except in the cases mentioned in sub-paragraphs (i), (ii) and (iii) of paragraph (*a*) and in paragraph (*c*) of sub-section (2) of this section, if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or

(*c*) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.

Powers of registering court on application to set aside registration.

5.—(1) If, on an application to set aside the registration of a judgment, the applicant satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment, the court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

(2) Where the registration of a judgment is set aside under the last foregoing subsection, or solely for the reason that the judgment was not at the date of the application for registration enforceable by execution in the country of the original court, the setting aside of the registration shall not prejudice a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.

(3) Where the registration of a judgment is set aside solely for the reason that the judgment, notwithstanding that it had at the date of the application for registration been partly satisfied, was registered for the whole sum payable thereunder, the registering court shall, on the application of the judgment creditor, order judgment to be registered for the balance remaining payable at that date.

Foreign judgments which can be registered not to be enforceable otherwise.

6. No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

Power to apply Part I of Act to British dominions, protectorates and mandated territories.

10 & 11 Geo. 5, c. 81.

7.—(1) His Majesty may by Order in Council direct that this Part of this Act shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of His Majesty so directing, this Act shall have effect accordingly and Part II of the Administration of Justice Act, 1920, shall cease to have effect except in relation to those parts of the said dominions to which it extends at the date of the Order.

(2) If at any time after His Majesty has directed as aforesaid an Order in Council is made under section one of this Act extending Part I of this Act to any part of His Majesty's dominions to which the said Part II extends as aforesaid, the said Part II shall cease to have effect in relation to that part of His Majesty's dominions.

(3) References in this section to His Majesty's dominions outside the United Kingdom shall be construed as including references to any territories which are under His Majesty's protection and to any territories in respect of which a mandate under the League of Nations has been accepted by His Majesty.

PART II

Miscellaneous and General

General effect of certain foreign judgments.

8.—(1) Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.

(2) This section shall not apply in the case of any judgment—

(*a*) where the judgment has been registered and the registration thereof has been set aside on some ground other than—

(i) that a sum of money was not payable under the judgment; or

(ii) that the judgment had been wholly or partly satisfied; or

(iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or

(*b*) where the judgment has not been registered, it is shown (whether it could have been registered or not) that if it had been registered the registration thereof would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (*a*) of this subsection.

(3) Nothing in this section shall be taken to prevent any court in the United Kingdom recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Act.

Power to make foreign judgments unenforceable in United Kingdom if no reciprocity.

9.—(1) If it appears to His Majesty that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the superior courts of the United Kingdom is substantially less favourable than that accorded by the courts of the United Kingdom to judgments of the superior courts of that country, His Majesty may by Order in Council apply this section to that country.

(2) Except so far as His Majesty may by Order in Council under this section otherwise direct, no proceedings shall be entertained in any court in the United Kingdom for the recovery of any sum alleged to be payable under a judgment given in a court of a country to which this section applies.

(3) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

10. (*Power of High Court to issue certified copies of foreign judgments.*)

11.—(1) (*Definitions.*)

(2) For the purposes of this Act, the expression 'action in personam' shall not be deemed to include any matrimonial cause or any proceedings in connection with any of the following matters, that is to

say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants.

12. (*Application to Scotland.*)

13. (*Application to Northern Ireland.*)

14. This Act may be cited as the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

CHAPTER II

JURISDICTION TO STAY ACTIONS

The English courts have jurisdiction to restrain an action where the defendant is sued in England as well as abroad by the same plaintiff, or where the defendant in England is plaintiff abroad, but will exercise it only where the double proceedings are vexatious and oppressive.

COHEN v. ROTHFIELD. — Scrutton L.J.

COHEN *v.* ROTHFIELD, [1919] 1 K.B. 410 (Court of Appeal)

APPEAL from a decision of Shearman J.

SCRUTTON L.J.: This is an appeal by one Rothfield, a moneylender, from an order of Shearman J. in chambers, staying Rothfield from proceeding with an action brought by him as plaintiff against one Cohen in Scotland, on the ground that its substance is included in an action brought by Cohen, another moneylender, against Rothfield in England. Cohen carried on a business as moneylender in the north of England and Scotland, and Rothfield was his manager on the terms of getting one-fourth of the profits and paying one-fourth of the losses. Rothfield demanded accounts; Cohen alleged the receipt by Rothfield of secret commissions. Rothfield, through his solicitor, threatened an action in Scotland in respect of the Scotch business if accounts were not rendered in a week. Cohen within the week issued his English writ for an account as agent and for damages for misconduct as agent. Rothfield then issued his Scotch writ for an account of the Scotch business. Rothfield has got his Scotch action to the stage when it is nearly ready to be set down for trial. Cohen has done nothing in his English action. Cohen then applied in England to restrain Rothfield from proceeding with his Scotch action on the ground that it was vexatious, and Shearman J. granted him an injunction and gave leave to appeal. Rothfield now appeals.

