ADMINISTRATION

OF

FOREIGN ESTATES.

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BEING THE

PRINCIPLES OF PRIVATE INTERNATIONAL LAW RELATING TO THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS.

[IN TWO PARTS.]

PART I.—ESTATES OF DECEASED BRITISH SUBJECTS LEAVING PROPERTY ABROAD.

PART II.—ESTATES OF DECEASED FOREIGNERS LEAVING PROPERTY WITHIN THE UNITED KINGDOM.

[*Thesis approved for the Degree of Doctor of Laws in the University of London.*]

BY

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PREFACE.

In presenting this treatise on a branch of Private International Law, the writer realizes that any attempt to add to the literature on that subject requires a word of explanation.

There is probably no branch of English Law to which the great masters of the profession have given greater attention than the subject of domicile and the kindred principles underlying Private International Jurisprudence.

A branch of law which has received such elaborate treatment at the hands of many famous judges and upon which the standard text-book writers are such well-known men as Professor Westlake, Professor Dicey, Mr. Foote, Mr. Nelson and other great jurists, is one to which it might be thought superfluous to add further comment. Whilst, however, great learning has been applied to this branch of law, in a very real sense, the results of that learning are singularly inaccessible to the greater part of the legal profession, or are presented in a manner more consistent with academic research than practical utility.

In the course of a not inconsiderable experience of foreign probate work, most of the problems dealt with in this book have come before the author in concrete form in actual cases, and it has been his experience that in a number of such instances the solution has involved many hours of research amongst the English authorities and has, more often than not, made it necessary to trace the matter back to first principles in order to appreciate the position at the present time.

It is the author's modest hope that the present book may furnish a guide to the principal English cases and fulfil the purpose of a handy index to the more important rules which the English Courts apply in dealing with the estates of deceased persons wherein some foreign element occurs.

In dealing with the practical administration of the law upon this subject, and in the course of his research, the author has had occasion to study the great bulk of published work bearing upon the matter.

He would express his obligations to all the well-known writers both in England and on the Continent. Acknowledgment is made individually in the text wherever more particular reference is made to any one work.

So far as possible, direct reference has been made to the actual reported cases, and for the greater number of the views expressed in this

book the author is indebted to the clearness of thought and conciseness of language of the various able judges who have given the matter a special place in that treasure-house of learning known as English Case Law.

Amongst the more modern works on the subject, the author has read with great profit a Thesis of the University of Paris by André Marion, Docteur en Droit, entitled "La Loi du Domicile en matière Successorale selon la Jurisprudence Anglaise"—and the very able treatise by Mr. Norman Bentwich on "The Law of Domicile and its relation to Succession"—whilst no study on the complicated question of "Renvoi" would be complete without a reference to the masterly notes made by Mr. J. Pawley Bate on that subject.

Whilst the author has in every case dealt with the matter strictly from the point of view of English Law as it stands at the present day, he has in a concluding chapter ventured to advance certain views upon the advisability of modifying some of the rules adopted in the present English practice, with a view to making such practice more logical, more reciprocal and more in conformity with other leading systems of law.

Many of the points touched upon have, it is submitted, not yet received their final treatment at the hands of English judges, and the whole

subject-matter of Private International Law is of a peculiarly unstable nature and liable to modification.

In these circumstances the author is fully aware of the incompleteness of his work. He can only hope to dispel some of the vagueness, and to make clear some of the complexity, with which the subject is enshrouded, and to provide a stepping-stone to further study.

At the same time, if these observations on the English authorities and the rules to be deduced therefrom should in some small measure assist those who have occasion to deal with the problems of a like nature, the object of the author will have been achieved, and he will be more than satisfied with the result of his labours.

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OUTLINE OF THE SUBJECT

AND

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INTRODUCTION.

At first sight it may seem strange that this Work should be divided into two parts on a basis of nationality.

It is true, as a general rule, that the English Courts in administering Private International Law in this country are little influenced by the political status or nationality of any individual, but rely rather on domicile as a criterion of personal law.

It seems, however, to the writer that inasmuch as the first two sections of Lord Kingsdown's Act governing the formal validity of wills apply only to British subjects, confusion is avoided by dealing with the law that relates to British subjects and foreigners in separate parts of this book.

Moreover, although nationality may not be the English basis of the rules of choice of law, it is so in many Continental countries; and the English Courts, in administering the estates of deceased foreigners dying intestate leaving assets within the United Kingdom, are frequently called upon to apply the law of the nationality of the deceased.

Whether or not a deceased person was a British subject is generally a matter of easy determination, and con-

sequently once that fact is ascertained, only that part of the book dealing with such a case need be consulted in reference thereto. It is hoped, therefore, that such a division of the subject will render it unnecessary for a reader to be continually dissecting the text for the purpose of ascertaining how far the law there stated applies only to the case of a British subject or is of general application, and this arrangement of the subject-matter of the book has been adopted by the writer with that idea.

ADMINISTRATION OF FOREIGN ESTATES.

GENERAL MATTERS.

CHAPTER I.

THE NATURE OF PRIVATE INTERNATIONAL LAW.

THE world no longer consists, as in the days of the Early Roman Empire, of one single sovereign state, but is divided into a large number of separate communities.

No longer does the legislation of one sovereign body regulate the legal rights of the civilised world. Each state is subject to its own particular system of laws.

If a member of any of these states travels beyond the territorial limits of the community of which he is a member and enters the territory of a different state wherein an entirely different legal system prevails, the question at once arises by what law are the acts and deeds of such citizen to be governed, what law shall affect his property and his capacity of disposing of it in his lifetime or on death. Is the national or territorial law of his own state to be held applicable or is he considered to be subject to the laws of the country where he happens to be? It is apparent that such a question is not merely theoretical, but one of extreme practical importance intimately connected with the lives and acts of an ever-increasing number of persons.

The means of communication between the various parts of the earth are constantly becoming better developed, the habits of people (belonging to all classes in the community) are becoming yearly more migratory, and the problem of emigration and the laws affecting such individuals are a serious consideration of every leading state.

It follows that a multiplicity of cases must arise in which the legal tribunals called upon to adjudicate in the circumstances of a particular case, have to decide which legal system governs the matters in dispute.

The body of rules laying down the principles upon which the Courts of a particular country decide whether they have jurisdiction to entertain a particular case and determining the system of law to apply, is called "Private International Law."

Private international law in the sense in which we use the term, became a science on the continent of Europe before it had been seriously considered in this country. Especially in the Netherlands the subject was debated with great acumen and extraordinary keenness, with the result that most of the authoritative early works on the subject emanated from abroad, whilst the earlier decisions in our own Courts show that our judges not infrequently borrowed from that store.

The earliest decisions in cases of succession and administration are mostly to be found in the reports of the Prerogative Court of Canterbury, the earliest Probate Court of this country.

Usually these reports relate to cases either where the deceased left estate in more than one country, and relatives being in the different countries claimed according to the laws of their particular country, or where in other cases the deceased made a will disposing of his property in a manner allowed by one system of law and forbidden by

another. The respective claimants urged their contentions in the Courts of this country.

Professor Westlake defines "Private International Law" as "that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws" (*a*). Without entering into the very technical question of the exact judicial position and scientific accuracy of the term "Private International Law" (for criticism of the expression, see Dicey, 2nd ed., p. 14), it seems to us that Professor Westlake's description possesses the double advantage of accuracy and simplicity.

Wherever the territorial laws cannot apply, the rules of private international law must be resorted to.

For the purposes of this work it is enough to say that certain questions of judicial competence and the choice of law, where the Courts of one country have to adjudicate upon matters connected with another country, are known in this country as "Private International Law," an expression which conveniently indicates the nature of the questions referred to, and which has obtained wide currency and understanding throughout the civilised world. (See remarks of Lord Selborne in *Ewing* v. *Orr-Ewing*, 10 A. C. at p. 513.)

Our more particular concern, however, in this work is to deal with the rules the English Courts apply in matters of international aspect, from which it follows that the actual laws to which we shall more particularly confine ourselves in this treatise, are the laws, not of foreign countries, but of England purely and simply, as applied in this country in matters of international importance, and these are the only rules of law which are of practical

(*a*) Private International Law, 5th ed. p. 1.

interest to the legal profession of this country in dealing with the subject of private international law.

This branch of the law consists of those rules which regulate the jurisdiction of the Courts of this country, the validity of acts, and the choice of law wherever the parties to the suit and the subject-matter of the proceedings are not wholly and uniquely subject to the English territorial law.

Whenever a foreign element exists in a matter in dispute in this country, some principle of English law at once determines the various questions raised by the presence of that foreign element.

It is obvious that this branch of English law is far more extensive than the law relating to the administration of estates of deceased persons.

It is thought, however, that a work in which are collected the sum total of the principles and rules relating to the administration of such estates will prove not only useful to the legal practitioner, but will be helpful to a better understanding of the true application of these principles and the consequent uniformity of the various legal systems of the world.

In matters relating to the administration of the estates of deceased persons in which some foreign element exists, certain rules apply, of which the most notable is perhaps the rule "*mobilia sequuntur personam*."

In England, and indeed in every civilised state wherein there exists a defined system of law, that law consists, broadly speaking, of two fundamentally distinct branches; on the one hand is the general body of law regulating the rights of citizens and governing all transactions which take place within its territorial limits, and on the other hand, those rules and principles governing the choice of laws where the territorial laws cannot apply.

It is apparent that if the tribunals of one country refused to apply any principles of foreign laws, no matter what the circumstances were of the matter in question, great injustice would certainly result.

It is, moreover, evident that this branch of law increases in practical importance from year to year, as the occasions for its use and application become more frequent.

If a deceased person leaves property in more than one country, and questions arise as to the law applicable to its distribution, the Court before which the matter is brought for decision might, it is conceived, adopt at least three different methods:—

(1) It might apply to all assets of the deceased of whatever nature they consist, and whether moveable or immoveable, the law of the country in which the particular assets happened to be at death—the true "*lex loci rei sitæ*"—in which event an estate might be subject to numerous systems of law corresponding with the countries in which the properties were actually situate at death. It is unnecessary to point out the confusion such an application of a number of laws would involve. The duties of the representatives of the deceased charged with the administration of his estate, the payment of his debts, and the ultimate division amongst those entitled, already considered to be onerous, would be immeasurably increased.

Such a rule would not, therefore, be a convenient solution of the difficulty.

(2) It might, on the other hand, apply to the succession and all matters connected therewith, the personal law of the deceased—this being treated either as the national law (the law of the country to which the deceased owed allegiance) or the law of his domicile (the law of the place where the deceased had resided with the intention of remaining there for an indefinite period).

This, however, is not the English rule, as it conflicts with the fundamental principle of English jurisprudence, that immoveables are governed by the *lex situs*, and that moveable property is governed by the law of the last domicile of the deceased. Or—

(3) It might distinguish between immoveable and moveable property.

To the immoveable property it might apply the *lex situs*, whilst the moveable property might be governed by the rule "*mobilia sequuntur personam.*"

In most countries immoveable property is held to be governed solely by the law of the country where it is situated. This rule is based probably on the necessity for supreme control over all portions of its own territory which a state was deemed to desire.

By English law as regards land, the rights and obligations relating thereto are regulated entirely by the *lex situs*. The principle is a very general one, and applies alike in all matters of succession and administration affecting the same.

The transfer of such rights at death, whether such transfer operates through a will or by virtue of an intestacy, is governed by the law of the same land (*lex situs*) (*b*).

In connection with immoveable property, therefore, the representatives of the deceased will be bound to give effect to the laws of each country where the testator owned immoveable property at the date of his death.

Through this compulsory division of the administration of the testator's immoveable property into as many successions as there are foreign countries in which immoveables

(*b*) Certain interests in land are, however, treated in English law as personal estate, and thus, although for many purposes they are regarded as immoveables, still their transfer is governed by the *lex domicilii*, and not the *lex loci rei sitæ*. (See *infra*, Chapter V.)

belonging to the deceased are situate, it might be thought there would arise great confusion; but as this is the system adopted by the great majority of states, any question of conflict is very rare.

When such conflict does arise, as, for instance, in the case of an Italian subject dying domiciled in Italy leaving immoveable property in England—the Italian law, which enacts that for purposes of succession immoveable property, like moveable, is regulated by the personal law of the deceased, remains of no effect, and the English law will prevail (*c*).

Whilst, however (with the exception of Italy), immoveables are almost invariably governed by the *lex situs*—the rule "*mobilia sequuntur personam*" is interpreted in two distinct ways: the "personal" law is regarded on the continent of Europe as being the "national" law, whilst in the United Kingdom the law of the domicile is meant.

It is this cleavage in the great systems of the world which is responsible for a very large number of the problems arising in practical cases before the Courts of the various countries.

Owing to the territorial position, and to the habits of the peoples, France, Germany, and the neighbouring continental states are very greatly interested in the commerce, the arts and the institutions of this country, whilst a large number of the citizens of this country reside permanently in one or other of those countries. Questions frequently arise where the estate of a deceased person, who dies leaving property in both France or Germany and England, would be regulated on entirely different lines according

(*c*) See judgment of Lord Chief Baron Alexander in the case of *Doe* v. *Vardill* (House of Lords), 5 B. & C. 543; 2 Cl. & F. 571; and see *Ilderton* v. *Ilderton*, 2 Hy. Bl. 145.

to whether French, German, or English law is the governing factor.

The matter is, therefore, one of frequent practical interest.

The object of far-seeing jurists and statesmen in the leading countries of the world has been to bring the competing theories of private international law into uniformity. Conferences of the nations have been held at the Hague, and many valuable discussions have taken place. Complete uniformity, however, can never be achieved so long as the conflict between the national law and the law of the domicile exists with reference to the moveable property of a deceased person. It has been suggested that this country should adopt the continental practice and decide the matter by reference to the national law in every case. There are, however, very great objections to such a suggestion, which will be examined in a later place; not the least being that a member of the United Kingdom may have one of several national laws, there being no such thing as a national law common to all parts of the British Isles. Moreover, it is possible for a man to have more than one nationality (as, for instance, where a Frenchman becomes naturalized in England without the consent of his own government; in such circumstances his nationality would be English in every part of the world, except France and possibly her colonies—in which he would remain a Frenchman), though he cannot have more than one domicile.

It sometimes happens that the Courts of one country in applying to the estate of a deceased person situate within their jurisdiction, the rule of private international law there prevailing, refer the matter to some other jurisdiction, which in its turn refers the matter to the original or some other system.

This is the doctrine of the "renvoi" or throwing back, as, for instance—

If the English Courts have before them a matter arising out of the estate of a deceased person, who was a British subject but died domiciled in France, they will refer the matter to the law of the domicile, *e.g.*, French law for decision.

By French law, however, the rule applied is the law of the nationality, and so the matter is referred by French law back to English law. In such an event it is submitted that the better opinion is that the English Courts accept the "renvoi," and decide the case before them by pure English law.

As, however, the English Courts in such a case would treat themselves as sitting in France, it would be more accurate to say that the case would be decided by the view of English law which the French Courts would themselves have applied, had the matter come before them for decision. (See Laws of England, Art. Conflict of Laws, Vol. 6, p. 223, and notes to sect. 335.)

Jurists have been greatly divided as to whether the Courts of one country in applying the laws of another should apply the "internal" laws of such other country, or whether, in the event of such country applying some other rule, they should also apply the rule that would be applied had the matter come up for decision in such other country. The English Courts have in frequent instances laid down the principle that when they apply the law of a foreign country, they treat themselves as deciding the point in the foreign country, and, so far as possible, treat the matter in precisely the same way as the judges of such other country would do. (See *Balfour* v. *Scott; Collier* v. *Rivaz; In the goods of Brown Sequard.*) This being so, it follows that it would lead to uniformity of

action if the "renvoi" (being merely a logical deduction of this doctrine) were to be accepted in its entirety by the English Courts.

Recent decisions, such as in *Re Johnson, Roberts* v. *Att.-Gen.*, [1903] 1 Ch. 821, and in *Re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711, would seem to show that this is the view taken by the English judges.

The matter is fiercely debated on the Continent, and in France particularly, jurists are divided into two absolutely hostile camps. The general tendency of modern decisions throughout the world is, however, to accept the "renvoi" doctrine as being the best practical solution, until the comity of nations admits of some artificial rule adopted by agreement to meet the cases of practical difficulty and hardship. The matter is discussed in detail in a later chapter (*d*).

(*d*) See Chapter XX.

CHAPTER II.

DOMICILE AND ITS BEARING ON ADMINISTRATION AND SUCCESSION.

In dealing with questions of administration and succession we shall have occasion constantly to refer to the "law of the domicile" of the deceased.

To enable us to understand the expression "law of the domicile" we must first examine the nature and meaning of domicile itself, as recognised and understood in English law.

At different periods of early legal history the purely personal theory of law and the purely territorial conception have in turns prevailed. In those countries which accepted the personal theory of law each citizen was treated as a member of the particular group to which he belonged, and was considered to be subject to the laws prevailing amongst that group in the place where he resided.

However, at this stage the idea of allegiance to a particular state had not been fully developed, and consequently the conception of nationality had no place in the law of that age.

Where conflict arose as to the personal law governing a particular person's acts it usually happened to be a case of foreign merchants or traders who had travelled beyond the limits of their country of origin in pursuit of commerce.

The criterion adopted was usually, therefore, that of the place where the merchant resided at the time, provided

such residence appeared to be more or less permanent, and not of a merely transitory nature.

From this casual beginning and the accidental adoption of the permanent residence as the deciding factor the modern conception of domicile in this country has been slowly evolved.

The process has been a very gradual one, and during the course of the centuries many competing principles have had to be contended with.

The result is that the reports of cases in the Courts of this country contain a large number of contradictory decisions which greatly confuse the domain of private international law.

Unless these cases are treated chronologically, and the progress of the evolution of modern ideas on domicile carefully noted, the reader of them is apt to be bewildered by the seeming fluctuations of judicial opinion, and will come away from his researches with doubts cast upon fundamental principles of law which are now established beyond all dispute.

Those who are interested in the historical development of our legal system will find a full examination of the cases in the Appendix, under the heading "Historical Note on the Evolution of the English Conception of Domicile," but we have thought that it would not conduce to clearness to treat the subject historically at this point.

In the present and following chapters we deal with the subject of domicile and the application of the *lex domicilii* as it exists at the present day.

The conception of domicile in English law is the legal relationship between a person and a place; it is a conception which has received special treatment at the hands of the judges of the English tribunals, with the result that

the notion of domicile in English law possesses a distinctive character and special features of its own.

It is a conception partly dependent upon law and partly upon fact.

There must be actual residence in a given country coupled with an intention to reside there for an indefinite period, whilst at the same time, in view of the legal nature of the conception of domicile, the English law attributes to every person at birth a domicile by operation of law, which domicile, known as the domicile of origin, can only be changed within prescribed limits, and in default of a clear acquisition of another domicile by choice, governs the possessor of it throughout his life.

"The notion of domicile in English law is the judicial recognition of the actual residence of a person in some place coupled with an intention, either expressed or implied, to remain there for an indefinite period."

An excellent judicial summary of the English principles relating to domicile, showing clearly the peculiar nature of the domicile of origin, is to be found in the judgment of Lord Westbury in the House of Lords in the celebrated case of *Udny* v. *Udny* (reported in Law Reports I., Scotch Appeals, p. 441), and we cannot do better than incorporate such judgment (in so far as it deals with this point) *in extenso* in the text.

It is as follows (at p. 457 of the Report):—

"The law of England and of almost all civilised 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 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 Roman law, are common to the jurisprudence of all civilised 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 legitimate, and the domicile of his 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 an inference which the law derives from the fact of a man fixing 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 of illness; and it must be a 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 extirpated 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."

From this able description of the notion of domicile in English law, it is at once made clear that domicile must be carefully distinguished from nationality.

The political and the civil status of an individual are entirely separate conceptions.

Voluntary residence by an individual in a given country with the intention of remaining there permanently, or for an indefinite period, is sufficient to create in such person a domicile of choice, quite independently of any change in

allegiance or of any knowledge by such person of the legal effect of such residence.

In view of the decisions in *Re Johnson, Roberts* v. *Att.-Gen.* and in *Re Bowes, Bates* v. *Wengel* (referred to on p. 31), some authorities consider this statement of the effect of voluntary residence should be qualified by the addition of these words, "provided that the law of such country recognises and gives effect to domicile in the English sense of the term."

Considerations are, however, advanced on p. 32, *infra*, which in the writer's opinion show that this view is not correct, and that so far as the "acquisition" (as distinguished from the legal effect) of a domicile of choice is concerned, the law is correctly stated in the text.