Where it is proposed to stay an action on the ground that another is pending, and the action to be stayed is not in the court asked to make the order, the same result is obtained by restraining the person who is bringing the second action from proceeding with it. But, as the effect is to interfere with proceedings in another jurisdiction, this power should be exercised with great caution to avoid even the appearance of undue interference with another court.

Where an English court is asked to stay an action commenced in a foreign jurisdiction—that is, one outside the British Empire—on

the ground that the plaintiff in the foreign action is also plaintiff in an English action, the burden is on the person asking for relief from the English court to satisfy it that the plaintiff in the foreign court cannot obtain any advantage from the foreign procedure that he would not obtain in the English court. It is not prima facie vexatious for the same plaintiff to commence two actions relating to the same subject-matter, one in England and one abroad. The applicant must prove a substantial case of vexation resulting from the identity of proceedings, remedies, and benefits, or from the existence of some motive other than a bona fide desire to determine disputes. Within the English courts two actions by the same plaintiff relating to the same subject-matter may be prima facie vexatious, but this prima facie case does not exist where one action is out of the King's dominions, and the court is not necessarily aware of the advantages of the foreign procedure. This appears to be the result of the judgments in *McHenry* v. *Lewis* (1882), 22 Ch. D. 397, and *Hyman* v. *Helm* (1883), 24 Ch. D. 531. Where the plaintiff in the foreign action is not plaintiff, but defendant, in the English action, the case against interference is even stronger, for the person to be stayed has not himself initiated two proceedings. He has initiated one, and has been compelled to appear in another over which he has, as defendant, no control. When Cotton L.J. in 1883 in *Hyman* v. *Helm* asked if there was any case in which a defendant sued here has before decree been restrained from commencing an action abroad, no case was produced. When, in 1909, in *Vardopulo* v. *Vardopulo* (1909), 25 T.L.R. 518, a similar question was asked, again no case was produced. In *In re Connolly Brothers*, [1911] 1 Ch. 731, 745, Cozens Hardy M.R., who had asked the question in *Vardopulo* v. *Vardopulo*, again referred to the matter, and he then pointed out that there was one case in which a defendant had been restrained before decree. That case was *Bushby* v. *Munday* (1821), 5 Madd. 297, in which the plaintiff, who was suing to set aside a bond alleged to have been given for a gaming debt, succeeded in restraining the defendant from suing on the bond in Scotland by proving that, owing to the superior powers of discovery possessed by the English court, there would be more likelihood of the facts being correctly ascertained in England. While, therefore, there is jurisdiction to restrain a defendant from suing abroad, it is a jurisdiction very rarely exercised, and to be resorted to with great care and on ample evidence produced by the applicant that the action abroad is really vexatious and useless.

COHEN v. ROTHFIELD. — Scrutton L.J.

Does the same rule of procedure apply where the action to be stayed is not abroad but in another court in the King's dominions, as in Scotland, Ireland, or the Colonies? In *McHenry* v. *Lewis*, though it was not necessary to decide the question, Jessel M.R. expressed the view that in the case of the same plaintiff bringing two actions in two parts of the Empire, as there were facilities for enforcing the English judgment in other parts of the Empire, the case was more like concurrent actions in the same jurisdiction, though, as he pointed out, if the remedies were different, the case altered. It is obvious, for instance, that an action in South Africa, where the Dutch procedure prevails, in Mauritius or Quebec, where French procedure exists, in Malta with its peculiar law, or in Scotland with its Roman procedure, may produce quite different results from an English action. It appears to me that unless the applicant satisfies the court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's dominions, the court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. The principle has been repeatedly acted upon. Thus on similar grounds the court has declined to stay proceedings in Scotland in *In re Derwent Rolling Mills Co.* (1904), 21 T.L.R. 81, 701, in which case it was pointed out that by the arrestment in Scotland the plaintiff got a charge on the property arrested taking priority from the date of the judgment and had no similar advantage in England, and also in *In re Warrand* (1892), 93 L.T. Jour. 82, and has refused to stay an action in England, the only reason given being that proceedings were pending in Ireland between the same parties for the same relief: *Carter* v. *Hungerford* (1915), 59 Sol. J. 428. In *Jopson* v. *James* (1908), 77 L.J. (Ch.) 824, the Court of Appeal reversed an order of the Vice-Chancellor of the Palatine Court, who had restrained a partnership action in Nova Scotia on the ground of a partnership action pending in England in his court. In *Thornton* v. *Thornton* (1886), 11 P.D. 176, the court refused to restrain a wife from proceeding in England for restitution of conjugal rights because her husband was already bringing divorce proceedings against her in India; and the explanation of this case given in *In re Norton's Settlement*, [1908] 1 Ch. 471, does not at all detract from its authority. In the last case, as in several of the others, the decision or discretion of the judge below was overruled.