In spite of the very exact language of Lord Westbury already referred to, the view that change of domicile is wholly distinct from change of nationality and political allegiance has not always been made clear in reported cases.

Formerly, it was indeed held that the political status of a British subject could not be so far discarded as to enable him to acquire a new civil status. This was the interpretation of the old rule, "*nemo potest exuere patriam.*"

Several of the early cases dealing with matters of succession prior to the decision of the Appellate Court in *Stanley* v. *Bernes* (1831), 3 Hagg. Eccl. 447, completely disregarded the acquisition of the foreign domicile by a British subject, and regulated the matters in dispute purely by the English territorial law.

Great reluctance was shown in allowing a British subject to acquire a domicile in a foreign country, and different considerations were held to be applicable according to whether the country of choice belonged to the British Empire or was entirely foreign.

In formulating these differences some judges greatly confused the question of civil status and political allegiance, and by the constant quotation of their judgments much false reasoning has been introduced even into modern cases. For instance, in the case of *Whicker* v. *Hume* (1858), 7 H. L. C. 124, Lord Cranworth says (at p. 159 of the report):—

"I think it is not inexpedient in questions of this sort to say that I think that all Courts ought to look with the greatest suspicion and jealousy at any one of these questions as to change of domicile into a foreign country. You may much more easily suppose, that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versâ*, than that he is quitting the United Kingdom in order to make his permanent home where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication which exists, and the conflict between the duties that you owe to one country and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean '*quatenus in illo exuere patriam*.' But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducements for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country."

And again in *Moorhouse* v. *Lord* (1863), 10 H. L. C. 272, similar expressions occur.

The decision of the lower Court (Vice-Chancellor Kindersley) is reported *sub nom. Lord* v. *Kelvin* (1859), 4 Drew. 366, and is remarkable for a detailed examination of the ancient Latin definitions of domicile, and a

learned commentary upon them. In the House of Lords, however, the case is reported as *Moorhouse* v. *Lord*, and although the learned Vice-Chancellor's decision is affirmed and the appeal dismissed, yet in their judgments certain judges use expressions which in our view exhibit a looseness of phrasing, and which if literally understood are certainly not the law of England.

Lord Cranworth says (at p. 283):—

"In order to acquire a new domicile, according to an expression which I believe I used on a former occasion, and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, a man must '*quatenus in illo exuere patriam*.' It is not enough that you merely mean to take another house in some other place, and that on account of your health or for some other reason you think it tolerably certain that you had better remain there all the days of your life. That does not signify; you do not lose your domicile of origin or your resumed domicile merely because you go to some other place that suits your health better, unless, indeed, you mean either on account of your health or for some other motive to cease to be a Scotchman and become an Englishman or a Frenchman or a German. In that case, if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile.

"But it would be a most dangerous thing to say that by going and living elsewhere you make yourself a foreigner instead of a native."

Lord Chelmsford agreed, and quoted the words of Lord Cranworth in *Whicker* v. *Hume*, which we have already examined. Lord Kingsdown in the same case took the same view, and quoted with approval a statement made by Dr. Lushington in the case of *Hodgson* v. *De Beauchesne*,

12 Moo. P. C. C. 285. He says: "A man must intend to become a Frenchman instead of an Englishman."

Against these statements we have the judgments in *Udny* v. *Udny*. Lord Hatherley (the Lord Chancellor) says at the conclusion of an examination of the facts of that case and of the authorities bearing thereon (p. 452 of the report):—

"I have stated my opinion more at length than I should have done were it not of great importance that some fixed common principles should guide the Courts in every country on international questions. In questions of international law we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases, as to the intent '*exuere patriam*,' or to become 'a Frenchman instead of an Englishman,' go beyond the question of domicile. The question of naturalisation and of allegiance is distinct from that of domicile. A man may continue to be an Englishman and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself."

In the same case Lord Westbury (at p. 459) says: "I am obliged to dissent from a conclusion stated in the last edition of that useful book (Story's Conflict of Laws), 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*, 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 status of an individual, and to destroy the difference between *patria* and *domicilium*."

This was the view definitely taken in the case of *Haldane* v. *Eckford* (1869), 8 Eq. Cas. 631, the head-note to which is as follows:—

"The question of domicile is distinct from that of naturalisation and allegiance, and in order to effect a change of domicile it is not necessary that a man should do all in his power to divest himself of his original nationality (*exuere patriam*), it being sufficient that there should be a change of residence of a permanent character voluntarily assumed."

Sir William Milbourne James (Vice-Chancellor) in his judgment says:—

"The law is very clearly laid down in the judgment of Lord Westbury in the case, to which I have been referred on both sides, of *Udny* v. *Udny* in the House of Lords. He says: '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 a residence fixed not for a limited period or particular purpose, but generally 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, as soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established.'

"That is the rule as laid down by Lord Westbury. In substance it is the same as the rule laid down in the same case by the Lord Chancellor, and differs but slightly, I think, from the rule as laid down by Lord Chelmsford. I agree that it must be considered as differing from the rule as laid down in what may be called the intermediate class of cases in the Exchequer. In *Re Capdeville, Att.-Gen.* v. *Countess de Wahlstatt*, following the decision in the House of Lords (*Moorhouse* v. *Lord*), in which, if I may use the expression, that unfortunate term '*exuere patriam*' was introduced, as if it were a question of nationality and not of more or less permanence of residence. It does differ from those cases, but it differs in bringing back the law to that which (in my opinion) was always, before those cases, considered to have been the law, and evidently is the law as laid down by the treatise writers, viz., that domicile was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed."

The same point of view is further shown in the subsequent case of *Douglas* v. *Douglas, Douglas* v. *Webster* (1871), L. R. Eq. Cas., Vol. 12, where it was stated in argument that: "It was not necessary, on the authority of *Udny* v. *Udny*, for the testator in that case, whose domicile of origin was Scotch, to abandon his character as a Scotch proprietor because, as Lord Westbury pointed out in that case, political status and domicile are two distinct things. Then follows the important case of *Haldane* v. *Eckford* above referred to, important both because the facts were

very similar to the facts here, and also as explaining and putting on a proper footing the decision in *Moorhouse* v. *Lord,* where certain loose expressions occasioned some misconception as to the state of law which also ran through the decisions in the other cases in *Re Capdeville* and *Att.-Gen.* v. *Countess de Wahlstatt.*"

In his judgment in this case Sir John Wickens, V.-C., said:—

"It seems to me, as it did to Vice-Chancellor James in *Haldane* v. *Eckford,* that the intention required for a change of domicile, as distinguished from the action embodying it, is an intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary."

Since when, the exact case the Vice-Chancellor apparently had in mind has been so decided.

In the case of *King* v. *Foxwell* (1876), 3 Ch. D. 518, Jessel, M. R., it was held that where a native of this country possessing a domicile of origin here became domiciled and naturalised abroad, and subsequently abandoned his foreign domicile and acquired no further domicile of choice, his English domicile of origin reverted even though he retained his foreign nationality.

Regardless of these authorities the judgments in the House of Lords in two recent cases on domicile (*Winans* v. *Att.-Gen.*, [1904] A. C. 287, and *Huntley* v. *Gaskell,* [1906] A. C. 56) contain references to the older views, and in the writer's opinion again tend to cloud the true nature of domicile in English law (*a*).

(*a*) See also Bentwich, Domicile and Succession, at p. 27.

In *Winans* v. *Att.-Gen.*, Lord Macnaghten says (at p. 291):—"A change of domicile is a serious matter—serious enough when the competition is between two domiciles both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile."

Lord Lindley, on the other hand, in his dissenting judgment (as to the true interpretation to be put upon the admitted facts of the case) puts the matter upon what he considers the proper footing. He says (at p. 299):—

"An intention to change nationality, to cease to be an American and to become an Englishman, was said to be necessary in *Moorhouse* v. *Lord,* but that view was decided to be incorrect in *Udny* v. *Udny.*"

In *Huntley* (*Marchioness of*) v. *Gaskell, supra,* Lord Halsbury says: "I myself think in my view of the law that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis in the case of *Steel* v. *Steel.* 'It is, I think,' says the learned Judge, 'by no means an easy thing to establish that a man has lost his domicile of origin, for, as Lord Cranworth said in the case of *Moorhouse* v. *Lord,* "In order to acquire a new domicile a man must intend *quatenus in illo exuere patriam,*" and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile.' The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *M'Clure.* He says: 'To abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to

relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence.'

"My Lords, I do not believe that it could be expressed more clearly or distinctly than it is in that judgment . . . ," and later (at p. 69): "To my mind it is perfectly clear that he knew, because it had been explained to him —he was not without advice—what the distinction was and what domicile meant, and the assurance that he was an Englishman contented him and satisfied him, and he did no more.

"For my own part I cannot entertain the smallest doubt that from that moment he had satisfied himself that he was, as he intended to be, an Englishman, and retained his English domicile."

Again, Lord Robertson says (at p. 71):—

"But, speaking of the present case, it seems to me that this attempt to turn a strenuous English banker and great landed proprietor into a Scotchman is, on the face of the broad facts, hopeless."

These loose expressions show a tendency to revert to the former confusion of the ideas of domicile and nationality.

It is submitted that these statements are quite contrary to the great bulk of the English decisions, and conflict with the established English rule on the subject (*b*).

(*b*) A learned writer in the *Law Times*, December 28th, 1912, Mr. N. W. Hoyles, has an interesting article on the above cases.

Their inclusion in judgments of the Supreme Court of Appeal is all the more regrettable as they are apt to prevent the lower Courts from taking a contrary view, and, as we believe, a more correct view in future cases.

They have already profoundly influenced a Chancery judge in the case of *In re James, James* v. *James*, 98 L. T. 438, where Mr. Justice Eve, after quoting Lord Macnaghten's words in *Winans* v. *Att.-Gen.*, quoted in full and apparently approved the words of Lord Halsbury in the later case of *Huntley* v. *Gaskell*. After doing so, he says: "Now, what I have to ask myself here is this: Did this poor man, suffering as he was, from a very serious condition of his health—did this poor man in acting as he did in going to South Africa and remaining there as he did, except for a short visit, intend to renounce the rights and privileges and immunities which, as Lord Halsbury said, quoting Lord Cranworth, constitute his birthright?"

And further, he concludes his judgment by saying: "I have no hesitation in saying that the plaintiffs have failed to discharge the onus on them to show that the plaintiff was a domiciled Englishman."

From this, however, it must not be assumed that the case of *Huntley* v. *Gaskell* has no bearing of importance upon the law of domicile. It is undoubtedly an authority of the very highest value for showing that the relinquishment of a domicile of origin in favour of a domicile of choice is a serious step, and must be definitely proved by unequivocal inferences before the Courts will give effect thereto.

Mr. Hoyles treats Lord Halsbury's remarks as mere *dicta*, and criticises Mr. Bentwich's comments on these cases. In the writer's view, Mr. Bentwich's comments are amply justified, and for the reasons given in the text it is submitted that Lord Halsbury's judgment has tended to confuse the subject.

Domicile must also be clearly distinguished from residence. Residence in itself, even for an extremely long period, is insufficient. There must be the *animus manendi*. The element of intention is just as essential as the fact of residence. We again turn to the words of Lord Westbury, this time from the case of *Bell* v. *Kennedy*, L. R. I. Scotch Appeals, 320, where he says:—

"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 be invoked for the purpose of regulating the rights of the parties. We know very well that succession and distribution depend upon the law of 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."

Again at p. 321:—

"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."

Domicile must further be distinguished from the expression "home" (*c*). It may, of course, frequently happen that a place where a man has his "home," in the sense of his principal residence, is also the place where he resides permanently with no intention of removing therefrom, and if so, such place would no doubt be his domicile.

It is, however, quite possible for a man to have more than one home, and he is domiciled somewhere even if he has no home at all.

(*c*) See Laws of England, Art. "Conflict of Laws," at p. 183, sect. 280.

The English domicile of choice may frequently coincide with the idea of a man's home, but, strictly speaking, the expressions are not identical in meaning and cannot be interchanged.

Such then in outline is the notion of domicile in English law, and we are now in a position to deal briefly with the various rules for determining the domicile of a particular individual and the authorities by which they have been established in this country.

Domicile of Origin.

To every individual at birth the law ascribes a domicile of origin. Such domicile of origin in the case of a legitimate child is the domicile of the father at the time of the child's birth. The domicile of origin of an illegitimate child is the domicile of the mother at the time of the birth (*d*). It is submitted that the rule is correct as stated above. Some authorities seem to state that if the father of an illegitimate child is known, such child would in law have his father's domicile. However, in *Re Johnson, Roberts* v. *Att.-Gen.*, the deceased was the illegitimate daughter of a Maltese woman and a domiciled Englishman. Held, that her domicile of origin was Maltese, *i.e.*, the domicile of her mother at date of birth in accordance with the ordinary rule, although the father was known (*e*).

The same would apply in the case of a posthumous child. The domicile of origin of a child legitimated (*per subse-*

(*d*) The question of legitimacy and the exact test to apply is dealt with in detail in a later chapter, at p. 143.

(*e*) But see *Re Wright's Trusts*, 2 K. & J. 595, as an authority for the statement that if the paternity of the father is fixed by acknowledgment or otherwise, the domicile of the father attaches to the child. (See Foote, p. 53 (*n*).)

quens matrimonium) would be that of the father at birth (*f*).

Domicile of Dependent Persons.

Dependent persons take the domicile of those upon whom they are legally dependent. For instance, a minor legitimate that of the father, otherwise of the mother; a married woman that of her husband.

Domicile of Choice.

A domicile of choice can be obtained by the necessary residence and intention of indefinite stay. In this connection some authorities would add, provided the local requirements, if any, were complied with. See, however, the same discussed on p. 30, and later fully with reasons at p. 32, *infra*.

If the person is independent, this can be obtained by the fulfilment of the above two conditions of fact and intention. If dependent, the domicile changes with that of the person upon whom they are dependent, unless the change is made dishonestly or is expressly intended not to affect the domicile of the dependent person.

For instance, a wife's domicile changes with that of her husband, an infant with that of his father, a ward with that of his guardian (in the latter case, however, only if the change is made with the utmost *bona fides*, and would be for the ward's benefit).

There are a large number of cases where, although an individual does in fact reside in a particular country even for a great length of time with apparently the intention of remaining there indefinitely, he is considered to retain the

(*f*) The rules relating to legitimation, and the special English treatment of *legitimatio per subsequens matrimonium*, are dealt with in the chapter dealing with legitimacy, at p. 149.

domicile possessed at the commencement of such residence unless there be strong proof to the contrary. Such cases are those of consuls and members of the diplomatic service, soldiers, sailors, and others in the service of the State, and, generally speaking, any person whose residence abroad is not strictly voluntary.

Amongst others, see *Att.-Gen.* v. *Napier* (1851), 20 L. J. Ex. 173, 175; *Niboyet* v. *Niboyet* (1878), 4 P. D. 1; *Ex parte Cunningham* (1884), 13 Q. B. D. 418 *et seq.*

In reality such cases afford us no exception to the general rule for the acquisition of a domicile of choice, as there is no sufficient *animus manendi;* whilst if there were a definite intention sufficient to amount to *animus manendi,* it is submitted a foreign domicile would be acquired, even by a soldier or a sailor or other person referred to above. As whatever the motive, if fact of residence and intention to remain indefinitely coincide a domicile of choice would, it is submitted, be held to have been acquired.

For instance, if a man is told that he must go abroad for his health or die, his going does not, without intention of permanent residence, work a change of residence. (*Att.-Gen.* v. *Potinger* (1861), 30 L. J. Ex. 284; *Johnstone* v. *Beattie,* 10 Cl. & F. 42; *Firebrace* v. *Firebrace,* 4 P. D. 63—65; *Moorhouse* v. *Lord, supra;* and see *Hoskins* v. *Mathews,* quoted and approved in *Re James, James* v. *James, supra.*)

"The theory apparently is, that the *de cujus* is not a free agent. To acquire a new domicile of choice there must be an opportunity of exercising a choice, for if there is no alternative it cannot be said there is volition or choice." (See Lopes, L. J., in *Urquhart* v. *Butterfield,* 37 Ch. D. 385.)

But, on the other hand, there is a *dictum* of Lord Halsbury in *Winans* v. *Att.-Gen.* (at p. 288), where he says:—

"If I were satisfied that he (the testator) intended to make England his permanent home I do not think it would make any difference that he had arrived at the determination to make it so by reason of the state of his health, as to which he was very solicitous." This is probably a correct view. (See *Hoskins* v. *Mathews, supra.*) Whatever the motive, if there is a *bonâ fide* intention of permanent residence coupled with such residence, domicile will be acquired.

It is further submitted that the law of the country where the domicile of choice is acquired has no bearing upon the question of whether or not a domicile has been acquired there within the meaning of the English law, although under such circumstances no greater capacity will be acquired than the foreign law will allow.

In many countries a local domicile cannot be acquired in the eyes of the *lex situs* by a foreigner without some form of permission or authorisation being obtained from the government of that country. In such cases, the question arises will residence in such a country under conditions sufficient to impute a domicile of choice by English law, be prevented from having this effect owing to the local law containing provisions of a varying nature under which the person would not in such country be held to have acquired a local domicile.

In dealing with this subject Professor Westlake says (at p. 353 of his work, to which we have already referred):—

"If an establishment be made in any country in such manner that by English law it would fix the domicile there, still no effect which the law of that country does not allow to it, can be allowed to it in the character of domicile in England. In other words, no one can acquire a personal law in the teeth of that law itself."

And Professor Dicey, in his second edition of the Conflict of Laws, at p. 118, commenting upon this passage of Mr. Westlake's, says:—

"When it has been found by the English Court that the deceased has acquired or possessed a domicile in the English sense of the term, the question of its legal effect must be answered solely with regard to the foreign law, and this without any reference to the legal effect of the domicile under the law of England—see also Laws of England, Art. Conflict of Laws, sect. 296, at pp. 193, 194." The point has arisen indirectly in the recent case of *In re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711, decided by Mr. Justice Swinfen Eady.

The head-note to that case is as follows: "*In re Bowes, Bates* v. *Wengel* (1906), 22 T. L. R. 711.

"A British subject born in England lived permanently in France so as to be in fact domiciled there, although he had not acquired a legal domicile there in the manner prescribed by French law, and which only recognised a legal domicile. He died in France having made his will. Held, that as to construction and administration the will was governed by English law. *In re Johnson* followed."

In that case the testator had made an English will constituting an English trust and power of appointment with residuary bequests to legatees and charitable institutions in the United Kingdom. Evidence was given that the French Courts would in like circumstances apply the English law.

It was held by Mr. Justice Swinfen Eady that the case fell exactly within the decision of *In re Johnson, Roberts* v. *Att.-Gen.*, and he accordingly decided that the will was to be governed by English law.

The case bears out the statement in the text that although according to the local foreign law no legal

domicile has been acquired the acquisition of the foreign domicile remains unaffected, but the legal effect of that acquisition is no greater here than it would be under the same circumstances in the foreign Court.

In other words, although the English Courts will treat the deceased as having a foreign domicile, and will look to the law of the country of the domicile as the criterion governing the personal estate, they will, in doing so, take into account the foreign view of the deceased's domicile, and will only apply such rules of law as the foreign Courts hold applicable.

The important point being that the reference to the foreign law will still take place, and that law will govern, unless and until it is shown that by some provision of the foreign law another rule will be held to apply, as was the decision in the case of *Re Bowes* quoted above.

The decision so far as English law is concerned is merely an instance of the doctrine that in applying a foreign law the English Courts will apply whatever law the foreign Courts would themselves apply, and depends upon that doctrine for its accuracy.

The relation of this case to the "renvoi" doctrine is considered on a later page.

Domicile in Non-Christian Countries.

Here, as in other branches of the personal law, entirely different considerations apply where the country of residence is a non-Christian country. In such cases the English rule may be shortly stated as follows:—

Where a Western-born person settles permanently in an Eastern non-Christian country, although a domicile in fact may be obtained in that country, yet the personal law to which such person becomes thereby subject is not the general law applying to the non-Christian population of such country, but the special law applying to the trading

or residential community of which he becomes a member, and which in many Eastern countries would be his own national law.

The authorities on the point are conflicting, and the matter cannot be said to be beyond doubt. (See *Tootal's Trusts* (1883), 23 Ch. D. 532; *Maltass* v. *Maltass* (1844), 1 Rob. Eccl. 67; *Abd-ul-Messih* v. *Farra* (1888), 13 A. C. 431.

The best known English text-book writers, however, seem to agree with the statement of the rule expressed above; thus, in Piggott on Exterritoriality, 2nd ed., 1907, at p. 232, the rule is stated to be as follows:—

"The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land."

And Professor Westlake, in the fifth edition of his book on Private International Law, takes the same view at p. 348, and in sect. 243 of his work on that page gives an admirable exposition of the English case law on the subject.

An alternative method of dealing with the difficulty would be for the English Courts to hold that domicile cannot be acquired in a non-Christian country at all, in which case the personal law of the party concerned would be that of the domicile of origin.

Domicile of Choice (continued).

When a dependent person becomes independent, the last domicile is always retained until changed by the act and choice of the person so becoming independent.

Thus, for example:—

A widow retains her late husband's domicile.

A divorced woman also.

A person *sui juris* that possessed by him during his minority.

We have already seen, from Lord Westbury's judgment in *Udny* v. *Udny*, that no person can be without a domicile, and that unless a definite domicile of choice has been acquired, the domicile of origin applies, and attaches or re-attaches between the abandonment of one domicile of choice and the acquisition of another domicile of choice.

It would seem to be the better opinion that the domicile of origin applies where an individual leaves a domicile of choice, *animo non revertendi*, and is *in itinere* towards another country where he intends to acquire a fresh domicile of choice. (Dicey, at p. 116. See, however, Westlake, sect. 260 (1), (2), (3) and (4) (*g*).)

In addition to the above defined rules there are many presumptions in English law with regard to domicile. They are, however, only *presumptiones juris* and not *presumptiones juris et de jure*—they can therefore always be displaced by evidence to the contrary.

For instance, voluntary residence in a country implies a presumption of domicile there, and a known domicile implies a presumption that such domicile is continued, but evidence may always be produced which shows a contrary intention.

We need not consider in detail the above rules for determining whether a particular individual is domiciled in a particular country or not.

We see the test to apply, and it becomes, as a rule,

(*g*) It is a little difficult to understand the principle upon which it is contended that journeying towards a given place is equivalent to residence there. It would not be sufficient to acquire an original domicile of choice.

largely a question of fact whether a particular individual conforms to the test or not (*h*).

What interests us far more for our present purpose is the relation of the question of domicile to matters of succession. We have seen that in this country the rule "*mobilia sequuntur personam*" in its reference to the questions the subject-matter of this treatise is interpreted to mean, "succession to the moveable property of a deceased person is governed by the law of his domicile at the date of his death."

We wish to study what precisely this rule means, and its principal application at the present time in English law.

In English law it is the law of the domicile that governs the personal rights of an individual and which determines his majority or minority, his marriage, succession, testacy or intestacy.

We are, however, only concerned in this work with domicile in its relation to the succession to and the administration of the estates of deceased persons, and important though the other branches of the personal law are in practice, they are outside the scope of this treatise. We have occasion in this work to study the personal law in relation to the rights over property, the capacity to dispose of property on death, capacity to make a will, and capacity to succeed both as devisee or legatee and as *heres ab intestato*.

(*h*) It is largely upon this ground that the system of domicile is attacked. The opponents of that system contend that it is frequently a matter of extreme difficulty and great expense to determine the domicile of a given individual.

CHAPTER III.

BRITISH NATIONALITY.

ALTHOUGH at first sight it may appear that English law pays little or no attention to the nationality of a deceased person, especially in cases of intestacy, the subject is important for two reasons.

First, in testate succession, the provisions of Lord Kingsdown's Acts introducing the principle of *locus regit actum* to the testamentary law apply only to British subjects, *i.e.*, only to those who are natural-born British subjects, or who have become British subjects since birth by means of naturalization. Secondly, in cases of intestacy, although the "administration" of such estates is governed by reference to the *lex fori*, yet all questions of succession will be referred to the *lex domicilii*, and as in most Continental countries succession is determined by reference to the national law, the Courts of this country will themselves be concerned with the nationality and the national law of the deceased.

Nationality is the condition or status of an individual in reference to the nation or State of which he is deemed to be a citizen either by birth or naturalization. It is upon the nationality of an individual that his political status and natural allegiance depend. Whilst an individual may be domiciled and thus possess a civil status in one country, he may be invested, whether by birth or by naturalization, with the political status or nationality of another country.

The nationality of persons has played an important

part in the development of private international law in most Continental countries, where it has, as a rule, superseded domicile as the test of status and capacity.

It is the municipal or territorial law of each state which determines the persons who are to be regarded as its subjects.

The status of British nationality is determined solely by English law.

By the common law of England everybody whose birth happened within the allegiance of the Crown was a natural-born British subject; everyone else, except British ambassadors and the children of the king, were aliens.

National character was incidental to birth only, and provided that took place within the allegiance of the Crown, including children born on English ships or in the residences of members of the English diplomatic service, the person became a natural-born British subject, regardless of the status or condition of his parents or either of them.

The rules relating to the acquisition of British nationality were frequently modified by statutes, and as these have been codified and consolidated in the Naturalization Act, 1870 (33 & 34 Vict. c. 14), as slightly amended by the Naturalization Act of 1895, it is unnecessary here to set out the successive intermediate stages.

At the present day most questions of nationality in English law depend upon the construction of that Act—although, as the measure is not retrospective, cases may still arise when the old rules are applicable.

At common law the character of a natural-born British subject was as a rule indelible. It was not competent to the early citizens of Britain to throw off their allegiance to the king. The old broad rule, "*nemo potest exuere*

patriam" was then of practical force, and exceptions were not frequently met with.

Nowadays, however, naturalization is of everyday occurrence, and under the terms of the Naturalization Acts, 1870 and 1895, aliens can become British subjects, and British subjects are permitted to become citizens of foreign States.

Private international law, as interpreted by the English Courts, draws a distinction between those who are British subjects and those who are not. The leading statutory enactment upon the matter so far as British subjects are concerned is Lord Kingsdown's Act, four sections out of five of which relate solely to British subjects.

It is therefore of importance to consider the rules determining the nationality of a given individual.

According to English law every individual is either a British subject or an alien.

To quote Professor Hill, "a child born of foreign parents even during an accidental stay of a few days (within British dominions) is fully and, until the age of twenty-one years, irretrievably a British subject."

(a) Generally speaking, any person born within the British dominions is a natural-born British subject—that is to say, he is a British subject at birth, and remains such until he complies with the requisite formalities for permission to change his nationality.

The rule is based upon the fundamental nature of the conception of political status and the personal tie between subject and sovereign.

Blackstone says: "Allegiance is the tie or ligament which binds the subject to the king in return for that protection which the king affords the subject. Moreover, as a general rule, it accords with fact—subject to certain

rare exceptions the protection of the king is afforded to every individual born within the British dominions."

Such an exception would arise were a portion of the British dominions in hostile occupation at the time of birth—or where, although locally situate within the empire, the birth took place in what is regarded as foreign territory, such as a foreign ambassador's residence.

(b) Again, any person whose father was born in the British dominions, or whose paternal grandfather was so born, is a natural-born British subject wherever he may happen to be born, provided his father has not since birth lost his character of a natural-born British subject. (Dicey, 2nd ed., p. 169.)

(c) Any person complying with the formalities of naturalization becomes a British subject, and his infant children residing with him become British subjects if the same requisite formalities are observed.

(d) A woman marrying a British subject becomes herself a British subject.

The rules are general, and a woman in English law is deemed to take her husband's nationality on her marriage.

(e) Under the terms of the Naturalization Acts it is open to any person who is a natural-born British subject, who has during his minority acquired a nationality otherwise than by his own act, on attaining his majority to make a declaration of alienage, and thus either to acquire a foreign or a British national character.

(f) Nationality can also be resumed in the case of persons *sui juris* who comply with the Naturalization Act.

Finally, it may be said that any person who is not a British subject within the meaning of the above rules is in the eyes of the English law an alien.

CHAPTER IV.

ADMINISTRATION AND SUCCESSION IN ENGLISH LAW, INCLUDING THE MEANING OF THE LAW OF THE DOMICILE AND THE NATURE OF ITS APPLICATION IN MATTERS RELATING TO THE ESTATES OF DECEASED PERSONS.

We shall see in a later chapter that from a very early date in English legal history the Courts have controlled the administration of the estate of a deceased person.

The same is true of most civilised countries, and the reason is probably that the State in each case wishes to ensure payment of the contribution to the National Exchequer which is required before the persons entitled obtain unlimited possession of the assets of the deceased. In England little progress can be made towards collecting or distributing the assets of a deceased person without an application to the Courts or their officials (*a*).

The whole of the proceedings required for obtaining authority to deal with the estate of a deceased person, for the payment of the estate duty or other tax on inheritance, the freeing of the estate from all charges and debts, form part of the process known in English law as administration in the largest sense of the word.

Such dealings with the estate, however, are in reality foreign to succession. Before the deceased person could have freely disposed of his property in his lifetime, the process of freeing the estate from charges and debts would

(*a*) For cases in which it is not necessary to take out an English grant of representation, see Tristram & Coote, Probate Practice, 14th ed. p. 10; and Chapter VIII., *infra*.

have to be undertaken by him, and after his death his representative, to use a Continental expression, "continues the existence of the deceased for the purpose."

To these dealings the law of the domicile of the deceased has no direct application.

Applications to the Courts of this or any other country are governed by the *lex fori*, as are also all matters of procedure and evidence, and no exception is made in the case of applications to the Probate, Divorce and Admiralty Division of the English High Court of Justice.

It is also the *lex fori* which determines the nature and extent of the grant of representation made by the Courts of this country, and the person to whom such grant should be made.

In fact, all steps in the administration of the estate of a deceased person from the time when the legal personal representative is invested with his powers to the time when the surplus estate is available for distribution are, strictly speaking, foreign to questions of succession properly so called.

Such steps are of infinite variety according to the particular circumstances of each case, and depend on the nature of the subject-matter and the charges affecting the estate, and the number and nature of the creditors.

To all these various steps, the same law is applied as would have prevailed had the deceased continued to live. That is to say, each step is submitted to its appropriate law—

Applications to the Court	to the *lex fori;*
Validity of a debt	to *lex loci contractus;*
Effect of a charge on land	to the *lex loci rei sitæ;*

and so on.

The creditors, for example, will retain all the rights they had against the deceased in his lifetime, and will

enforce them against the proper representative in like manner; the only difference to them being the power to control the administration, and if circumstances should warrant it to apply to the Court for a grant of administration to enable one of their number to do so.

These, however, are administrative dealings with the deceased's property by the person appointed to act as his representative for the purpose.

When once, however, all duties, debts and charges have been paid and discharged, the available surplus must be distributed amongst those entitled.

This distribution is succession properly so called.

What then is the precise application of the *lex domicilii* to succession ?

With regard to succession (except in those cases to which special attention is called at p. 134, *infra*) it is now an established rule of English law that with regard to moveables, both testamentary and intestate succession depend upon the law of the last domicile of the deceased. (See Westlake, 5th ed., sect. 59; and *De Bonneval* v. *De Bonneval* (1838), 1 Curteis, 856, in which Sir Herbert Jenner says: "It is now settled by the case of *Stanley* v. *Bernes* that the law of the place of domicile and not the *lex loci rei sitæ* governs the distribution of and succession to personal property in testacy and intestacy.")

With regard to immoveables the *lex situs* generally prevails (*b*).

As to what are moveables and what are immoveables the *lex situs* decides (*c*).

The English division of property into realty and per-

(*b*) For exceptions, see Chapter XI., *infra*.

(*c*) The test to apply is fully considered and explained at p. 49; and see *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461 (Lord Selborne).

sonalty is not a division on the basis of immoveables and moveables, but is a division peculiar to English law.

The result is that certain classes of property in this country may be immoveables for one purpose, and therefore governed by the *lex situs,* whilst at the same time they may be personalty within the meaning of an English Act of Parliament, such as Lord Kingsdown's Act, and as such may be capable of being disposed of in accordance with the law of the domicile, such as chattel interests in land, or lands belonging to a partnership firm.

In the case of succession on intestacy, the rule that the domicile of the deceased at date of death governs the question of succession to the moveables, presents no difficulty. We have seen the tests to apply to determine the domicile, and it becomes a question of fact. Although the facts may be disputed, once the domicile is ascertained, there can be no conflict between the domicile at the date of death and the domicile at any other period of the deceased's existence. If a given individual is domiciled for the greater part of his life in France and dies intestate domiciled in England, the French domicile in earlier years can have no bearing upon the question of succession to his estate. His estate, in so far as it consists of immoveables, will be regulated by the *lex situs,* and his moveables will devolve in accordance with the law of the domicile at the date of his death (which in the case given would be in accordance with the English law).

With regard, however, to testamentary succession the question is much more difficult.

To immoveables the *lex situs* applies regardless of the domicile of the deceased, and need not, therefore, be further considered. With regard to moveables, however, we have seen from Lord Westbury's judgment in *Udny* v. *Udny,* that by English law the whole of a man's personal

rights are governed by the law of his domicile. This being so, we must first ascertain what matters are determined by reference to the domicile, and secondly the period of time at which the domicile is to be ascertained.

And first—

In matters of administration and succession the law of the domicile determines such matters as the following:—

(a) Is the succession testate or intestate ?

(b) If testate, whether probate is to be granted, and if so, of which instrument if more than one ?

(c) The capacity of a testator to dispose of his property and the respective effect of successive wills.

(d) If intestate, who is entitled to share in the estate ?

For instance, although if there is no testamentary instrument at all left by the deceased, the succession is, of course, wholly intestate, and the property is distributed according to the rules governing an intestacy; yet if a testamentary document is left, it will be to the law of the domicile that reference must be made as to the validity of such instrument. See *Bremer* v. *Freeman*, 10 Moo. P. C. 306 (Lord Wensleydale):—

"It lies upon the party propounding a will to prove that the law of the domicile was such as to authorise a will in that form. If he fails in that proof the will propounded cannot be admitted to probate. That the law of the testator's domicile at the time of making the will, and of the death of the testator, when there is no intermediate change of domicile, must govern the form and solemnities of the will, can be no longer questioned (*d*). The maxim, '*mobilia sequuntur personam*,' has long prevailed, and

(*d*) For the law since Lord Kingsdown's Act, both where there is and is not an intermediate change of domicile between the making of the will and date of death, see Chapter VII., at p. 93 and following pages.

whatever the origin of that doctrine may be, whether it was derived from a fictitious annexation of moveables to the person or from an enlarged policy growing out of their transitory nature, it has so general sanction amongst all civilised nations that it may now be treated as part of the *jus gentium*. (See Story, sect. 330.) It follows from this maxim that the post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, if he dies without a will, and it seems equally to follow that if the law of the country allowed him to make a will, the will must be in the form and with the solemnities which that law required (*e*), and it was so decided in the case of *Stanley* v. *Bernes*, which doctrine, we believe, has been generally approved." (Story, sect. 468.)

Once it has been determined by such a test that the deceased has left a formally valid will or testamentary disposition, it must be seen whether any other document is incorporated, and if so, whether probate should be granted of one or both; further, although valid in form, it must be shown that the testator had capacity to make such a will. Capacity in English law is governed by the law of the domicile (usually at the time of performing a legal transaction, as to which see p. 97, *infra*).

Secondly—

In applying the law of the domicile to testate succession, this question arises:—

At what period of a man's life is the domicile to be ascertained for providing the index to his personal law?

A given individual duly makes his will in accordance with the law of his then domicile. Subsequently he

(*e*) Since Lord Kingsdown's Act the rule would appear to be as stated on p. 95, *infra*.

abandons his former domicile and acquires a fresh domicile, either by the acquisition of a new domicile of choice or by the re-attachment of his domicile of origin.

Is the will affected ? Which law governs ?

Or, again, having made his will the testator marries. When will marriage revoke the will ? What is the test, domicile at date of making the will or at the time of marriage ?

At common law it was the law of the domicile at the date of death which governed the validity of the will of moveables of a deceased person. If, therefore, any change of domicile supervened between the making of the will and the time of death, the will would be affected, and would be altogether invalid or only so far valid as the law of the domicile at date of death permitted.

This rule operated very harshly upon British subjects who had gone abroad, and having acquired a foreign domicile by residence abroad made wills in accordance with the forms of the law of their domicile of origin.

It was therefore amended by the Wills Act, 1861, known as Lord Kingsdown's Act (*f*), which introduced for British subjects only the principle of "*locus regit actum*" into the English law relating to the formal validity of testamentary documents.

The Act also provided (*g*) that a will otherwise valid should not be rendered invalid as to form by a subsequent change of domicile.

This latter provision is general in its operation, and applies to foreigners as well as to British subjects. (*Re De Groos*, [1904] P. 269 (*h*).)

(*f*) 24 & 25 Vict. c. 114.

(*g*) Sect. 3.

(*h*) Notwithstanding the preamble of the Act and apparently limited scope of its provisions.

We deal later in detail with the form of wills and the principles governing the Courts in reference to construction of wills, and the administration and distribution of the estates of intestates, showing in each case the limits and effects of the application of the law of domicile.

So far we have referred to the "law of the domicile" without discussing the meaning attached to that expression in English law. In the sense in which we use the expressions law of the domicile and law of a given country, they mean the whole of the law, whether it be the territorial law or the rules of private international law, which the Courts of the country would apply under the particular circumstances. (See Westlake, sect. 59, 5th ed., at p. 113.) Considerations are advanced in a subsequent chapter for showing that this is the sense in which the terms are used in English law. (See p. 91 and Chapter XX.)

CHAPTER V.

THE RULES RELATING TO THE LOCAL SITUATION OF ASSETS AND THE LEGAL CONSEQUENCES ARISING THEREFROM.

For the purposes of private international law, property is divided into two classes, moveables and immoveables. Immoveables, speaking generally, are lands and houses and all estates and interests therein, including leaseholds or chattels real.

Moveables are all other property, whether tangible objects which have an actual local situation, or choses in action which have but a constructive situation.

It is important to consider the legal situation of these two classes of property and of the various species of each class in order to ascertain the system of law applicable.

Moreover, it is settled law that unless the estate of a deceased person includes assets locally situate within the jurisdiction of the English High Court of Justice, no application for probate or letters of administration can be successfully made here.

Most of the reported decisions upon the legal situation of assets occur in connection with the incidence of English death duties. However, as the liability to death duties depends upon principles wholly independent of private international law, and frequently turns upon the construction of the wording of Acts of Parliament, we have thought it advisable to deal with the legal situation of assets in general in this chapter rather than to relegate the subject entirely to the chapter in which death duties are examined and discussed.

We have seen that in private international law all property is either immoveable or moveable.

The test of whether a particular species of property belongs to the one class or the other depends upon the law of the place where the property is legally situated. (*Freke* v. *Lord Carbery, supra.*)

As Story says in his Conflict of Laws, p. 630, "the question is not so much what are or ought to be deemed *ex sua natura,* moveables or not, as what are deemed so by the law of the place where they are situated."

As has been pointed out by Professor Dicey, at p. 497, law in reality deals with rights over property, and the law of the country where a given tangible thing is in fact located can alone determine whether the rights over such thing, be it land or obligations connected with it, or documents which embody such rights or obligations, shall be treated as moveables or immoveables.

When the personal theory of law was accepted in this country, it was only to the moveable property of a deceased person that the law of the domicile was treated as having any reference.

The old feudal ideas prevailed as to immoveable property, and no foreign law or custom was recognised in reference to land or any interest or easement connected therewith. We again quote Story:—

"The common law declares that the law of the *situs* shall exclusively govern in regard to all rights, interests and titles in its immoveable property."

All rights over or relating to immoveables are therefore governed, generally speaking, by the law of the country where the immoveables are locally situated. This applies almost universally in the civilised world, but is particularly true of English law: see *Doe* v. *Vardill, supra,* where the Lord Chief Baron Alexander says:—

"What the rights of the claimant are respecting English land must be left to the law of England, and the comity of nations is totally ineffective to alter in the slightest degree the rules of inheritance and descent which the law of England has attached to this English law." (And see further, with particular reference to leaseholds, *In the goods of Gentili*, L. R. 9 Eq. 541.)

Immoveables.

In English rules of private international law the following are considered as immoveables:—

(1) All real estate which (by the Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 1) is deemed to include manors, advowsons, messuages, lands, titles, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal.

And any undivided share thereof.

And any estate, right or interest (other than a chattel interest) therein.

(2) Further, any property not of a moveable nature which in English law is considered personal estate, such as:—

Leaseholds or other chattel interests in land.

Land on trust for sale converted by rule of law into personal estate.

English partnership realty and leasehold properties.

Proceeds of sale of foreign land.

Foreign partnership immoveables.