Applying these principles to the present case, Rothfield has brought a perfectly proper action in Scotland to take the accounts of a busi-

ness carried on in Scotland, and by arrestment has obtained a charge on certain funds. He announced his intention of bringing this action before Cohen commenced his action in England, and has prosecuted it with much greater diligence than Cohen has in England. Cohen gives no evidence to show that Rothfield will obtain no advantage by the Scotch action, and, so far as the English action relates to Scotch affairs, the evidence can more easily be taken in Scotland than in England. In my view the applicant did not in any way support the burden imposed on him by the principles I have stated, and on those principles there was no evidence which justified Shearman J. in staying the defendant from proceeding with his action in Scotland. His order must be set aside, and the appeal allowed with costs here and below.

EVE J. delivered judgment to the same effect.

Appeal allowed.

CHAPTER III

SUBSTANCE AND PROCEDURE

The fourth section of the Statute of Frauds relates to procedure and not to substance. Consequently an oral contract not to be performed within a year, the proper law of which is French, cannot be sued on in England.

LEROUX v. BROWN.

LEROUX *v.* BROWN (1852), 12 C.B. 801 (Court of Common Pleas)

ASSUMPSIT. The declaration stated, that, on the 1st of December 1849, at Calais, in France, to wit, at Westminster, in the county of Middlesex, in consideration that the plaintiff, at the request of the defendant, then agreed with the defendant to enter into the service of the defendant as clerk and agent, and to serve the defendant in that capacity for one year certain, at certain wages, to wit, 100*l.* a year, to be paid by the defendant to the plaintiff by equal quarterly payments during his continuance in such service, the defendant then promised the plaintiff to receive him into his said service, and to retain and employ him in his said service, at the wages aforesaid: Averment that the plaintiff was ready and willing to enter into the service of the defendant as aforesaid: Breach, that the defendant did not, nor would, at the time he was so requested as aforesaid, or at any other time, receive the plaintiff into his service as aforesaid, or retain or employ him, at such wages as aforesaid, or in any other way.

Pleas,—first, non assumpsit.

The cause was tried before Talfourd J. It appeared that an oral agreement had been entered into at Calais, between the plaintiff and the defendant, under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100*l.* per annum, to collect poultry and eggs in that neighbourhood, for transmission to the defendant here,—the employment to commence at a future day, and to continue for one year certain.

Evidence was given on the part of the plaintiff to show, that, by the law of France, such an agreement is capable of being enforced, although not in writing.

For the defendant, it was insisted, that, notwithstanding the contract was made in France, when it was sought to enforce it in this country, it must be dealt with according to our law; and, being a

contract not to be performed within a year, the Statute of Frauds, 1677, s. 4, required it to be in writing.

Under the direction of the learned judge, a verdict was entered for the plaintiff on the first issue,—leave being reserved to the defendant to move to enter a nonsuit or a verdict for him on that issue, if the court should be of opinion that the contract could not be enforced here.

JERVIS C.J.: I am of opinion that the rule to enter a nonsuit must be made absolute. There is no dispute as to the principles which ought to govern our decision. My brother Allen admits, that, if the 4th section of the Statute of Frauds applies, not to the validity of the contract, but only to the procedure, the plaintiff cannot maintain this action, because there is no agreement, nor any memorandum or note thereof, in writing. On the other hand, it is not denied by Mr. Honyman,—who has argued this case in a manner for which the court is much indebted to him,—that, if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the solemnities of the contract, inasmuch as our law cannot regulate foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the statute of frauds, and contrasting them with those of the 1st, 3rd, and 17th sections, this conclusion seems to me to be inevitable. The words of s. 4 are, 'no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorised.' The statute, in this part of it, does not say, that, unless those requisites are complied with, the contract shall be void, but merely that no action shall be brought upon it: and, as was put with great force by Mr. Honyman, the alternative, 'unless the agreement, or some memorandum or note thereof, shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement,—shews that the statute contemplated that the agreement may be good, though not capable of being enforced, if not evidenced by

LEROUX v. BROWN. — Jervis C.J.

writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice. This view seems to be supported by the authorities; because, unless we are to infer that the courts thought the agreement itself good, though not made in strict compliance with the statute, they could not consistently have held, as was held in the cases referred to by Sir Edward Sugden, that a writing subsequent to the contract, and addressed to a third person, was sufficient evidence of an agreement, within the statute. It seems, therefore, that both authority and practice are consistent with the words of the 4th section. . . . I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of the Statute of Frauds relates only to the procedure, and not to the right and validity of the contract itself. As to what is said by Boullenois in the passage last cited by my brother Allen, it is to be observed that the learned author is there speaking of what pertains ad vinculum obligationis et solemnitatem, and not with reference to the mode of procedure. Upon these grounds, I am of opinion that this action cannot be maintained, and that the rule to enter a nonsuit must be made absolute.

MAULE and TALFOURD JJ. delivered judgments to the same effect.

Rule absolute.

If a foreign rule of prescription extinguishes the plaintiff's right it is fatal to his claim in England: but not if it merely extinguishes his remedy.

HUBER v. STEINER.

HUBER *v.* STEINER (1835), 2 Bing. (N.C.) 202 (Court of Common Pleas)

Assumpsit on a promissory note made by the defendant in France on the 12th of May 1813, and payable to the order of the plaintiff 10th of May 1817.

The defendant pleaded (1) the general issue; (2) the Statute of Limitations; (3) and (4) the French law of prescription. The effect of these pleas appears fully from the judgment.

TINDAL C.J.: The answer which the defendant has set up against this action is twofold: first, he relies upon the English Statute of Limitations; and, secondly, upon the French Law of Prescription, as stated in his third and fourth pleas. As the plea of the Statute of Limitations has been disposed of, by reason that the replication of

the plaintiff's being beyond sea from the time of the cause of action accruing, has been found in his favour, the only ground of defence which it will be necessary to consider will be, that which arises from the plea of the French law.

It becomes necessary to consider the general question in the cause; whether, by the law of France, the contract made by the defendant in his promissory note, is altogether extinguished and made null and void in that country, by reason of the doctrine of prescription, which holds in the French law; or whether, under the doctrine of prescription, the contract itself is not annulled and extinguished, but the remedy only barred in the French courts of law. For we take it to be clearly established, and recognised as part of the law of England, by various decisions, that if the prescription of the French law, which has been opposed to the plaintiff in the present case, is no more than a limitation of the time within which the action upon the note must be brought in the French courts, it will not form a bar to the right of action in our English courts; but that the question, whether the action is brought within due and proper time, must be governed by the English statute. The distinction between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates 'ad litis decisionem', is adopted from the foreign country; so much of the law as affects the remedy only, all that relates 'ad litis ordinationem', is taken from the 'lex fori' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the lex loci contractûs, is evident from many authorities. . . .

Such being the general rule of law, a distinction has been sought to be engrafted on it by the learned counsel for the defendant; that 'where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, ipso facto, and declare it a nullity after the lapse of the prescribed period, that in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment'. This distinction is stated to be adopted from a work entitled Commentaries on the Conflict of Laws, p. 487, by Joseph Story LL.D.; a work which it would be unjust to mention without at the same time paying a

HUBER v. STEINER. Tindal C.J.

tribute to the learning, acuteness, and accuracy of its author. And undoubtedly, the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case'; and with such restriction, it does indeed appear but reasonable, that the part of the lex loci contractûs which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country, as the part of the lex loci contractûs which gives life to, and regulates the construction of the contract; both parts go equally 'ad valorem contractûs', both 'ad decisionem litis'.

So much, however, being conceded to the defendant, it remains for him to set up and establish to the satisfaction of the court the proposition for which he contends, that the French law of prescription which applies to the present case, is one which extinguishes not only the remedy, but the right or contract itself; for unless it has this effect in France, the case falls within the larger and more general rule, that the time of limitation of the action must be governed by the law of the country where the action is brought.