The above classes of property being considered immoveables in English law, the following results accrue:—

Capacity to dispose thereof depends (as a general rule) on the local law as the *lex situs*—and in addition the formalities necessary for alienation. (*Re Hernando* (1884), 27 Ch. D. 284; see *Adams* v. *Clutterbuck* (1883),

10 Q. B. D. 403.) The length of time to acquire a possessory title. (*Beckford* v. *Wade* (1805), 17 Ves. 87; *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; and *Pitt* v. *Dacre* (1876), 3 Ch. D. 295.) Devolution on death. (*Doe* v. *Vardill*.)

Liability to taxation during the owner's lifetime and on his death to death duties.

Restrictions on alienation for particular purposes. (*Curtis* v. *Hutton* (1808), 14 Ves. 537; and see also *Att.-Gen.* v. *Mill*, 2 D. & Cl. 393.)

Priority of incumbrancers, position of mortgagees and their powers. (*Bent* v. *Young* (1838), 7 L. J. (N. S.) Ch. 151; *Jackson* v. *Petrie* (1804), 10 Ves. 164.)

Necessity for registration of the instrument of title, escheat and forfeiture are all governed by the local laws.

At this point, however, it may be well to mention that the position of parties under a contract relating to immoveables probably depends on the *lex loci contractus* (*De Beers Consolidated Diamond Mines* v. *British South Africa Co.*, [1912] A. C. 52), and that in proceedings in the Courts all questions of procedure, whether the subject-matter of the suit relate to immoveables or not, depend on the *lex fori*.

The English Statute of Limitations of Actions has been held merely to bar the remedy, and not the right, and is thus treated as part of the procedure of the Courts.

The period of time, therefore, within which a particular action must be brought depends on the *lex fori*, even if relating to title to land situated elsewhere, where a different rule may prevail.

Whilst this is so as to any mere statute of limitations, where the effect of the foreign rule is to extinguish not only the remedy but also the right, then a plaintiff in this country can have no greater rights than in the country of

the *situs* (*Pitt* v. *Dacre* (1876), 3 Ch. D. 295), and there is also authority for the proposition that although statute-barred here, a claim may be put forward as to immoveables situated abroad if it would be allowed by the Courts of the *situs*. (See *Re Peat's Trusts, supra.*) For the whole subject of prescription, see Dicey, 2nd ed., at p. 505; and see Laws of England, Art. Conflict of Laws, sects. 320 and 450.)

Of the above varieties of immoveable property in English law, some call for special comment.

Chattels real, which mean in English law lands of leasehold tenure, furnish probably the most unique type, and we will now consider their legal nature with reference to the English rules of private international law.

Chattels real are a peculiar conception of English law whereby leasehold interests in land are treated as personal estate. Thus, although in fact leaseholds are almost universally regarded as immoveables (*Freke* v. *Lord Carbery*) and are treated as such in English law so far as the estates of all persons other than British subjects are concerned, there are cases in which the rules usually applicable to moveables also apply to them.

A foreigner to make his will effectively apply to land in this country must, no matter what his domicile, comply with the forms required by English law, and that whether his interest in the land be in freehold, copyhold or leasehold hereditaments, and whatever the extent of such interest, and regardless of whether such property is treated here as realty or personalty. (See *Este* v. *Smyth*, 18 B. 112; *Duncan* v. *Lawson* (1889), 41 C. D. 394; *Pepin* v. *Bruyere*, [1900] 2 Ch. 504, and C. A., [1902] 1 Ch. 24.)

A British subject also, in the case of freehold or copyhold lands, must comply with the forms required by the

Wills Act, 1837, no matter what his domicile. In the case of leaseholds, however, it has been held that a British subject can validly dispose of these by any will valid either by the Wills Act, 1837, or by virtue of Lord Kingsdown's Act. (*Re De Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. D. 584.)

As this latter Act applies to all personal property, it is submitted on the authority of the principle governing the above decision that all property treated as personal property here, would also pass under such a will, even though the same consisted of proceeds of sale of land, or of land which by the equitable doctrines of conversion or reconversion is treated as money, such as land on trust for sale.

Moveables.

When the personal theory of law became supreme it was held in England, as elsewhere, that the moveable property of a person was subject to his personal law.

Moveables were said to "follow" the person, "*mobilia sequuntur personam.*"

By a legal fiction moveable property was considered to be situated in the country where its owner was domiciled for the time being.

Various reasons were given for the rule. (See *Bremer* v. *Freeman, supra.*) According to some judges it was stated that the rule was based upon public policy. (See Lord Hardwicke's judgments in *Pipon* v. *Pipon,* and in *Thorne and Watkins* (1750), 2 Ves. sen. 35.) At other times it was put in a more scientific form. For instance, Lord Loughborough, in the bankruptcy case of *Sill* v. *Worswick* (1791), 1 H. B. C. at p. 690, says:—

"First, it is a clear proposition not only of the law of England but of every country in the world, where law has the semblance of a science, that personal property has

no locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country in which he was a domiciled subject that will regulate the succession. For instance, if a foreigner having property in the Funds here dies, that property is claimed according to the right of representation given by the law of his own country." And he quotes and approves Lord Hardwicke's judgment in *Pipon* v. *Pipon*.

However, this rule that the disposition of moveable property and the succession thereto on the death of a person are governed by the law of the domicile only applies to the moveables treated as a universality.

In so far as the death of the owner operates to transfer a universal succession the rule applies. By a universal succession we mean a succession to a *universitas juris*, *i.e.*, to the universality of the rights and duties of the deceased.

Treated individually the moveables belonging to a deceased person are subject in many ways to the laws of the country where they are situate, and to the laws of the country in which a contract concerning them is made.

In other words, a given article is subject to the ordinary rules of private international law, both as to *lex situs* and *lex loci contractus*.

This distinction between the rules governing the moveables as a *universitas juris* and individually is well treated in a thesis of the University of Paris, by André Marion, Docteur en Droit (1906), entitled "La loi du domicile en matière successorale selon la jurisprudence anglaise."

After dealing with the peculiarities of the English system of law, the learned author says (*a*):—

"We must now consider the exact conditions under which the question of choice of law arises, and the precise points to which the English Courts have to apply their principle. At first sight, there is an apparent paradox. It is said that the moveable property of a deceased follows the person—in other words, such property is only situated in the country where the deceased was domiciled. It would seem, therefore, that the English Courts would never have to deal with succession to moveable property unless the assets had their legal situation in England, that is, unless the deceased was domiciled in England. From which it would result that the English Courts would only have to apply English law, and as no conflict would be possible, the question would be devoid of all practical interest. To reason thus is, however, to deny what continually happens in practice.

"Whatever theory may be relied upon in a given country to decide the law to apply to a deceased's estate, and whether the moveable property has in law no other situation than that of the country where the deceased was domiciled or not, in practice we know that such property is frequently situated elsewhere. A deceased having his domicile in England may possess amongst his property in France valuable furniture and precious collections of articles of value. On the other hand, a Frenchman not domiciled in England may have invested large sums in the Funds of that country. In spite of theories the actual presence of these properties in the different countries concerned cannot be ignored, and the Courts of the countries where they are in fact situate will have frequently to deal therewith."

(*a*) Marion, Thèse, p. 13 *et seq.*

This is well illustrated in English law by the different stages in the disposition of a deceased's estate.

The administration, collection of the assets, payment of fiscal duties, discharge of debts, granting of representation are in general independent of the law of domicile.

They depend on the *lex fori* or the law of the place where representation is applied for, and consequently the law of the place where part of the deceased's estate is in fact situate.

It has already been shown that until the process of administration is complete there is in effect no succession.

We refer again to Dr. Marion's thesis (*b*):—

"Of the two phases of operations in the English system, that which is concerned with the realisation of the assets and payment of debts, and that governing the distribution of the surplus, the latter alone is really succession. This appears to exactly correspond with the sense in which '*mobilia*' is used in the maxim '*mobilia sequuntur personam*.' If during the period of liquidation obedience is given to the *lex situs* and *lex loci contractus*, it is precisely because so long as this operation continues the moveable property of the deceased does not form an 'open succession,' *i.e.*, a distributable estate (*succession ouverte* in French law). The whole has not been ascertained, and there is not any question of transfer. When the whole is complete, and debts charged upon the assets have been paid, the local law will cease to apply, and will allow the personal law of the deceased to make its influence felt. Then, and not until then, will a legal relationship be created between the deceased and those entitled to share in his estate, and it is only such relationship which the personal law of succession can govern."

(*b*) Marion, Thèse, p. 91.

Until the state of succession, strictly so called, is reached the *lex domicilii* does not in general apply.

Thus, although a deceased die domiciled in France, the succession to his moveable property will be governed by French law, yet English law will refuse to allow his moveable assets situated here to be dealt with by any person claiming rights under the law of the domicile, unless and until such person has clothed himself with the necessary authority required by the local English law—that is, unless a grant of probate of the will or letters of administration to the estate of the deceased has been made to the person in question.

Moveables in English law may be divided into:—

(1) Pure chattels, *i.e.*, things of a tangible nature, known as choses in possession.

(2) Choses in action: Rights to personal property independent of possession (which, strictly speaking, are neither moveable nor immoveable).

(3) Ships.

(1) *With regard to pure chattels there is little difficulty.* Individually, the laws of the country where they are in fact situate will govern. (*Cammell* v. *Sewell* (1858), 3 H. & N. 617, and 5 H. & N. 728; also *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414.)

As a general rule, a particular disposition of a moveable according to the *lex situs* cannot be disregarded, and will be binding even though invalid by the law of the domicile.

Whether a good title has been acquired to particular moveables by transactions taking place in this country is to be governed by the law of this country. (See *Williams* v. *Colonial Bank* (1888), 38 Ch. D. 388 (C. A.), which, although it relates to share certificates, illustrates this

particular point.) In that case certificates of shares in an American railway company had been transferred in England, and the question was whether the transferees had a good title. In favour of this contention the transferees relied on American law.

Held, that the transaction taking place in England, the title to the shares depended on English law.

Lord Lindley says (at p. 403):—"American law is important up to a certain point, but not beyond that point. We must look to American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this: Who is entitled to these certificates? Now, the certificates have been dealt with by the executors in England, and the certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that is to govern the case."

This view was adopted by the other members of the Appeal Court, Cotton, L. J., and Bowen, L. J., who used similar expressions.

As in the case of pure chattels there can be no doubt as to their actual situation, and as the law of the situation governs all transactions taking place within its jurisdiction, difficulty rarely arises in determining their ownership or the title thereto.

(2) *In the case of choses in action, the question is more complicated*, largely because their legal "situation" is a matter which frequently gives rise to great dispute.

Where is a debt incurred by a person residing in France to a creditor in London deemed to be situate ? Would the same rule apply if judgment had been obtained in the Courts of either country ?

Are bearer bonds to be treated as tangible chattels and capable of a *de facto* situation, or are they merely evidence of a loan due from a limited company to the rightful owner of the bonds ?

The accepted definition of chose in action has varied in the progress of legal notions, and the conception of a chose in action has been greatly widened in modern times. Originally the term "chose in action" was applied only to a right to take proceedings either at law or in equity to recover a debt or damages, or to obtain some other judicial relief. It did not include any other incorporeal right of property, and, of course, included no tangible personal property. It was practically identical with what is now called a "right of action."

But as stated by Lord Justice Cotton in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. at p. 276, there has undoubtedly been, not only in common language but in legal language, an extension of the application of the term "chose in action" beyond its legal meaning.

In more modern times there have sprung up several species of incorporeal personal property which were unknown to the early writers, such as Consols, stocks, shares, debentures, patents and copyrights. All these, probably for want of a better classification, are often called choses in action; they are, strictly speaking, personal property of an incorporeal nature.

The following are the principal rules of English law relating to the legal situation of choses in action:—

Debts.—Simple contract debts are situated where the

debtor resides at the time of death of the creditor. (*Att.-Gen.* v. *Bouwens* (1838), 4 M. & W. 171.)

This is so, even though the debt is secured by a mortgage on land abroad (*Payne* v. *Regina*, [1902] A. C. 553); and even where, by the law of the place where the property is situate, the debt is treated as a "specialty debt." (*Payne* v. *Regina*.)

This, however, does not apply to bills of exchange and promissory notes, where they are instruments negotiable elsewhere. (See Dicey, 2nd ed., p. 311, and *Att.-Gen.* v. *Bouwens*.)

Specialty debts (in accordance with the old view taken by the Ecclesiastical Courts) are situated where the instrument securing them is situated. (*Att.-Gen.* v. *Bouwens; Gurney* v. *Rawlins* (1836), 2 M. & W. 87; see also *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476.)

For certain purposes (estate duty) all specialty debts owing by debtors resident within the United Kingdom are situated here. (Revenue Act, 1862 (25 & 26 Vict. c. 22, s. 39).)

Judgment debts are situated in the country where the judgment is recorded. (*Att.-Gen.* v. *Bouwens*.) (This same rule applies to debts due under foreign judgments, although, strictly speaking, such debts are not "judgment debts" in the English sense. (See *Duplein* v. *De Roven* (1705), 2 Vern. 540.))

Shares, stock, bonds, debentures, obligations, bearer warrants and other certificates of title to an interest in the assets of a company, or the funds of a municipality, State or foreign government are situated here in the following circumstances:—

(a) If the registered office of the company concerned is here; or

(b) If the holders must be registered here; or

(c) If the instruments themselves or the rights of which they are the evidence are capable of being transferred, sold, or dealt with here. (*Att.-Gen.* v. *Higgins* (1857), 26 L. J. Ex. 403; *Fernandes' Executors' case* (1870), L. R. 5 Ch. 314.)

However, a mere request to convert foreign stock into registered stock here which has not been carried through prior to the date of death is insufficient of itself to make such foreign stock assets locally situate here. (*Pearse* v. *Pearse* (1838), 9 Sim. 430.)

As to other personal property of an incorporeal nature:

Goods on the high seas are situated in the country where the bills of lading can be dealt with. (See Hanson on Death Duties, 6th ed., p. 110; and *Att.-Gen.* v. *Hope* (1834), 1 C. M. & R. 530.)

Goods in transitu from one country to another are considered locally situate in the country to which they have been consigned. (Hanson, p. 11; and *Att.-Gen.* v. *Pratt* (1874), L. R. 9 Ex. 140; and *Wyckoff's case* (1862), 3 Sw. & Tr. 20.)

An interest in a trust fund will be held to be situated in the country where the trustees reside.

No matter what the actual situation of property subject to an English trust with trustees resident here, any interest in such trust property, such as a reversion, or the like, is considered locally situate here. (*Att.-Gen.* v. *Lord Sudeley*, [1897] A. C. 2; *Re Smyth, Leech* v. *Leech*, [1898] 1 Ch. 89.)

Money owing under an insurance policy is deemed locally situate in the country where the head office of the insurance company is situated. (Hanson, p. 110.) Property which consists of shares in or claims upon any company or society must be taken to be locally situate where the company has its head office. (See *Att.-Gen.* v.

Higgins (1857), 2 H. & N. 339; and *Fernandes' Executors' case* (1870), L. R. 5 Ch. 314.)

A share in the assets of a partnership is deemed to be situate in the country where the partnership business is principally carried on.

In the goods of Ewing, 6 P. D. 23, Sir James Hannen: "the share of a deceased partner in a partnership asset is situate where the business is carried on." (*Commissioner of Stamps* v. *Salting*, [1907] A. C. 449; *Laidlay* v. *Lord Advocate*, 15 A. C. 468.)

A patent is presumably deemed to be situate in the country where the same has been registered. If, however, the rights covered by the patent can in fact be dealt with elsewhere, no doubt they could in some senses be considered as locally situate wherever the rights could be dealt with. Thus, on this reasoning it has been held that an interest in a Colonial patent which was capable of assignment here was not property locally situate out of the United Kingdom. (See *Smelting Co. of Australia* v. *Commissioners of Inland Revenue*, [1897] 1 Q. B. 175; and Hanson, p. 110.)

Copyright is presumably deemed to be situate in the country of registration. If capable of assignment elsewhere, see note above referring to patents.

A claim against the estate of a deceased person is an asset in the country where the deceased was domiciled at the date of his death. (*Att.-Gen.* v. *Lord Sudeley;* and *In the goods of Ewing, infra.*)

This is not affected by the actual situation of the assets belonging to the estate of the deceased against whom the claim is made, nor by the domicile of the creditor or claimant. (*In the goods of Ewing* (1881), 6 P. D. 19.)

And in general any property which may from time to time be included in the expression "chose in action" will

be considered locally situate in the country where the same can be sued for and recovered.

(3) *British ships are deemed to be locally situate in the country of their port of registry.* (See 27 & 28 Vict. c. 56.)

This would seem to be on the assumption that before an effective transfer of a ship could take place, some formality would have to be complied with at the port of registry.

If this were not so, a ship would probably be situate in the country where it actually was at the date of death, and if on the high seas, in the country where the owner was domiciled.

Thus, it is submitted a foreign ship would be situated here if within the territorial limits of the United Kingdom, no matter what the port of registry. (See, however, Hanson, at p. 110.)

And ships wherever situate or wherever registered will be deemed to form part of the moveable assets of a deceased who dies domiciled in England, and will be (*inter alia*) subject to duties here.

CHAPTER VI.

THE JURISDICTION OF THE ENGLISH HIGH COURT OF JUSTICE IN MATTERS RELATING TO THE ADMINISTRATION OF THE ESTATES OF DECEASED PERSONS.

From the earliest times when English law began to formulate itself, the Courts of the country have intervened on the death of an owner of property to control its disposition.

In the days of Saxon rule, on the death of a person intestate his effects became vested in the Lord of the Manorial Court of which the deceased had been a member and in which he had his soen, whilst his land descended strictly in accordance with the common law. On the introduction of the system of primogeniture in the twelfth century the heir succeeded to lands, and no devise was possible. This continued until 32 Hen. VIII., Chap. I. (See Encyclopædia of the Laws of England, 2nd ed., Art. Probate, Vol. 11, p. 674.)

After the Norman Conquest the jurisdiction of the lords of the manor as to chattels gradually passed into the hands of the foreign ecclesiastics who came to this country and continually encroached on their prerogatives.

The Church stepped in to protect gifts at death to pious uses, and if there were no testamentary gifts of land, the Church Courts were allowed exclusive jurisdiction.

The written will of chattels, and the appointment and position of an executor, a person charged with the carrying out of the wishes of the deceased, make their appearance at the same time in English law. According to Selden

there is no instance of any process for establishing the validity of a man's testamentary dispositions or will prior to the reign of Henry III.

The proper tribunal was at first that of the ordinary, usually the bishop, in whose diocese the effects of the deceased were situate, and if the deceased left goods of a certain value (*bona notabilia*) in more than one diocese, the archbishop alone had jurisdiction, which he exercised in the Court of Arches. Administration in intestacy does not appear until later. The Church was interested in securing the making of a will or a bequest in her favour for the poor, and it was regarded as an ecclesiastical offence to die intestate.

In that event, however, the Church stepped in and claimed to control the disposition of the deceased's effects.

As early as 1285 the jurisdiction of the ordinary in cases of intestacy was confirmed by statute (Statute of Westminster II. c. 19), and thereby the ordinary was bound to pay the debts of the deceased in the same manner as an executor.

In the year 1443 the Prerogative Court of Canterbury was established, and all powers formerly vested in the Archbishop's Court of Arches were transferred to it.

This Court existed side by side with the various manorial and other privileged Courts which had not succumbed to the invasion by the Church, until the formation of the Court of Probate in the year 1857.

At the time of the passing of the Court of Probate Act, in that year, there were no less than 372 ecclesiastical or other Courts possessing authority to grant or revoke probates of wills and letters of administration to the estates of deceased persons.

By the Court of Probate Act (20 & 21 Vict. c. 77), the preamble to which recites that "it is expedient that all

jurisdiction in relation to the grant or revocation of probates of wills and letters of administration in England should be exercised in the name of her Majesty by one Court," it is enacted in sect. 4 as follows: "The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relative to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her Majesty in a Court to be called the Court of Probate, and to hold its ordinary sittings and to have its principal registry at such place or places in London or Middlesex as her Majesty in Council may from time to time appoint."

By sect. 23 of the Act it was provided that the Court of Probate should be a Court of Record, and have the same powers throughout England as the Prerogative Court of the Province of Canterbury had in relation to testamentary matters and effects of deceased persons.

It was, however, expressly provided by the same section, "that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished."

Matters of this kind had formerly been entertained by the old Ecclesiastical Courts; after being expressly reserved by this Act they were assigned to the Chancery Division of the High Court, and are now dealt with there.

By the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 19, it was provided that:—

"From and after the decease of any person dying in-

testate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they were vested in the ordinary."

The Probate Court continued its separate existence until 1875, when, by the operation of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the Probate Court was abolished, and became part of the new Supreme Court of Judicature, consisting of the Court of Appeal and High Court of Justice. By this Act, the High Court of Justice is declared to be a superior Court of Record, and amongst other jurisdictions that of the Court of Probate is transferred to it. By sect. 34 all causes and matters pending in the Court of Probate, and all causes and matters which would have been within the exclusive cognizance of the Court of Probate if this Act had not been passed, were assigned to the Probate Division of the High Court of Justice.

The five Divisions of the High Court of Justice have since been reduced to three.

The Act also dealt fully with the procedure to be adopted, and the new enactments in this respect apply to and override the former rules of contentious practice in the Court of Probate.

The voluntary or non-contentious practice is unaffected, and it has been expressly held that the old rules in existence before the passing of the Judicature Act still govern this branch of the procedure in probate matters. (See *In the goods of Tomlinson* (1881), 6 P. D. 209.)

In small cases there is a certain jurisdiction relating to matters of succession and administration vested in the

County Courts, but for our purposes it is not of importance.

Speaking generally, therefore, it may be said that in England the Court possessing jurisdiction with regard to the granting or revoking of probates of wills and letters of administration is the probate section of the Probate, Divorce and Admiralty Division of the High Court of Justice.

Whilst matters relating to the administration of the estates of deceased persons, suits for legacies, suits for the distribution of residues, and all proceedings relating to the enforcement of trusts are primarily the subject-matter of the jurisdiction of the Chancery Division of the same Court.

It is the dual nature of the *forum* for administration of estates in English law which causes much of the complexity with which the rules of private international law are involved in this country.

On account of the extensive inherent jurisdiction *in personam* exercised formerly by the English Court of Chancery, and now by the Chancery Division of the High Court, many of the rules of private international law, such as the application of the *lex fori* to matters of procedure and the local situation of choses in action, have received a more extended application in the Courts of this country than in those of Continental countries.

Without an intimate acquaintance with the respective spheres of the Probate Court and of the Chancery Division, and an exact appreciation of the peculiar nature of the jurisdiction in Chancery, a student of private international law, as accepted in England, will find himself surrounded by an interminable number of judicial problems of which there is no apparent solution.

In considering the jurisdiction of the English Courts

in matters relating to the administration of the estates of deceased persons the natural division would be into the law dealing with probate or proof of wills and that governing grants of simple letters of administration to the estates of deceased persons.

The term probate, in its strictest sense, signifies the copy of the will which is given to the executor, together with a certificate under the seal of the Court, signed by a registrar of such Court, certifying that the will has been proved. In a wider sense the word indicates the process and results of proving a will, and, generally, is used to denote all matters which come within the sphere of the Probate Division of the Probate, Divorce and Admiralty Division of the High Court of Justice.

Jurisdiction as to Probate.

This consists of two branches:—

(a) Common form business.

(b) Solemn form or contentious business.

As regards (a). By the Court of Probate Act, 1857, s. 2, voluntary, non-contentious or common form business is defined as being "the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administration through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or letters of administration."

The jurisdiction of the Probate, Divorce and Admiralty Division in common form business applies to the personalty of a deceased person situated within the jurisdic-

tion of the Court or *in transitu* to this country, and since 1897 to real estate here as well.

Grants of representation are made in accordance with statutes, statutory rules and a certain unwritten law of the Court based upon precedents and the practice of the Division.

To executors probate is granted. Such representation is general or limited, absolute or for a time only.

It is not, however, in every case that the English Court will assume jurisdiction to grant probate. The Court will not grant probate (at all events in common form) unless the deceased has left a valid will containing the appointment, either express or implied, of an executor. (See *infra*, p. 113, and *Wankford* v. *Wankford*, there quoted and referred to.) Nor will the Court assume jurisdiction unless there is some property belonging to the deceased's estate locally situate within the jurisdiction of the Court. On the application for probate being made the Court determines the exact nature and extent of the grant of representation to be made.

This and all other matters relating to the application to the Courts are treated as questions of procedure, and are therefore regulated solely by the *lex fori*.

Nor does the power of the Court cease on the original grant being made. In a very real sense the Court controls the disposition of the estate, and permits any person aggrieved to apply to the Court for protection and assistance.

Probate granted in common form is revocable. Any person whose interest is adversely affected may call it in and put the party who obtained it to proof in solemn form. (*Merryweather* v. *Turner* (1844), 3 Curt. 802—817.)

As regards (b)—In solemn form or contentious business. A grant of probate in solemn form means a grant

consequent upon a judgment or decree of the Court after action brought, and is usually the result of either—

(1) A doubt on the part of the executor who formally submits the document to the Court for adjudication as to its validity; or,

(2) A dispute by parties interested who take hostile steps to prevent common form probate being obtained on the grounds of undue influence, the faulty execution of the will, defective testing power of the deceased, or other suitable reasons.

In either case, on the hearing, the Court will go fully into the merits of the case, and will not grant probate until all the formalities required by reference to the proper system of law are complied with.

As in common form business the one essential, in order to give the High Court jurisdiction, is the presence of some property belonging to the deceased within the jurisdiction of the Court. (See *Evans* v. *Burrell* (1859), 28 L. J. P. 82; *In the goods of Tucker* (1864), 34 L. J. P. 29.)

Jurisdiction in Cases of Letters of Administration.

Whenever there are assets in this country, and wherever the deceased left a valid will, but there is no executor, either because no executor has been appointed, or by reason of his having renounced probate or having predeceased the testator, the Court will grant letters of administration, with the will annexed, to the person having the greatest interest in the estate—usually the residuary legatee, if the will contains a residuary clause.

If no residuary bequest is contained in the will, then the grant will be made to the next of kin, and failing them, to creditors or a legatee.

If the deceased died wholly intestate, a grant of simple administration of the estate will be made.

The principles upon which the Court acts in granting letters of administration here are purely principles of English law. (See Dicey, 2nd ed., p. 658, and see *Blackwood* v. *Regina*, 8 A. C. 82.)

The choice of the representative, the nature of the grant of representation accorded, are alike referred to the *lex fori*. (*Re Stewart* (1838), 1 Curt. 904.)

In deference, however, to the rule that the Courts of the domicile are the *forum* primarily entitled to decide such matters, the English Courts will, as a general rule, in making such grants give effect here to any judgment or order made by the Courts of the domicile. (*In the goods of Briesemann*, [1894] P. 260; and see Chapter XVI., *infra*, where the subject is discussed in detail, and the principal cases are set out and commented upon.)

Jurisdiction of the Chancery Division.

Whilst both the ecclesiastical and the common law Courts acquired an early jurisdiction to deal with matters testamentary, they had a very rigid system of procedure, and no efficient means of enforcing a judgment or of compelling a person to comply with the terms of the orders made by them.

For the purpose of administration it was necessary that property should be collected and realised, debts and liabilities ascertained and paid, and residuary estate, whether real or personal, distributed or conveyed to the respective persons beneficially entitled.

The ecclesiastical and common law Courts did not possess the machinery necessary for such administration.

It was not, therefore, to be wondered at that the Court of Chancery, which alone could compel discovery, properly control the taking and examination of accounts, and

readily enforce its decrees, should have become at an early time in English legal history the favourite tribunal for the performance of such functions.

Research into the early decisions in matters of administration and the performance of trusts shows that administration suits by creditors were of common occurrence as far back as the reign of Edward VI.

The Chancery Court has also for a great length of time claimed to exercise a wide jurisdiction *in personam* over accountable parties or persons in a fiduciary position, whenever such parties were within the jurisdiction or within reach of the process of the Court.

Once the process of administration of an intestate succession is complete the administrator holds the surplus in reality as trustee for the persons beneficially entitled to succeed thereto, according to the law of the deceased's domicile.

In the case of a will, the executors are also in reality trustees, whose mission is to carry out the trusts created by the deceased.

No matter, then, where the assets forming the estate of the deceased were situate, provided his representatives (executors or administrators) were in fact within the reach of the Court, the Chancery Courts entertained, and still entertain, suits to compel the performance of the trusts upon which, and subject to which, the property of the deceased had come into their possession or under their control.

In the leading case upon the extent of this equitable jurisdiction *in personam* (*Penn* v. *Lord Baltimore* (1750), 1 Ves. sen. 444), Lord Hardwicke indicates the basis of this jurisdiction.

It does not depend upon an original jurisdiction, but rather on the ground of some equity between the parties.

Thus, it does not necessarily follow that the Chancery Court will make a decree against the representative of a deceased.

It will only do so where by the *lex fori* there is some equity between the parties entitling the claimant to relief. If the *lex fori* refers the matter to some foreign law, the claimant must show that the foreign law admits a similar equitable right.

It is needless to say that such jurisdiction is quite independent of the domicile of the deceased.

If a testator had a foreign domicile and left any assets locally situate here, it would be necessary to constitute an English personal representative, and it would be the duty of such representative to pay the debts, and only after that was done to distribute the surplus.

But payment out of personal assets of the debts in this country is a matter of procedure for which the English representative would be responsible, and which would be governed by the *lex fori*.

It was, indeed, at one time suggested that the Courts of the domicile had "exclusive" jurisdiction in all matters relating to administration to succession, and that the Courts of this country had no *locus standi* to entertain suits relating to the estate of a deceased dying domiciled in a foreign country.

Thus, Lord Westbury, in *Enohin* v. *Wylie* (1862), 10 H. L. C. 1, says:—"I hold it to be put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the Court of the domicile belong the interpretation and

construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator or the parties entitled to the distribution of the estate of an intestate are required to resort."

Lord Cranworth, however, in the same case lays down what we submit is the more correct view. He says:— "Personal property in this country belonging to a foreigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, then administration will be granted here, limited to the personal estate in this country. If he has left a will valid by the law of his domicile and has thereby appointed executors, then probate of that will must be obtained here. There may be cases of a more special nature, but for our present purpose they may be disregarded. In every case the succession to the property will be regulated not according to the law of this country, but to that of the domicile. Where there is such a will, and probate of it has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who, by the law of the domicile, are entitled under the will, and that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the Courts of this country; though in the performance of that duty they will be guided by the law of the domicile. This was the mode in which the law was laid down by Lord Cottenham in this House in the case of *Preston* v. *Lord Melville*, 8 Cl. & F. 1."

Lord Chelmsford in the same case took an equally

decided view, and it does not seem that Lord Westbury's view has ever been followed, whilst on several occasions it has been expressly dissented from.

The matter was really definitely decided by the *Orr-Ewing* decision, where, in the English appeal (1883, A. C.), Lord Selborne says:—"With reference to domicile it is familiar law that the succession to the moveable estate of a deceased person is governed by the *lex domicilii*. But that law does not prescribe the *forum* in which the persons beneficially entitled to the succession may pursue against the trustees in whom the estate is vested their proper remedies. The proposition that the Courts of that country only in which a testator dies domiciled can administer his personal estate, is without support from any authority, except certain *dicta* of Lord Westbury, in *Enohin* v. *Wylie*, with which the other Lords who decided that case did not agree. If it were true, it must extend (as Lord Westbury extended it) to the whole moveable estate of the deceased person, wheresoever situate, on the principle '*mobilia sequuntur personam*.' This was not seriously contended for at your Lordships' bar," and later in the same case:—

"The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the Colonies, in foreign countries." And again:—"A jurisdiction against trustees, which is not excluded *ratione legis rei sitæ* as to land, cannot be excluded as to moveables because the author of the trust may have had a foreign domicile. . . . Accordingly, it

has always been the practice of the English Court of Chancery (as was said by James, L. J., in *Stirling Maxwell* v. *Cartwright,* 11 Ch. D. 523) to administer as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad, by decrees like that now in question."

Lord Blackburn and Lord Watson concurred, and an order for general administration of testator's will and codicils, with the usual accounts and inquiries, was made as to the whole of that estate, both Scottish and English.

In the subsequent appeal from the Scotch Courts to the House of Lords in the same case two years later (1885, A. C. at p. 512), Lord Selborne again lays down the same principles and dissents from Lord Westbury's *dictum* in *Enohin* v. *Wylie,* and it was definitely held by the whole tribunal that the order of the Scotch Courts claiming the exclusive competency of their jurisdiction was not supported by statute or authority. (See also *Re Bonnefoi,* [1912] P. 233, where this was reaffirmed by the Court of Appeal.)

Speaking generally, it may be said that wherever the English Courts have jurisdiction to make a grant of representation to the estate of a deceased person, they have power to determine any matter arising out of the estate. (Dicey, 2nd ed., p. 318.)

Conversely, as a general rule, where there is no power to make a grant there is no power to determine other matters connected with the administration of the estate. (Dicey, 2nd ed., p. 317.)

PART I.

CHAPTER VII.

ESTATES OF DECEASED BRITISH SUBJECTS LEAVING PROPERTY HERE AND ABROAD.

The principles of private international law relating to matters of administration and succession as accepted in this country having been laid down, the precise application of those principles in English law to such administration and succession will form the subject of this chapter.

In many countries the State makes a will for the citizen in the sense that definite provision is made by law for certain classes of relatives and dependants which cannot be affected by any testamentary disposition made or attempted to be made by the testator.

In this country, however, no such rule of law exists, and the capacity to dispose of one's property extends to the entirety of the assets.

The division of the subject-matter into testate and intestate succession may be preserved as different principles of law apply.

Testate Succession.

When Probate will be granted.

A deceased British subject having left assets in this country and abroad, and having by his will or wills disposed of the whole or part of his property in a particular

manner, by what tests is it to be determined whether or no the English Courts will grant probate of such will or wills ?

It has been shown that if a will exists, no executor appointed by that will can (except in certain cases) effectually deal with deceased's estate in this country until the English Courts have formally proved the will and granted probate of it.

In a purely inland case, if a will apparently valid on the face of it deals with property in this country, and appoints an executor, such executor will be able to obtain probate in common form on complying with the ordinary requirements of the Probate Registry, and taking such steps as the practice of the registry demands. The question arises to what extent those domestic requirements are modified when the estate in question contains some foreign element. British subjects frequently have substantial domestic and pecuniary interests in foreign countries, and it is such cases as these that we wish particularly to consider.

We have seen that the process of obtaining probate of a will in this country is in reality an application to the Courts by the executor for the determination and verification of his title to deal with the deceased's estate. This being so, it follows that the English Courts will not grant such probate until their own requirements are complied with. The essential facts which an executor must prove before he can successfully apply to the English Probate Court for probate of the will of the deceased are as follows:—

1. That the deceased left a will or testamentary document or documents.
2. That the will is valid as to form.
3. That the testator had the capacity to make the will,

and that the will was effective at the date of death.

4. That the will, expressly or impliedly, contains an appointment of an executor or executors who, at the time when probate is applied for, are capable of acting and willing to act.
5. That there is some property belonging to the deceased situate, either in fact or by presumption of law, within the jurisdiction of the Court.
6. That the party applying for probate has duly proved his title, and has adduced the evidence and complied with the rules of the *lex fori* (*i.e.*, the English Courts), and has paid the necessary death duties upon the estate.

As a general rule, it may be said that all the above requirements must be fulfilled before probate will be granted, and that the absence of any one of them will effectually prevent the executor obtaining probate of the will. (The exceptions to such rule are noted in this chapter.) It may well be, however, that although the Court would not in some circumstances grant probate, yet a grant of letters of administration with the will annexed might be made in the requisite form to the person entitled.

Dealing first with the question of probate, let us examine these requirements in detail.

1. *The Deceased must have left a Will or Testamentary Document or Documents.*

This is not the place for the detailed examination of the English principles relating to wills, and the subject is only dealt with in so far as the presence of a foreign element allows departures from the strict English municipal testamentary law.

It has been said that there is nothing which requires so little solemnity as the making of a will by English law. Lord Hardwicke, in the case of *Ross* v. *Ewer*, 3 Atk. 163, says:—"There is nothing that requires so little solemnity as the making of a will of personal estate according to the ecclesiastical laws of this realm—for there is scarcely any paper writing which they will not admit as such."

In order to constitute a will, or to entitle a document to be considered as a testamentary writing, the document must clearly show that the maker thereof, or the signatory of the writing, intended the same to operate on his death.

The actual appearance or nature of the document is wholly immaterial, provided such intention exists, and it is properly executed in accordance with the law governing the form of such documents.

Thus, these and the preceding requirements being complied with, the following documents have been admitted to probate here as wills:—A letter, a deed, a deed poll, a statutory declaration, signed memoranda, and other writings in an unusual form.

If, however, the document is, from its nature, irrevocable, the English Courts will not treat it as a will, it being a fundamental rule of English law that a will is revocable at any time.

There are also cases in which by reference to the *lex domicilii* the document may be admitted to probate here, although such document may not comply with, or is in fact inconsistent with the above rules of English law and procedure.

2. *The Will must be valid as to Form.*

Although private international law decided that the capacity of an individual was to be governed by his per-

sonal law, meaning thereby either the law of his domicile ascertained at the date of his death or his national law, it has from the first moment when this branch of law came to be regarded as a science, and to be developed as such, paid considerable respect to the law of the place where a given transaction was carried into effect.

Thus, at an early stage of private international law, the law of the place where a contract was made, or a document drawn up, was considered the proper test of the external forms of such contract or document (*a*).

The rule was expressed in the Latin phrase "*locus regit actum*."

The formal validity of a document depended on the place of execution, the material validity and the effect of its provisions were regulated by the personal law of the contracting parties or that of the signatory of the document.

In many Continental countries the rule was extended to all classes of legal documents, including wills and testamentary dispositions.

In England, however, it was otherwise, and although the principle of "*locus regit actum*" held an important place in the English rules of private international law with regard to the execution and external formalities of contracts and certain other documents of a quasi-contractual nature, it never extended to wills and documents of a testamentary nature until, by Lord Kingsdown's Act, 1861, such rule was expressly made to apply to wills of British subjects dealing with personal estate.

According to English ideas a will is essentially different from a contract. The English law knows nothing of the

(*a*) See judgment of Lord Mansfield in *Robinson* v. *Bland*, 1 W. Bl. 234; 2 Burr. 1079.

ancient contractual will, the "*testamentum per æs et libram*" of early Roman law.

In the case of *Curling* v. *Thornton* (*b*) (1823), 2 Add. 6, Sir John Nicholl did, it is true, expressly decide upon the validity of a will by applying the principles of law governing the formal validity of interpretation of contracts. The *rationes decidendi* of this case, and of a subsequent one by the same judge to the same effect, were, however, expressly disapproved of and rejected by the Appeal Court in *Stanley* v. *Bernes* (*c*) (1831), 3 Hagg. Eccl. 447. In that case a testator domiciled in Portugal made a will and two codicils valid by Portuguese law, and two codicils made by him in England in the English form.

Sir John Nicholl, applying the principles upon which he had based his decision in *Curling* v. *Thornton,* granted probate of the will and all four codicils.

The Court of Delegates, however, on appeal limited the grant to the will and the two codicils valid according to the law of Portugal, being the law of the domicile.

In English law the principles governing the formal validity of a will still vary according to the nature of the property to be disposed of.

In general the formal validity of the will, so far as it relates to immoveables, is governed by the *lex situs* (*d*), and, so far as it relates to moveables, by *lex domicilii* (*e*), at the time of making the will or at date of death. It must, however, be remembered that in order to determine the validity of a will regard will be had to the law of one

(*b*) See Appendix, where this case is further discussed.

(*c*) See Appendix.

(*d*) See Foote, Private International Jurisprudence, p. 216, and cases there cited.

(*e*) See Appendix, where the cases are set out.

country only at a time. (See *Pechell* v. *Hilderley* (1869), L. R. 1 P. & D. 673.)

Dealing first with Immoveables.

We have already discussed the distinction in private international law as received in this country between immoveable and moveable property.

This distinction has an important bearing on the form of wills and testamentary documents.

A will dealing with immoveables must, as a general rule, comply with the provisions of the *lex situs*, both as to form and effect; and such rule is not affected by any provisions of the law of domicile of the deceased.

If a testator, a British subject, possesses immoveable property out of England, then (in general) the formalities required by the law of the country where the property is situated must be complied with in order to pass by will the beneficial interest therein.

Seeing that whether property is immoveable or not depends on the *lex situs*, the importance of this rule to British subjects who invest their funds in land abroad is obvious.

In such a case it will usually be wisest for the owner of such property to make separate wills, the one dealing only with the land abroad, and made in accordance with the *lex situs* of the foreign immoveables; the other dealing with the remainder of his property.