Before, however, we come to the argument on this point, it may be expedient to advert to the facts of the present case, to which the rule of the French law is proposed to be applied.

The action is brought on a promissory note, made at Mulhausen, which at that time was subject to the law of France, where both the plaintiff and the defendant may be taken to have been then domiciled. The promissory note was made and bore date on the 12th of May 1813, and was payable to the order of the plaintiff, on the 10th of May 1817. In the course of 1813, very shortly after the making of the note, and nearly four years before it became due, both parties quitted Mulhausen; the plaintiff going to Switzerland, the defendant to England, where he has ever since resided and been domiciled.

Under such a state of facts, the defendant seeks to apply the 189th article of the Code de Commerce as a bar to the present action; on the ground that it operates as an annulling of the contract, as an extinguishment of the claim and right of action in that country. That article is found in the division of the Code de Commerce which relates to bills of exchange, and is contained in the following words, viz.:—

'Sect. 3, of Prescription.—All actions relative to letters of exchange and to bills to order, subscribed by tradesmen, merchants,

and bankers, or for matters of commerce, "prescribe themselves" by five years, reckoning from the day of protest, or from the last suing out any judicial process, if there hath been no judgment, or if the debt hath not been acknowledged by any separate act.'

'Nevertheless, the pretended debtors shall be held, if required, to affirm upon oath that they no longer owe the money. And their widows, heirs, &c., that they bonâ fide believe there is nothing more due.'

Now, the question is, whether the defendant has made out, affirmatively, to the satisfaction of the court, that this prescription has the necessary force of extinguishing and annulling the contract upon the note, ipso facto, after a lapse of five years from the time it becomes due: for unless the prescription has this force, it operates on the remedy only; which, upon the general principle before laid down and acknowledged, will be governed by the lex fori, and not by the lex loci contractûs.

And, after giving every attention to the authorities cited on both sides, we think the French law is not shewn to have the force contended for by the defendant. The defendant has brought different passages in the Code de Commerce, and by contrasting them with others which are found in the Code Civil, has shewn it possible that such may be the force and effect of the article in question; but he has produced no distinct authority that the contract is intended to be annulled; whereas, on the contrary, the very terms of the article itself, the authorities of text writers, and the reason of the thing, do so far outweigh, as it appears to us, the inference drawn from the comparison of different parts of the French law, that we cannot but hold the section relied upon amounts only to a limitation of the remedy in the French courts, to the space of five years, and not to an utter avoidance of the contract itself at the end of that period.

The article itself begins by stating, that 'all actions prescribe themselves', not 'that the contract is prescribed or gone'. The exception, that the 'action is not prescribed, if the debt is acknowledged by a separate writing'; the power given to the creditor to put the debtor to his oath, that he owes nothing, called in the French law 'le serment décisoire';—all these circumstances agree with the notion that it is the action, not the debt, which is prescribed by the law. . . .

But, from the ground of reason and expediency, the inference is still more strong that the prescription limits the action only, and does not destroy the debt; for if the debt itself is absolutely gone by

HUBER v. STEINER. Tindal C.J.

reason of the lapse of five years, without any reference to the power of the plaintiff to sue in the meantime, what would be the condition of the creditor whose debtor quits the country, where this law applies, before the day of payment arrives,—that is before there is a possibility of maintaining the action,—and never returns to it again?

To maintain a position so contrary to reason, very strong authority must be expected; but none is shewn; on the contrary, the very text of the book from which the distinction is first taken (Story, p. 487) annexes to it the condition, that the debtor and creditor have remained within the jurisdiction during the time of the prescription.

In the case before us, both were absent: it would be enough, however, to say that the debtor was absent, to call in aid the maxim of the French, no less than of the civil law, 'contra non valentem agere, non currit prescriptio.'

We do therefore think, that the law set up on the part of the defendant amounts to no more than a limitation of the time for bringing the action, not to an extinction of the contract; that, consequently, it is no bar in itself under any circumstances; still less, where the debtor ceased to reside in the country where the law prevails during the whole period of time that the debt was owing and due.

We therefore think the verdict must be entered for the plaintiff, upon the general issue, as well as upon the issues arising on the special pleas.

Judgment for the plaintiff.

CHAPTER IV

PROOF OF FOREIGN LAW

Foreign law is a question of fact for the Judge to be proved by expert evidence.