And generally, where a testator, a British subject, possesses immoveable property in various countries, and personal property as well, he should make as many wills as there are countries in which immoveable property is situate, each in the form required by the local law, and then a general will of his personalty.

To dispose of lands abroad, therefore, the will must

comply with the *lex situs*—it may be, however (and in some countries it is), that the *lex situs* allows some other form of will than the purely local forms.

By Italian law immoveable property and moveable property have been so far assimilated that a will dealing with immoveables is valid as to form if it complies with the personal law of the deceased, regardless of the *situs*.

With regard to immoveables in the United Kingdom, however, the rule is absolute. Whatever the domicile of the testator, his will must be made in accordance with the English Wills Act, in order to pass immoveables within the jurisdiction of the English Courts. (See Westlake, p. 226.) There is, however, an important exception in the case of leasehold interests in land. In such a case, although by the rule of international law leaseholds are immoveables, by a statutory enactment—Lord Kingsdown's Act, 1861—a British subject can dispose of the beneficial interest in such properties without of necessity complying with the formalities of the *lex situs*.

And so in *In re Watson* (1887), 35 W. R. 711, it was held that an Englishman domiciled in Scotland could effectively dispose of English leasehold properties by a will executed according to the law of Scotland.

And in *In re De Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. D. 584, it was held that the holograph will of an Italian subject, who had become a naturalised Englishman, and whose will was formally valid according to Italian law, the *lex domicilii*, was valid according to Lord Kingsdown's Act, and operated to dispose of the leasehold property in England. Buckley, J., thus decided on the ground that Lord Kingsdown's Act extended to all personal estate, and therefore included leaseholds in England.

The exception of leaseholds is, however, more apparent than real, as the legality of the will in such cases depends

upon the wording of Lord Kingsdown's Act, which extends to all personal estate, and in which the expression "personal estate" has its full English meaning, and is therefore more extensive than the class of "moveables."

The division of property in English law into realty and personalty is an arbitrary division arising out of historical development, and does not correspond with the private international law division into immoveables and moveables.

Leasehold interests being personal property in English law, thus come expressly within the terms of the Act.

Or, again, it may be said that Lord Kingsdown's Act is really part and parcel of the *lex situs*.

If this be the correct view, the case of leaseholds forms no exception at all, as the English leaseholds are in such cases governed by a provision of the *lex situs*.

And if this view is correct, it is none the less so because a particular provision of the *lex situs* refers the matter to some other system of law, such as the law of the domicile. That is to say, the *lex situs* is not necessarily the territorial law itself, but means any law which the territorial law would consider applicable.

It must, of course, be remembered that the sections of Lord Kingsdown's Act referred to (*i.e.*, sects. 1 and 2) apply only to British subjects, and consequently a foreigner desiring to dispose of English leaseholds by will must still comply with the strict *lex situs*, and make his will in the form required by the Wills Act, 1837. (*Pepin* v. *Bruyere*, [1900] 2 Ch. 504; [1902] 1 Ch. 24.)

In that case a Frenchman domiciled in France made a will valid according to the laws of France (that is, valid by the law of his domicile), and it was held by the English Court of Appeal, affirming Kekewich, J., that the will was inoperative to pass leasehold property situated in

England, such property being immoveable, and therefore governed by the *lex situs* and not the *lex domicilii*.

In order to avoid the difficulty thus caused, it is a common practice for foreigners owning immoveable property here, whether real or personal, to make a separate will in accordance with the Wills Act, 1837, limited to such English immoveable property, and a general will dealing with the remainder of their assets.

It is submitted that a British subject, in addition to being able to dispose of English leaseholds by a will valid under Lord Kingsdown's Act, can still also do so by a will made in accordance with the Wills Act, 1837.

For example, suppose a natural-born British subject, whose domicile of origin is Trinidad, makes a will while on holiday in Switzerland, at a time when he is domiciled in Germany, it is submitted that he could dispose of leasehold properties situate in England by any will valid as to form according to any one of the following laws:—

Trinidad.—The law of domicile of origin.

Switzerland.—The *lex loci*.

Germany.—The law of the domicile.

England.—The *lex situs* contained in the Wills Act, 1837.

In the first three cases the will would depend for its validity upon the terms of Lord Kingsdown's Act (*f*), and in the last case the will would be valid by the broad principle of English private international law that dispositions of immoveables are governed by the *lex situs*.

Formal validity of Wills of Moveables.

In England the maxim "*mobilia sequuntur personam*" is interpreted to mean that the disposition of and succes-

(*f*) As construed in the case of *Re Grassi*, cited above.

sion to the moveable property of a deceased person depends upon the law of the domicile at the date of death (*g*). (See *Bremer* v. *Freeman, supra.*)

This is the general rule, but British subjects have more extended privileges by reason of the Act already referred to, *i.e.*, Lord Kingsdown's Act, 1861.

The rule that the law of the domicile governed succession on intestacy can be traced back at least as far as 1744 (see *Pipon* v. *Pipon*, and cases given in the Appendix), but it was not until the case of *Somerville* v. *Somerville* (1801) that the question of the application of the *lex domicilii* in cases of testate succession definitely arose (*h*).

In connection with testate succession the form of the will had then to be considered. We have seen that the principle of *locus regit actum* was at one time applied, but that that view was rejected in *Stanley* v. *Bernes* (1831).

So far as wills of moveable property were concerned, the rule of *locus regit actum* had no place in English law from that time forward until 1861, when Lord Kingsdown's Act introduced the rule by statute.

During the period of 1831 to 1861 the Courts regularly refused probate of the wills of deceased British subjects dealing with moveables wherever the form was bad owing to a change of domicile between the time of making the will and the date of death, or where for any other reason the will was not in the form required by the last domicile of the deceased.

The new rules introduced by Lord Kingsdown's Act extended the powers of British subjects with regard to the form of wills, but did not in any way lessen the earlier rule

(*g*) For a discussion of the earlier cases establishing this proposition, see Appendix.

(*h*) See, however, *Kilpatrick* v. *Kilpatrick*, cited in the Appendix, and note the arguments used in *Hog* v. *Lashley* (1792).

that a will valid in form according to the law of the last domicile of the deceased is valid and effectual here so far as moveables are concerned. The statute was an enabling Act, and extended, but did not abrogate, the previous rules. Since Lord Kingsdown's Act, therefore, the position is this: In order to be valid as to form the will of a British subject dealing with moveables must be either—

(a) Valid according to the law of his domicile at the date of death—meaning thereby valid according to any law the *lex domicilii* would apply in the circumstances (see p. 91, *infra*); or

(b) Valid according to Lord Kingsdown's Act,

and subject to those cases in which Lord Kingsdown's Act applies, no will of moveables which is not formally valid according to the law of the domicile at the date of death, is valid in England.

And firstly—Validity by the law of the domicile at date of death.

If a will is formally valid by the law of the domicile at the date of death, it will be considered valid as to form by the English Probate Court (*Bremer* v. *Freeman*), even though, according to English notions, the document is not in the form of a will at all (*Doglioni* v. *Crispin* (1863), 3 S. & T. 96 (see Chapter XVI. for full report of this case)); or where the instrument would be incapable of effect had the domicile been English. (See *In bonis Maraver*, 1 Hagg. 498; and Chapter XVI., *post*.)

Where the validity of the will has been adjudicated upon by the Courts of the domicile, the English Court will follow the decision of the Court of the domicile, and make a similar decree. (*Miller* v. *James*, L. R. 3 P. & D. 4; *Re Trufort* (1887), 36 Ch. D. 600; and see Jarman on Wills, 6th ed., Vol. 1, p. 7, n.; see also the case of *In the goods of De Vigny*, 13 W. R. 616, 640.)

If the matter has not arisen in the Courts of the domicile, the English Court will endeavour to ascertain the law of the domicile and itself apply it to the issues before the Court (*i*).

Again, where there is a defect in the form of the will according to the test of the law of domicile, the English Court will apply the law of the domicile, and if satisfied that the defect is one which would have been remedied by the Courts of the domicile, will itself allow the will to be deemed formally valid in England for all purposes. This is merely an instance of the general rule that the English judge will place himself in the same surroundings as the foreign judge, and will endeavour to make the same decree that the foreign Court would make.

It seems that the English Court will grant equitable relief whenever, in the opinion of the Court, such relief should be granted, without too closely scrutinizing the actions of the Court of the domicile in similar cases.

Thus, recently a postcard was admitted to probate in England as the will of a deceased in a case where a domiciled Frenchwoman had in accordance with French law made a holograph will on the back of a postcard, although the instrument was wrongly dated. By French law the date of a holograph will is a material consideration, and any error or omission is usually fatal. The English Court held, however, that the wrong date was filled in by inadvertence, and that the testator's intentions having been clearly shown, the circumstances were such as to justify the Court in remedying the defect. (*Lyne* v. *De la Ferté* (1910), 102 L. T. 143.)

Where the country of the domicile has no general form

(*i*) Proof of foreign law, being a question of procedure, is governed by the *lex fori*. For the English practice, see Westlake, 424—428.

of testament, a will formally valid according to general principles will be treated here as valid in form for purposes of admission to probate. (*Stokes* v. *Stokes*, 67 L. J. P. 55.)

Mr. Bentwich, in his book on Domicile and Succession, at pp. 116, 117, suggests that the same rule applies to the case of residents belonging to a Christian community in an Oriental or non-Christian country, and although the matter does not appear to have been expressly decided, it would seem most in accordance with logic that the rule should be so.

Where the will is not in accordance with the forms required by the law of the domicile (meaning thereby the territorial law of the country of the domicile), it will be held to be valid as to form if the Courts of the country of the domicile would give effect to the will. (See *Re Lacroix* (1877), 2 P. D. 94 (*k*).)

Thus, a testatrix domiciled in France made a will in English form. The French law, that is, the French Civil Code, required, under similar circumstances, a will executed in a different form—but evidence was given that in the particular circumstances the French Courts would give effect to the will. It was held that the will was valid. (*Re Brown-Séquard*, 70 L. T. N. S. 811; see also *Re Bowes, Bates* v. *Wengel, supra.*)

Changes in the law of the domicile between death of the testator and distribution of the estate do not affect the validity of the will.

The will must be valid according to the law of the domicile at death—no subsequent change in the law, even though specifically declared to be retrospective, is allowed

(*k*) Also see *Collier* v. *Rivaz; De Bonneval* v. *De Bonneval; Anderson* v. *Laneuville; Re Bowes, Bates* v. *Wengel;* and cases cited.

to affect the matter. (*Lynch* v. *Provisional Government of Paraguay* (1871), L. R. 2 P. & M. 241; and later *Re Aganoor's Trusts* (1895), 64 L. J. Ch. 521 (Romer, J.).)

Secondly—Validity under Lord Kingsdown's Act.

The Wills Act, 1861 (24 & 25 Vict. c. 114), known as Lord Kingsdown's Act, enacts as follows:—

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 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.

2. Every will or other testamentary instrument made in the United Kingdom by any British subject (whatever 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.

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 so far as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

From sect. 1 it will be seen that a British subject can make a will of "personal estate" out of the United Kingdom, valid as to form if the same is valid according—

(1) Either to the law of the place where it is made (*locus regit actum*); or
(2) To the law of the domicile at the time the will is made; or
(3) To the law of that part of his Majesty's dominions where the testator had his domicile of origin;

and that within the United Kingdom a will of personal estate made by a British subject is valid as to form by sect. 2 of the Act if executed in accordance with the law of that part of the United Kingdom where it is made.

These two sections apply only to British subjects.

They apply, however, to both natural-born British subjects and those who become so by naturalisation. (*In the goods of Gally* (1876), 1 P. 438; *In the goods of Lacroix*, L. R. 2 P. 94.)

In such case the testator must be a British subject at the time of making the will. Acquisition of British nationality at a period of time subsequent to the execution of the will is not sufficient to render a will effective which would otherwise be invalid, and conversely the fact that the testator was at one period a British subject is immaterial if he has altered his nationality at the date of making

his will. (*In the goods of Buseck* (1881), 6 P. D. 211; and *Bloxam* v. *Favre* (1883), 8 P. D. 101; and on appeal (1884), 9 P. D. 130.)

The words of the statute are, "will or other testamentary instrument *made* by a British subject."

The rule also is limited to personal estate. This, however, extends not only to pure personalty, but to all property which is by English law treated as personalty, including chattels real, viz., leaseholds.

The statute takes no notice of the more usual division of property into moveable and immoveable, and personal estate is given, therefore, its fullest interpretation, and includes other immoveables treated as personal property by English law.

Professor Dicey points out in his Conflict of Laws, 2nd ed., at p. 675, that the law of the domicile of origin is only applicable in those cases where the domicile of origin is in a country forming part of the British Empire.

If the domicile of origin of a British subject were in any other country than a part of the British Empire, the statute would not apply in this respect. This is of special importance in the case of naturalised British subjects, who will, therefore, usually be limited to two alternatives, either the law of the domicile at the time the will is made or the law of the place where the will is made.

The words "law of the place" in sect. 1 invariably mean any law that the Court of the place would themselves apply to the particular case, and are not restricted to the municipal or territorial laws of the country referred to. (*In the goods of Lacroix* (1877), 2 P. D. 94.)

Sect. 3 involves a great innovation. Change of domicile between the making of the will and the death of the testator had been the cause of defeating many a testator's wishes prior to 1861.

It has been held, in spite of the preamble to the Act and the general tenor of its provisions, that this section is of universal application, and extends to British subjects and foreigners alike. (See *Re Groos, infra* (*l*).)

The section especially refers to invalidity of wills. It lays down a negative rule, no will shall be rendered invalid by a change of domicile.

Sect. 4 preserves all wills valid without the Act, except so far as the ordinary principles of revocation apply.

Sect. 5 shows that although the Act only applies to the wills of persons dying since the passing of the Act (6th August, 1861), yet as to such persons its provisions are retrospective.

So far as personal property is concerned the Act, therefore, gives a very extensive freedom to British subjects in matters of formal requirement in cases of wills and testamentary instruments, and in practice nearly all wills made out of the United Kingdom by British subjects, whose deaths have taken place since the date of the passing of the measure, depend for their validity upon the enabling provisions of the Act; whilst the provisions of the all-important 3rd section (by which change of domicile does not affect validity of wills) are greatly relied upon by those responsible for preparing wills of British subjects and foreigners alike.

There is on the English Statute Book a further enabling Act (24 & 25 Vict. c. 121, 6th August, 1861), entitled An Act to amend the law in relation to the wills and domicile of British subjects dying whilst resident abroad, and of foreign subjects dying whilst resident within her Majesty's dominions.

(*l*) The fourth edition of Foote's Private International Jurisprudence was completed in 1903, and published in 1904, prior to the decision in this case. The statements on pp. 267—269 must therefore be revised in this respect.

Under this Act certain rules were laid down governing wills and domicile of British and foreign subjects, to be carried into effect by means of Conventions with foreign countries.

No Convention has, however, been made under this Act, and it remains practically a dead letter (*m*).

With reference to change of domicile a further question has arisen: Can change of domicile *validate* a will in so far as the formalities of execution are required? The answer would appear to be in the affirmative.

If the law of the domicile at the date of death treated the will as valid, it is apparently immaterial that at the time of making it the document was bad in form and of no effect. (Dicey, 2nd ed., notes to Rule 187, at pp. 682 *et seq.*)

We deal later with the question of construction, and refer here solely to the "form" of the will.

3. *The Will must be one which the Testator had the requisite capacity to make, the provisions of which are not invalid, and which is effective at the date of death.*

And first of capacity.—Testamentary capacity in English law is a branch of status, and all questions of status are governed by the law of the domicile, with the exception of those relating to immoveables in England. However, it must at once be pointed out the question of capacity to make a will does not of necessity arise in every case.

If a will is valid as to form, bears no apparent defect, and the remaining requirements of the Probate Court are complied with, probate in common form would, as a rule, be granted, without inquiry as to the capacity of the

(*m*) See, however, Foote, pp. 65, 66 (n.).

testator (but in all cases where Lord Kingsdown's Act is called in aid an affidavit of British status has to be filed to show that the Act does in fact apply).

Where, however, the question is raised, or where objection is taken, the testamentary capacity of the testator must be proved.

In English law capacity to make a will must exist at the time the will is made, and is probably governed by the law of the testator's domicile at that time. (See Dicey, notes to Rule 184; Story, sect. 465.)

Thus, a will made by a person under age, according to the law of his domicile, would be invalid, although full age might have been attained before the date of death.

The making of a will is regarded as an act of great importance, and it is in accordance with general principles of law that a will to be regarded as valid must be the voluntary expression of a testator's desires, arrived at with due understanding and of his own volition.

A person who is incapable of understanding the nature and effect of a testament is incapable of making one.

A will made through fear, under duress, by fraud or otherwise against the desire of the person making it, would not be given effect by the English Courts.

This being so, several classes of persons are placed by law under a testamentary incapacity varying according to their powers.

Thus, different provisions apply in the case of those who are blind or deaf, or are otherwise deprived of the full use of their faculties.

Testamentary capacity being governed by the law of the domicile, generally at the time of the will being made (*n*), it is important to consider the various classes of

(*n*) But see Westlake, p. 125.

persons who are incapacitated from the full powers of testacy.

In English law, persons under the age of twenty-one years are, as a general rule, unable to make wills, as are also persons of unsound mind.

Similar restrictions prevail in most civilised countries, although the details vary, and in some cases the incapacity is absolute, whilst in others it is limited, and the age limit as to minority varies very greatly in the various countries possessing a defined system of law.

In Continental countries there are also a number of incapacities of a more or less penal nature unknown to English law, such as the limited status of the "prodigal" in French law, and the spendthrift of those other systems which have their origin in the Roman law. (As to how far these will be recognised in the English Courts, see p. 104, *infra*.)

With regard to capacity, as in other branches of private international law, different rules apply according to the nature of the assets to which reference is made. In the case of immoveables by English law (in the absence of any trust or personal contract) all questions of testamentary capacity are referred to the *lex situs* in common with questions of form and material validity. (See *Curtis* v. *Hutton; Nelson* v. *Bridport; Sell* v. *Miller; Harrison* v. *Harrison;* cited in Westlake, p. 225, and Foote, p. 216, and cases there cited.)

Capacity to dispose by will of English freeholds is governed solely by the *lex situs*, regardless of any powers, privileges or limitations granted or imposed by the law of the domicile of the testator. (*In re Hernando*, 27 Ch. D. 284.)

With regard to moveables, testamentary capacity is in general in English law to be determined according to the

law of the domicile of the deceased at the time the will is made. (Story, Conflict of Laws, sect. 465; Dicey, 2nd ed., Rule 187, and notes, at p. 683; see, however, Westlake, 5th ed., p. 125, and Bentwich, 101.)

As a general rule, however, where at the date of his death a testator is domiciled in a foreign country, he can take advantage of any powers conferred upon him by the laws of that country.

Thus, if the foreign law allows an infant (under the age of twenty-one) to make a valid will, the will of an infant British subject domiciled in that country, made in accordance with the local law, would be valid even though, according to British principles, the testator had no testamentary capacity at all. (*Re Hellmann's Will*, L. R. 2 Eq. 363.)

The rule applies not only to enabling provisions of the law of the domicile, but to restrictive conditions also, unless indeed they are restrictions which are referred to in this country as of a penal nature—in which case the condition would be disregarded by the Courts of this country. (See *Re Selot's Trusts, infra.*)

Once it is shown that a testator had power to make a testament, a further question of capacity may arise: Was the testator prevented from disposing of his estate, and if so, to what extent; and what law is to determine the matter ?

For instance, the capacity of a testator to dispose of his estate may be limited in the following ways:—

(a) There may be persons he cannot disinherit.

(b) There may be persons he cannot benefit to more than a certain extent.

(c) There may be restrictions as to imposing conditions upon bequests.

(d) The dispositions may themselves be invalid unless within prescribed limits.

All of which, however, are in some measure governed by the law of the domicile ascertained at the date of death.

Capacity as regards (a) may be limited in cases where a marriage settlement exists, or in which the law of the matrimonial domicile gives the parties to a marriage rights and interests in the property of each other, such as in the case of the French *communio bonorum*.

In England it is a common practice prior to the solemnisation of a marriage for a settlement to be entered into, whereby certain property belonging, it may be, to either or both of the spouses is conveyed to trustees upon certain trusts declared by the indenture of settlement.

In many other countries the positive law of the country makes provision for a similar arrangement, either under the Continental system of community of goods, or by regulating the rights of the parties to a marriage in some other similar way.

Where, therefore, a marriage contract exists, or where the law of the country of the matrimonial domicile prescribes the rights of the parties, the testamentary capacity of those parties may be affected, in so far as the property so regulated is concerned.

It has recently been held by the House of Lords that the rights given on marriage by the law of the matrimonial domicile are not affected by a subsequent change of domicile of the parties to the marriage. (*De Nichols* v. *Curlier*, [1900] A. C. 21.)

Where, therefore, upon a marriage, a marriage contract or settlement is made, or where a rule of the *lex loci* exists, which regulates the property of the spouses, such contract, settlement, or rule of law shall have full effect given to its provisions wherever the parties may afterwards be

domiciled. It may, therefore, frequently happen that the testamentary capacity of either or both of the spouses is very seriously limited or curtailed by a previous contract of marriage or other equivalent provision. Where the law of the matrimonial domicile does not give either party any rights in the property of the other during life, the rights of the parties on death can be changed by a subsequent change of the husband's domicile, since in that case the domicile at the death of either spouse would govern the rights of the other in all cases of intestacy. (See *Lashley* v. *Hog* (1804), 4 Paton, 581, discussed and distinguished in *De Nichols* v. *Curlier;* see also on a similar point, *Re Fitzgerald,* [1904] 1 Ch. 573.) See also Westlake, at p. 156:—

"If any dispositions are invalid by the law of the last domicile, whether as being in excess of the disposing power allowed by it, or for any other reason, they will fail to effect," and later on the same point, "The right of a widow or child to *legitim* and consequently to defeat any contrary disposition made by the testator depends entirely on the law of the last domicile. (See *Hog* v. *Lashley.*)"

As to (b). By the laws of many Continental countries it is not competent for a testator to give away to strangers in blood more than a certain proportion of his estate.

The existence or not of such a restriction will depend upon the testator's domicile at the date of his death.

Thus, in the case of *Re Pryce, Lawford* v. *Pryce,* [1911] 2 Ch. 286 (C. A.), the testatrix was domiciled in Holland at the date of her death, and purported by her will to dispose of all her property in favour of a beneficiary.

By the law of the domicile at the date of death her mother was entitled to a one-tenth share of her estate. It was, therefore, held that under the circumstances she was unable completely to dispose of her property, and that

one-tenth part must be considered as belonging to her mother in spite of the will. (This was a case involving the exercise by will of a general power of appointment, and the question was whether the appointor, by making the funds subject to the power, general assets, could override the provisions of the law of the domicile, and it was held that she could not. The same case is discussed later in connection with the subject of powers of appointment.)

As to (c). It is unnecessary to discuss at length the question of conditions attached by a testator's will to the legacies and bequests given thereby. The general principles of law relating thereto are well known, and such conditions, in so far as they relate to moveable property, are usually valid or invalid according to the law of the domicile of the testator at the date of his death.

However, cases sometimes arise in which the conditions attached to a gift, either by the testator himself or by the law of the domicile of the beneficiary, are repugnant to some established principle of English law.

Where such is the case the English Courts will not assist any party to proceedings pending before them to support or take advantage of such conditions or restrictions.

Indeed, in proceedings in this country, there are authorities for showing that such conditions will be ignored by the English Courts. Thus, in the case of *Worms* v. *De Valdor* (1880), 49 L. J. Ch. 261, a French plaintiff, who had been adjudicated a "prodigal" in France, and who consequently was unable by French law to commence proceedings without the concurrence of his *conseil judiciaire*, was allowed to sue here in his own name and without such concurrence.

This was followed in the case of *Re Selot's Trust*, [1902] 1 Ch. 488, by Lord Justice Farwell (then Mr. Justice

Farwell), who quoted the earlier case (*Worms* v. *De Valdor*) with approval, and on similar grounds to those expressed in that case, allowed a Frenchman, who had been similarly declared a prodigal, to obtain payment out of Court to himself of certain funds in Court here, and this, not only without the concurrence of his *conseil judiciaire,* but in spite of the most active opposition of that official.

These two cases have been adversely criticised by text-book writers (see Westlake, p. 53, and Bentwich, p. 104, although Dicey apparently does not disapprove, nor does Foote, see p. 82).

It would certainly seem that the two cases were concerned with a change of status, which would in the ordinary way have been referred solely to the law of the domicile for its legal effect.

Moreover, it seems a little fantastic to place such classes of personal disqualification as those of the French prodigal on an equal footing with slavery and other penal conditions which would never be tolerated by any modern system of law.

However this may be, there can be no two opinions as to the view taken by the judges of the English Chancery Division on the matter.

The case of *Re Selot's Trust,* although only a decision of a Court of First Instance, was not appealed from, and has remained for over ten years without being overruled, or even being judicially dissented from. The question has been before the Courts recently in the unreported case of *In re Mouchel, Thompson* v. *The Orphelines de Ste. Marie,* Neville, J., December 12th, 1912. In that case the testator, a Frenchman, domiciled in England, had by an English will made in the English language in the English form, and with English executors and trustees, bequeathed a certain share of his residuary personal estate to a charitable institution in France.

By the French Civil Code a charitable institution in France is unable to accept legacies until authorised by the decree of the President of the Republic so to do. This authorisation had never been obtained, and it was contended by counsel for the next of kin of the testator that under those circumstances there was an intestacy as to the share of the residue in question. The matter was argued at length, and the case of *Re Selot's Trust* was quoted with approval by the judge. The point was not, however, expressly decided as to whether that restriction on the acceptance of charitable legacies under English wills was one which the Court would uphold, as the judge decided on the construction of the will, that the gift could be construed to be a gift to an individual on behalf of the charity, and not as a gift to the charity itself. He, therefore, upheld the legacy. In the course of his judgment, Mr. Justice Neville remarked that he was clearly of opinion that as the bequest in his view was a bequest to an individual, he should decree payment without regard to any condition imposed by foreign law of the kind mentioned, but that had he come to the conclusion that the gift was one in favour of a corporation different considerations would have arisen. In that case it might well be that a corporation could only have the powers given to it by the law of the country where it was incorporated. If that law gave no power to accept legacies except under certain conditions, then, unless those conditions were complied with, probably the gift would have failed.

From the remarks of the judge in this case it may therefore be safely stated that the English Courts will entirely disregard any condition or status which is in any degree unknown to, or is of a kind repugnant to, English ideas whenever the matter concerns an individual.

As to corporations, see also Westlake, pp. 388, 389.

As to (d). The limitations in the will must not be

invalid; in other words, the will must not be subject to material invalidity, as determined by the appropriate test.

In the same way as in cases of capacity, common form probate can usually be obtained, if a will is valid as to form, without discussing the material validity of the dispositions contained in it. The validity of these is usually a matter for the Court of construction to decide at a later stage.

The subject must, however, be noticed in passing, as it is possible for cases to arise in which the invalidity would, if brought to the notice of the Probate Court, effectually prevent the will being proved.

As the question of validity usually arises in administration proceedings after probate has been obtained, the question is discussed later in connection with other matters arising upon construction.

The will must be effective at the date of death, that is, the will must remain in force and unrevoked at the time the testator dies.

The general principles of revocation need not be set out here, as to which see the text-books on the law of wills. One particular method of revocation, to which attention has been given by the Courts of this country in such cases as those under discussion in this book, is, however, that of revocation by marriage.

By English law, marriage absolutely revokes the will of a man or woman made prior thereto (except as to certain property which would not under any circumstances pass to his or her representatives in the event of no will being made).

This rule, however, is modified where a conflict of laws arises, and the question of the domicile of the testator or testatrix at the time of marriage has to be considered.

It is submitted that the true rule of English law now

adopted by the English Courts is that the question of the effect of marriage upon the validity of an ante-nuptial will is determined by reference to the law of the domicile of the parties contracting the marriage at the date of the marriage, which means the law of the domicile of the husband at the time the marriage is celebrated.

If the law of the husband's domicile at that time revokes the will on account of the marriage, the will is revoked independently of any subsequent change of domicile, or of the laws of the country where the marriage is celebrated.

And, conversely, if by that law marriage does not operate to revoke the will, then the will is good and remains valid in spite of the parties subsequently becoming domiciled in a country where the rule is otherwise.

Thus, in the case of *In the goods of Reid*, L. R. 1 P. & D. 74, Sir J. P. Wilde admitted to probate the will of a person dying domiciled in England, who whilst domiciled in Scotland had made a will and subsequently married, and then acquired an English domicile. By Scotch law, marriage had no effect on the will. It was therefore held to be valid here.

Inasmuch, however, as Lord Kingsdown's Act (sect. 3) specifically enacts that "no testamentary instrument shall be held to have become invalid, nor shall the construction thereof be altered, by reason of any change of domicile of the person making the same"; it has been contended in some quarters that the view expressed above is inaccurate.

The opponents of the rule stated above suggest that the true rule is this:—That if the will is valid when made, no subsequent change of domicile makes it invalid, so that if by the law of the new domicile marriage revokes the will, and the testator having made a valid will, changes his domicile and then marries, the will would not be rendered invalid owing to sect. 3 of Lord Kingsdown's Act

(although if the law of the matrimonial domicile gives either party rights which cannot be defeated by testation, the will would to that extent be ineffective and invalid, but not revoked). The authorities, apparently, relied upon for this proposition are the cases of *In the goods of Reid,* quoted above, and that of *In the goods of Groos*, [1904] P. 269.

Considering first the case of *In the goods of Reid*, we find that in that case, in his judgment, Sir J. P. Wilde said:—

"It appears that at the time the will was made it was a good will, that the deceased was married on the day after it was made, but it was still a good will notwithstanding the marriage, that he remained domiciled in Scotland for some time, and that up to the time that he abandoned his Scotch domicile the will was good. He afterwards changed his Scotch domicile for an English domicile, but he did nothing after he came to England which had the slightest effect on the validity of the will, either by the law of England or by the law of Scotland. If, therefore, he should be held to have revoked his will by passing from Scotland to England, it would be impossible to say that the will was not revoked 'by reason of a subsequent change of domicile.' The section, therefore, directly applies to the case and the will is valid. If instead of marrying in Scotland, he had married in England after he had obtained an English domicile, a question of some nicety would probably have arisen."

It would appear, therefore, that the learned judge had decided the case on the basis that it was one governed by the 3rd section of Lord Kingsdown's Act.

It is submitted that the judgment is inconsistent on the face of it. It is stated accurately enough that at the time the testator married, his will was valid by Scotch law (the

lex domicilii), and that down to the moment of leaving Scotland his will remained valid.

Now, the only reason alleged for revoking the will was the fact of the testator having married after the will was made. It was, therefore, quite unnecessary for the learned judge to have discussed the effect of the change of domicile —no change of domicile after marriage could have affected the validity of the will, and it was never suggested by any party to the suit that such was the case.

Whilst therefore agreeing that on the facts of that case the will was unquestionably valid at the date of death, it seems to us that there was a confusion of thought in deciding the case by reference to sect. 3 of Lord Kingsdown's Act, which in our opinion has no application to such a case. (See also the case of *In the goods of Van Faber,* 20 T. L. R. 640.)

But however that may be, suppose the facts had been these:—Whilst domiciled in Scotland the testator had made a valid will and subsequently became domiciled in England, and whilst so domiciled married, could it be said that owing to sect. 3 of Lord Kingsdown's Act the will remained invalid?

Could it for one moment be pretended that the old-established rule of English law, whereby marriage revokes a previous will, did not apply owing to the mere accident that there had been a change of domicile since the making of the will, and that the testator was therefore entitled to pray in aid the wording of a statute passed to effect a very different purpose?

It is respectfully submitted that it is perfectly clear that it could not, and that the will would be revoked in such a case. (See *In re Martin, Loustalan* v. *Loustalan,* [1900] P. 211 (C. A.).)

In that case it was held by Rigby and Vaughan

Williams, L. JJ. (Lindley, M. R., dissenting), that as the domicile of the husband, and consequently of the wife (the testatrix), at the time of marriage was English, the question of the validity of the ante-nuptial will was governed by English law and not by French law (the law of the domicile at the time the will was drawn up), and that being so, that the will was revoked by the marriage. The case is a very valuable one in private international law, and contains many judicial pronouncements of an important nature. The case turned purely on the facts as to domicile, the Master of the Rolls dissenting from the other members of the Court solely upon this point.

So far as the effect of marriage upon a will is concerned all three judges of the Court of Appeal are unanimous. Thus Lord Lindley in his judgment says:—

"If the domicile of the deceased 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 intention of the parties may be (1 Jarman on Wills, c. 7); but if the 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 so soon as she married him. The effect of the marriage must therefore depend on the English view of his domicile."

And later (at p. 233 of the report) he says:—

"It is not necessary to cite authorities to show that it is now settled that according to international law as understood in England the effect of the marriage on the moveable property of spouses depends (in the absence of express contract) on the domicile of the husband in the English sense at the time of the marriage. The authorities will be found collected in Foote's International Law, 2nd ed., pp. 315—321, and Dicey's Conflict of Laws, p. 648.

This being clear, if the domicile was French at the date of marriage the will was not revoked."

And Vaughan Williams, L. J., says (at p. 240):—

"I think that the rule of 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 law," and further on in the same case: "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."

In the later case of *In the goods of Groos*, [1904] P. 269, Sir Francis Jeune (President) appears to again confuse the point at issue.

In that case the testatrix whilst domiciled in Holland made a will valid according to Dutch law, and subsequently whilst still so domiciled in Holland was married there with all the formalities required by Dutch law. She subsequently acquired an English domicile, and died domiciled in England. It was therefore held that the will was not revoked by marriage.

Upon motion being made for probate of the will it was sought to validate the will by reference to sect. 3 of Lord Kingsdown's Act (and the case is reported on the proposition that notwithstanding the preamble and title of the Act, and the apparent scope of its provisions and limitation to British subjects, this particular section is of general application, and applies to British subjects and foreigners alike).

In his judgment Gorell Barnes, J., says (at p. 272):—

"The point for my determination is whether the change of domicile renders the will bad on account of the marriage which took place after the execution of the will."

It is submitted with great respect that a change of domicile after the date of marriage could not possibly have affected the validity of the will.

Neither *In the goods of Reid*, nor the case of *Re Martin, Loustalan* v. *Loustalan*, appear to have been cited, and neither are expressly referred to in the judgment.

In addition, however, to these English authorities there is an important Scotch decision, *Westerman* v. *Schwab* (reported in 1905, 13 Scots Law Times Reports, 594), in which the learned judges discussed the principles at great length, and examined the English authorities bearing upon the matter.

In that case a domiciled Englishwoman made a will properly executed according to English law, and thereafter married a domiciled Scotchman, and subsequently died in Scotland. Held, that the will was not revoked by reason of the marriage. Throughout the case no mention whatever is made of Lord Kingsdown's Act. The learned judges base their decision almost entirely upon the case *Re Martin, Loustalan* v. *Loustalan*. Thus, the Lord President (Lord Dunedin) says (at p. 597):—"Accordingly, I think that, carefully looked at, it will be found that I certainly have the great authority of Lord Lindley for saying that when you come to consider what the effect of the marriage is upon the will, which you have already started with as being properly executed, you must consider that in the light of the law of the domicile of the married persons at the date of the marriage, and the law of the domicile of the married persons is the law of the domicile of the husband. Here the domicile of the husband at the date of the marriage was Scottish, and, therefore, you have to consider the effect of the marriage upon the will in the light of the Scottish law and not of the English. That being so, there is no question whatsoever that by the

Scottish law the will of this spinster, being valid before her marriage, was not revoked, and accordingly I think the will stands."

The leading text-book writers appear to be unanimous in agreeing that the material criterion is the law of the husband's domicile at the time of marriage. (See Westlake, Private International Law, 5th ed., at pp. 123, 126; also Dicey, Conflict of Laws, 2nd ed., at p. 684; Foote, Private International Jurisprudence, 4th ed., at pp. 269, 332; Bentwich, Domicile and Succession, pp. 39, 40, 143.)

Mr. Bentwich, in commenting upon *Re Martin* (*supra*), says, and it is submitted with absolute accuracy:—"In such a case indirectly the change of domicile after the will is executed revokes the will, but it is the special marriage law, and not the testamentary law of succession of the domicile, which produces the effect, so that the exception in the law of succession is only apparent." Upon all the facts, therefore, we submit that the rule is clearly established that the law of the domicile of the testator or of the husband of the testatrix at the time of marriage is the law which alone determines the effect of the marriage upon the ante-nuptial will.

Besides being valid in form, and being one which the testator had power to make, the will must contain certain other provisions before it can be admitted to probate. Thus—

4. *The Testamentary Instrument must, expressly or impliedly, appoint an Executor who, at the time when probate of the Will is sought, must be capable of acting and willing to act.*

Unless there is an express appointment of an executor, or unless the powers and duties of an executor are clearly conferred or imposed upon some person mentioned in the

will, probate of the will cannot be granted (at all events, in common form), although letters of administration with the will annexed might be.

The only person entitled to a grant of probate is the executor, whether he be expressly appointed or merely by implication. (See judgment of Holt, C. J., *Wankford* v. *Wankford* (1703), 1 Salk. 299, at p. 308.)

If the executor named in the will or codicil is not subject to any incapacity preventing him from applying to the Court, and is capable of acting and willing to act, no difficulty will arise, and probate will be granted to him, provided the requirements of the law as to form of the will and capacity of the testator have been duly complied with.

Any person not under an incapacity can be appointed executor.

A corporation may be appointed, in which case an officer called a "syndic" will be appointed on behalf of the corporation to take the grant.

The law of the domicile of the deceased at the date of his death determines the nature and extent of the executor's powers. (See Tristram & Coote, Probate Practice, 14th ed., p. 53, and note.) Thus, for instance, where a British subject dies domiciled in France, the persons appointed executors have by French law only one year and a day from the death of deceased in which to take seisin (*saisine*), and after this period has expired they are no longer empowered to prove the will, and probate would not be granted to them here (although no doubt letters of administration would be granted with the will annexed to some other person entitled in the particular case). (*Laneuville* v. *Anderson;* and also *Re Groos.*)

No person will be allowed to prove the will here who, by the laws of this country, is considered incapable of

acting as executor, even if the law of the domicile contains no such restriction. (See Chapter XVI., *infra*.)

For instance, probate will not be granted here to a minor, no matter what the provisions of the *lex domicilii*. (*In the goods of Meatyard*, [1903] P. 130; *In the goods of Duchess of Orleans*, 1 Sw. & Tr. 453.)

When there is no express appointment of executors, but where it is evident from the terms of the will that the testator intended certain persons named therein to collect the assets, pay the debts, and distribute the surplus, such persons will be considered executors according to the tenor and will be entitled to probate.

In all other cases probate cannot be granted, although letters of administration with the will annexed may be.

The general tendency of the English Court is to grant letters of administration with the will annexed, unless the appointment of executors is very clear. The Court does not favour an executor according to the tenor, especially in foreign cases. (See Chapter XVI. for examples of this, in practice.)

Then, again, there must be assets of the deceased within the United Kingdom.

5. *There must be some Property situate either in fact or by presumption of law within the jurisdiction of the English Court.* (*In the goods of Hannah Tucker* (1864), 3 Sw. & Tr. 585.)

A deceased died in France leaving personal estate there, but none in England, and it was alleged that by the law of France her husband, from whom she had eloped, could not establish his claim to her property there without an English grant. Grant refused.

Sir J. P. Wilde said:—

"It is not one of the functions of this Court to deter-

mine as an abstract question who is the proper representative of a deceased person, and if the Courts of France insist upon such a declaration they are very unreasonable.

"The foundation of the jurisdiction of this Court is that there is personal property of the deceased to be distributed within its jurisdiction.

"In this case the deceased had no property within this country, and the Court has, therefore, no jurisdiction."

(It is just possible, if the Court thought there was a *primâ facie* case made out that the deceased was likely to be interested in property the subject of a suit, that a grant of administration *pendente lite* would be made to enable the question to be tried.) (See this case, and also *In the goods of Charles Turner*, 3 Sw. & Tr. 476; see also following this case, *In the goods of Coode*, L. R. 1 P. & D. 449.)

It is a fundamental principle of English law that a will dealing solely with property abroad is not, by itself, entitled to probate here.

If, therefore, there are no English assets, or if the deceased's will does not operate to dispose of them or affect them in any way, the will cannot be proved here.

It is otherwise if the will, although not itself operating to dispose of the English estate, incorporates another document under which the estate here is affected, and in this case the will can and must be proved here, *e.g.*, a foreign will which in terms refers to and incorporates an English will. (See *In the goods of Harris*, L. R. 2 P. & D. 83; and compare *In the goods of Murray*, [1896] P. 65.)

It is immaterial that a will dealing with property here also deals with property abroad.