LAZARD BROTHERS AND CO. *v.* MIDLAND BANK, [1933] A.C. 289 (House of Lords)

BEFORE the Bolshevik Revolution in Russia in October 1917, the Banque Industrielle de Moscou (hereinafter called the Moscow Bank), a Russian bank, kept current accounts with the Midland Bank, Ltd., and at the end of 1917 these accounts were in credit to an amount exceeding £300,000. At the same time the Moscow bank were indebted to Lazard Brothers & Co., bankers in London, in a sum which, though large, was less than that owed by the Midland Bank to the Moscow Bank. Both these debts were English debts, payable in England and governed by English law.

On 27 October 1930 Lazard Brothers & Co. obtained an order from Branson J. in Chambers for leave to issue a writ against the Moscow Bank and to serve notice thereof at Moscow by sending it by registered post to the Moscow Bank. In pursuance of this order Lazard Brothers & Co. issued a writ against the Moscow Bank claiming the sums owing to them, and sent notice of it by registered post to Moscow. On 24 November 1930 judgment in default of appearance was given for Lazard Brothers, who on 28 November 1930 received a letter from the Soviet Embassy returning the notice of writ and stating that it could not be delivered because the Moscow Bank had gone out of existence during the Revolution of October 1917.

On 12 December 1930 Lazard Brothers obtained a garnishee order nisi against the Midland Bank attaching all debts owing from the Midland Bank, the garnishees, to the Moscow Bank, the judgment debtors, to answer the judgment of 24 November. On the same day a copy of this order was sent by registered post to the Moscow Bank, but the envelope was returned marked 'Unknown'.

On 20 January 1931 a garnishee issue was directed between Lazard Brothers as judgment creditors and the Midland Bank as garnishees, the issue being whether the garnishees were indebted to the judgment debtors, the Moscow Bank. Roche J. made an order absolute that they were so indebted. His judgment was reversed by the Court of

LAZARD BROTHERS AND CO. v. MIDLAND BANK.

Appeal on the ground that the Moscow Bank had ceased to exist as a juristic person before 1930 and that therefore the writ and judgment, and consequently the garnishee proceedings, were null and void.

The judgment creditors appealed.

LORD WRIGHT: . . . The Industrial Bank was a corporation established by an Act of the Tsar; but the governing authority in Russia, as recognised in the English courts, is now and has been since October, 1917, the Soviet State. Soviet law is accordingly the governing law from the same date in virtue of the recognition de facto in 1921 and de jure in 1924 by this country of the Soviet State as the sovereign power in Russia. The effect of such recognition is retroactive and dates back to the original establishment of Soviet rule which was in the 1917 October Revolution, as was held by the Court of Appeal in *Luther* v. *Sagor* (*ante*, p. 25). The question, therefore, is whether by Soviet law the Industrial Bank was at the date of the issue of the writ in this action, that is on October 27, 1930, an existing juristic person. What the Russian Soviet law is in that respect is a question of fact, of which the English court cannot take judicial cognizance, even though the foreign law has already been proved before it in another case. The court must act upon the evidence before it in the actual case. The recent enactment, s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that this question of fact must be decided by the judge alone instead of by the jury, if there be a jury, expressly treats the question as depending on the evidence given with respect to the foreign law. No earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case. On what evidence of the foreign law a court can act has been often discussed. The evidence it is clear must be that of qualified experts in the foreign law. If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication; so in effect it was laid down by Coleridge J. in *Baron de Bode's Case* (1845), 8 Q.B. 208, 266; in the *Sussex Peerage* case (1844), 11 Cl. & F. 85, 116, Lord Denman stated his opinion to the same effect as he had done in *Baron de Bode's Case*. He said that if there be a conflict of evidence of the experts, 'you (the judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses.' Hence the court is not entitled to construe a foreign code

itself: it has not 'organs to know and to deal with the text of that law' (as was said by Lord Brougham in the *Sussex Peerage* case). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony. . . .

(His Lordship reviewed the evidence of Soviet law and came to the conclusion that the Moscow Bank had by Soviet law ceased to exist long before 1930, although in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, the House of Lords had held that a Russian bank had not been dissolved by the same Soviet decrees as were in issue in this case.)

LORDS BUCKMASTER, BLANESBURGH, WARRINGTON OF CLYFFE, and RUSSELL OF KILLOWEN concurred.

Appeal dismissed.

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