It is a common thing for a testator to leave separate wills framed in accordance with the laws of the different States in which his property is situated. In such a case,

only the will dealing with the English property will be entitled to probate here.

Where, however, although there is only one will, different executors are appointed to deal with the property in the different countries, the English Courts will make a grant to the general executors limited to the English property, and a separate grant of the remainder of the estate to the foreign executors. (*Re Von Brentano*, [1911] P. 172.)

The amount or money value of the assets in this country is immaterial, and there is authority for saying that the existence of the smallest assets, even that of wearing apparel, is sufficient assets upon which to invoke the jurisdiction of the English Court.

It would seem, therefore, that whenever a testator dies in this country, there must necessarily be sufficient assets to found a grant upon.

We have discussed in Chapter V. the rules determining the legal situation of assets.

It is immaterial that the assets in this country were brought there subsequent to the date of death (*o*)—the essential period of time being the time when probate is applied for.

There must also be proof of title in accordance with *lex fori*.

6. *The Party applying for Probate must prove his title, and must adduce the evidence required by the* lex fori.

It is a general rule of private international law that questions of evidence are governed by the laws of the tribunal before which the matter comes for decision, and this rule extends to the domain of administration and succession.

Before probate will be granted in England the applicant

(*o*) See note (*o*), opposite.

must strictly comply with the English probate procedure, and must prove his title and adduce the evidence required by the English law (the *lex fori*).

We are not concerned with the details of mere practice rules of the Probate Registry, which are readily accessible to all who require information concerning them. (See Tristram & Coote's Probate Practice, 14th ed.)

One aspect, however, of the practice interests us here. That is, the rules as to the instrument of which probate will be granted (*o*).

In a case of a will made abroad, it may be that the original is deposited in the Courts of the foreign country —if so, what are the requirements of the English Court before probate can be obtained ?

The principle is that the English Courts act on the same document as that before the Court of the domicile, and where by the laws of such country a deposit of the will is required, the English Courts will require a duly authenticated notarial copy of the document to be lodged. (See Laws of England, Vol. Conflict of Laws, for cases where will deposited abroad.)

If that document be in a foreign language a notarial translation into English will also be required.

Whilst if, owing to the will being in a different language to that of the Court of the domicile, a translation was adjudicated upon in the *forum* of the domicile, the English Courts will require a translation of the translation, and will not, as a general rule, refer to the original text. (*In the goods of Dehais*, 48 S. & T. 13; *In the goods of Rule*, 4 P. D. 76.)

Throughout the system of administration where there is a principal or leading grant, and other ancillary admin-

(*o*) See Dicey, Rule 63, at p. 307.

istrations granted in connection with it, every effort is made to ensure uniformity, and this must be given as the reason of so artificial a rule as the above.

Death Duties.

In addition to complying with the rules of practice, so far as evidence is concerned, the requisite death duties must be paid on the deceased's property the subject of the grant.

In another chapter we consider the incidence of estate duty and the other fiscal charges upon the estates of deceased persons, and the manner in which foreign estates are subject to them. Until duty is paid, or the Revenue authorities are satisfied that no duty is payable, the papers to lead to a grant cannot be proceeded with.

Moreover, although formerly affidavits of estate bearing a statement that the deceased died domiciled abroad were freely accepted by the Revenue authorities without challenge, it is now the practice to demand proof of the foreign domicile before the affidavit is assessed to duty (*p*).

If, on the application for probate, it is shown that all the above requirements have been complied with, a grant will be made, and the executor will thus obtain his formal evidence of title to deal with and dispose of the testator's estate in this country in due course of administration.

Testate Succession.

When Letters of Administration (cum testamento annexo) *will be granted with the Will annexed.*

A grant of letters of administration with the will

(*p*) The usual practice is for the authorities to require a short statement of facts to be lodged in the Probate Registry showing date and place of birth and marriage, and any other fact bearing upon question of domicile.

annexed is made where the will of the deceased does not contain the appointment of an executor, or where the executor is unwilling or unable to act, or where the estate having been partially administered the executor dies without appointing an executor.

The same principles apply to granting letters of administration with the will annexed as to probate of wills, and no special feature calls for comment.

Whilst, however, probate can only be granted to the executor, letters of administration with the will annexed are granted to the person having the greatest interest in the estate, usually the residuary legatee, or if none, to the next of kin.

The grant may be to an attorney or to some person for the use and benefit of another, and until such person shall duly apply for a grant or until some contingency happen.

For the form which such grants take, and for the practice connected with such cases, see Tristram & Coote's Probate Practice, and Mortimer on Probate.

CHAPTER VIII.

INTESTATE SUCCESSION.

The jurisdiction of the English Courts to superintend and control the administration and distribution of the estate of a deceased person is not limited to cases in which the deceased has left a valid will disposing of his property.

Where no will exists the Court has jurisdiction to ensure that the moveable estate reaches the hands of those entitled by the law of the domicile, or if the deceased was domiciled in England, of those entitled under the English Statutes of Distribution, whilst as to immoveables the Court has also jurisdiction to protect the interests of the parties entitled thereto under the appropriate laws of inheritance.

As a general rule, whenever a person dies intestate leaving property within the jurisdiction of the English Courts, letters of administration to his estate must be obtained before that property can be distributed (*a*).

An important exception to this rule exists in the case of policies of insurance effected upon the lives of persons dying domiciled elsewhere than in the United Kingdom. (See Revenue Act, 1884, s. 11, as amended by Revenue Act, 1889, s. 19; see also the very recent case of *Haas* v. *Atlas Insurance Company*, "Times" newspaper for February 20th, 1913, where these statutes were judicially construed.)

A deceased person will be deemed to have died intestate according to English law if either he left no will at all,

(*a*) For exceptions, see Tristram & Coote's Probate Practice.

or he left a will which is invalid or of no effect, as for instance:—

(a) A will dealing with English immoveables which is not in accordance with the *lex situs* (unless the will falls within the exception created by Lord Kingsdown's Act in respect of personal estate belonging to British subjects).

(b) A will dealing with foreign immoveables (of such a nature that they do not amount to personal estate in English law, and therefore do not come within the above Act), and which is not in accordance with the forms of the *lex situs*.

(c) A will dealing with moveables which is invalid by the law of the domicile on account of testamentary incapacity, formal invalidity or material invalidity. (Under this heading we must again except such cases as by Lord Kingsdown's Act are not necessarily governed by the law of the domicile (*b*).)

(d) A will dealing solely with property situate abroad.

In any of the above cases the deceased will be deemed to have died intestate, and the rules of succession on intestacy will apply, and letters of administration will be required to obtain possession of the English estate and to deal therewith.

If the deceased died domiciled abroad, and the Courts of the domicile have adjudicated upon the estate, the English Courts will as a rule follow the decision of the Court of the domicile, and make a grant in the appropriate form to the administrator appointed in the country of the

(*b*) Some authorities consider that Lord Kingsdown's Act only regulates questions of form; others, that the Act extends to everything except testamentary capacity. (See Westlake, p. 125.)

domicile. (*Miller* v. *James;* and see Chapter XVI., *infra.*)

Where no such adjudication has been made the English Court will itself appoint an administrator according to English rules.

The appointment of a legal personal representative of a deceased person in this country, whether the deceased was a British subject or a foreigner, and whatever the domicile, is regarded as part and parcel of the administration of an estate, and all the steps and provisions thereof are governed by the *lex fori.*

This being so, the English Court will apply English rules and English principles to determine the choice of a legal personal representative for the deceased's estate.

In cases of intestacy such legal personal representative will in general be the surviving spouse, if any, and failing such survivor the heir-at-law or next of kin. Where the deceased left real estate the heir-at-law and the next of kin have equal rights to administration.

If there is no real estate the next of kin are alone entitled.

The order in which they are entitled is practically the order in which they are entitled to succeed to personal estate under the Statutes of Distribution.

Where the deceased died domiciled abroad administration will usually be granted to the person entrusted by the law of the domicile with the administration.

Where there are no next of kin the personal estate devolves as *bona vacantia* to the Crown, notwithstanding a foreign domicile. (See *Re Barnett's Trusts,* [1902] 1 Ch. 847.) In such a case there is, in truth, no question of succession at all.

On the application to the Court for a grant of letters

of administration the party applying for the grant must show:—

1. That the deceased died intestate.
2. That there exist assets in this country at the time the grant is applied for.
3. That the party applying for the grant of letters of administration is the party entitled to a grant, and
4. That the requirements of the *lex fori* as to death duties, evidence and compliance with the rules of the Probate Registry have been fulfilled.

We will deal with these requirements in the order named.

1. *That the deceased died intestate.*

First where there is no will.—Where there is no testamentary document at all, there can be no question but that the deceased died intestate, and the estate will be divided amongst those entitled—as to immoveables (other than English leaseholds) according to the laws of descent of the *situs*, and as to moveables according to the law of the domicile of the deceased at the date of his death.

Where there is a will or other testamentary document (if it is valid, probate or letters of administration with the will annexed will be granted according to the appropriate test).

If the will is invalid then the estate is intestate. The validity of the will may be questioned on many grounds.

In English law the rules may be shortly stated as follows:—A will dealing with immoveables must comply as to form with the *lex situs*.

Whilst this is so as to English municipal law (except in the case of a British subject dealing by will with personal estate under the express provisions of Lord Kings-

down's Act), it is not so in some Continental countries, where the rule *locus regit actum* is allowed to apply to wills dealing with immoveables, nor is it so where the form of such wills is regulated by the personal law of the testator.

If, therefore, the deceased was domiciled in a country which permits a will to be made in the form other than that of the *situs*, such will would be valid here, as English law would recognise and give effect to the law governing the matter according to the law of the domicile. (*Collier* v. *Rivaz*, 2 Curt. 855.)

A will dealing with moveables is invalid—

(a) Unless it complies with the terms of Lord Kingsdown's Act; or

(b) Unless it is valid by the law of the domicile of the testator at the date of death.

As to (a), we have already discussed the effect of Lord Kingsdown's Act.

As to (b), any will which is not valid according to the law of the last domicile of the testator on account of—

Formal invalidity
Testamentary incapacity } is invalid here,
Material invalidity

each of which points has already been dealt with in Part I., *supra*.

2. *There must be assets here.*

We have already seen that the rule is that jurisdiction of the English Courts is founded on the presence here of assets at the time application is made to the Court of administration. (*In the goods of Tucker.*)

It is possible, however, for a colonial grant to be re-sealed here in some cases when no assets exist in this country. (See *In the goods of Sanders*, [1900] P. 292.)

3. *The applicant must prove his title.*

If the Courts of the domicile have adjudicated upon a will or intestacy, and have appointed a provisional or other administrator, the English Courts will follow the foreign order and make a grant to the same person or his attorney here. (Chapter XVI., *post.*)

If the matter has not been adjudicated upon by the foreign Courts, the Court here, so far as mere administration is concerned, will, as a general rule, apply English law, and determine the choice of an administrator in precisely the same manner as in a purely English case.

In applications for administration, as in probate, the formalities of the Probate Registry must be complied with.

The English law as to evidence and procedure must be fully observed.

4. *The* lex fori *must be complied with.*

The *lex fori* will also determine the nature and extent of the grant of representation to be made.

Thus, in a case where the Courts of the domicile appointed a judicial administrator of a banking business for a period of six months, the English Court, under the wide powers conferred by sect. 73 of the Court of Probate Act, made a general grant of representation to the English estate of the deceased in favour of the attorney of the judicial administrator without any limit of time, as a limited grant would have caused inconvenience; but see *In re Levy,* [1908] P. 108; Chapter XVI. as to the accuracy of this case, and generally as to the limitations to the rule of following the foreign decision. (See also "Law Quarterly Review," p. 38, January, 1913.)

CHAPTER IX.

THE EFFECT OF AN ENGLISH PROBATE OR GRANT OF ADMINISTRATION.

THE executor of a will having obtained a grant of probate to him under the seal of the Court, or, in cases of intestate succession, a grant of administration having been made in favour of the applicant, let us consider the scope and effect of such grants.

An executor derives his powers from the will, an administrator from the grant made to him.

By the issue of these grants the English representative then obtains evidence of his title to deal with the deceased's estates. As a general rule, neither a grant of probate nor of administration has any extra-territorial effect. An English grant has no direct operation outside England.

The effect of an English grant of probate or letters of administration upon foreign assets depends partly upon the nature of the property in question, that is, whether it consists of immoveables, moveables, choses in action, ships or other property of special kinds, and in practice partly upon the domicile of the deceased at the date of his death. Although in so far as proceedings in the Courts of this country are concerned, the domicile is irrelevant.

With regard to Immoveables.

An executor does not, by virtue of English grant of probate alone, acquire any rights or powers over foreign immoveable property.

His grant cannot (except in the case of moveables belonging to a deceased domiciled in England) directly extend to property situate outside the jurisdiction of the Court.

In the same way, a grant of administration gives the administrator no direct rights over foreign immoveables.

What the executor or administrator does, however, acquire by such grants is, in most cases where the English grant is the grant of the domicile, the right to call upon the Courts of the foreign country to follow the English grant, and give him ancillary administration, that is, by order to clothe him with the authority required by the *lex fori* of the foreign Court to enable him to acquire and exercise the rights which the deceased had in his lifetime over the property situated within the jurisdiction of the Courts of such foreign country.

No doubt the English executor is regarded by the Courts of this country as representing the deceased in respect of the whole of his property wherever situate, but the title to foreign land cannot be adjudicated upon by English Courts—and the administration of such foreign lands must depend on the *lex situs,* and succession thereto must be regulated by the same law.

It would, therefore, perhaps be more exact to say that the English grant of probate only gives the executor such rights over immoveables situated out of the United Kingdom as are allowed by the *lex situs*.

Thus, in French cases it is sometimes competent to an English executor, under a will proved in England, to dispose of immoveable property abroad without making the English probate executory in France, and without obtaining any ancillary grant to the deceased's estate. Compliance must, however, be made with the *lex situs* in each case.

As to Moveables.

Where the domicile of the deceased was English at the date of his death, the maxim *mobilia sequuntur personam* is interpreted to mean that all moveables are considered as situate in England, and the English grant of probate or administration extends to all the moveable property of the deceased wherever situate, and gives the executor or administrator rights over all such property.

In such circumstances an executor or administrator can by virtue of the English grant of probate or administration:—

(1) Sue in the Courts of this country in respect of all moveables wherever situate.
(2) He can receive or recover or reduce into possession any moveable property of the deceased.
(3) He can receive moveables situate in a foreign country.
(4) He can retain moveables of the deceased which are brought into this country after the death, unless a good title has previously been acquired thereto in a foreign country.

Whilst, however, the operation of an English grant of probate or administration in cases where the deceased was domiciled in England is to vest all the moveable property of the deceased in the executor or administrator, yet it may frequently happen that the executor or administrator has to obtain the requisite local authority before he can deal with foreign property.

Thus, where a deceased domiciled in England leaves money and securities on deposit in a French bank, although an English grant of probate vests such property in the executor, and gives him the right to recover it, yet he cannot successfully do so until he complies with the

local law and fulfils the proper formalities required by the bank at which the securities are lodged or the account was opened, and which formalities usually consist in the production of a certificate by a qualified English practitioner of the effect in England of the grant, and as to the power of the executor or administrator to receive and collect the moveable assets of the deceased wherever situate.

Where, however, the domicile of the deceased at the date of death was not English, then the English grant of probate or administration only directly extends to moveable property within the jurisdiction of the English Probate Court, and the executors' powers are limited accordingly. At the same time the grant extends to all moveables, wherever situate, for the purpose of enabling the English executor or administrator to sue in respect of them in the Courts of this country.

With reference to Choses in Action.

For the purposes of this chapter, choses in action form part of the moveable estate of the deceased. If, therefore, the domicile of the deceased be English, the grant of probate will extend to and cover all choses in action wherever locally situate. Where the domicile was foreign, the grant would not extend to choses in action situate out of the jurisdiction (except for purposes of suing here).

As to Ships.

If a ship is registered here, the English grant will extend to it, and will enable the executor to deal with the deceased's rights and interests therein.

If the port of registry is out of the jurisdiction, the executor will presumably be unable to exercise rights over

such ships until his title has been approved by the Courts of the country of the port of registry.

If the deceased had a British domicile, the executor would apply for ancillary probate in the foreign country.

Although an English grant of probate or administration does not directly extend to property locally situate outside England, it must be remembered that in so far as Scotland, Ireland and the British colonies are concerned, express legislative provision has been made for extending the operation of English grants to such places, and *vice versâ*. (See Chapter XVI., *post*.)

CHAPTER X.

CONSTRUCTION GENERALLY—FORUM—LAW APPLICABLE—RIGHTS OF BENEFICIARIES UNDER THE WILL.

The construction of the will of moveables of a deceased person is, so far as the "operation" of the will is concerned, in general governed by the laws of the last domicile of the testator; so far as the meaning of the testator's words is concerned, this is usually governed by the law of the domicile of the testator at the time when the will was made.

The rules of construction of a will of immoveables cannot be said to be definitely established.

Professor Westlake says (*a*):—"No general rule can be laid down for the construction of contracts, wills or other dispositions concerning immoveables. A stringent rule of construction will, of course, prevent any instrument from affecting immoveables except in accordance with it, but otherwise a reasonable regard must be had to all the circumstances, including the *locus contractus* or *actus*, and the national character or domicile of the parties, testator or other disponer," and he quotes cases which have been decided on points arising out of such construction.

It would seem, however, that there is a difference governing the rules of construction of a will, and the rules governing the effect given to the construction when properly ascertained. Thus, for instance, a will is couched in the terms exclusively used in a particular country; the con-

(*a*) Private International Law, 5th ed., sect. 170.

struction may be, and probably is, governed by the law of the domicile of the testator, and on applying the rules prescribed by that law a particular meaning is attached to the words used by the testator, but it is upon the *lex situs* that the effect to be given to that interpretation will depend.

In Burge's Colonial Law a case is given where a particular disposition made by a testator of his immoveables would operate to create a grant of a fee simple as to part of his estate, an estate tail as to a further part, and an estate for life of a third portion. Such a result is obviously inconvenient.

It would seem that a uniform rule of interpretation of the testator's dispositions should be ascertained by reference to a single law—which law would be either the law of the domicile at the date of death, or such other system of law (if any) as the testator had indicated should apply to his will.

This principle has recently been applied to a contract dealing with immoveables in the case of *British South Africa Company* v. *De Beers Consolidated Mines, Limited,* [1910] 2 Ch. 502 (C. A.), and also on another point, [1912] A. C. 52.

That decision is an authority for saying that a contract relating to immoveables is governed by the "proper law of the contract," and that is the *lex loci contractus* in the absence of express provision, and that the *lex situs* does not exclusively apply.

There seems no good reason why such a canon of construction should not apply equally in cases of testamentary instruments. The advantage to be derived from such rules of construction applying both to wills of immoveables and moveables is well pointed out by Mr. Bentwich in his book on Domicile and Succession. Moreover, the words of Lord

Lyndhurst in the Scotch appeal case of *Trotter* v. *Trotter* apply with great force to such a position.

In that case Lord Lyndhurst said:—"A will must be construed according to the law of the country where it was made, and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will, and the language of a will have frequently reference to those rules of construction, and it would be productive therefore of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded, and the judge of a foreign Court, which it may be considered in relation to the will, without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction.

"That would be productive of another inconvenience, namely, that the will might have a different construction put upon it in England to that which might be put upon it in the Courts of a foreign country."

As to moveables the position is clear.

As Professor Dicey says in his Conflict of Laws, 2nd ed., at p. 679:—

"A will of moveables is in general interpreted with reference to the law of the domicile at the time when the will is made."

The justice of the rule is apparent—it is probably to the law of his domicile that the testator himself refers when using technical terms, or even in non-technical language reference is probably intended to the established customs of the country of the domicile.

As Professor Dicey further points out (at p. 679), "where wills are expressed in the technical terms of the

law of a country where the testator is not domiciled, the will should be construed with reference to the laws of that country."

This arises principally in two classes of cases—

(1) Where the will is made in the language of the country where it is drawn up, and

(2) Where the will contains references to the laws of the country where its provisions are to be carried into effect.

Moreover, whilst these rules serve as useful canons of interpretation, and probable guides to the testator's intentions, as Professor Dicey rightly points out, except where the construction is governed by an absolute rule, these rules are mere canons of interpretation, which should not prevail if any good reason exists to suppose that the testator meant a different result.

Hence, it is open to a testator to choose his system of law, and if an unequivocal choice is made that law will undoubtedly form the basis of construction. (See *Studd* v. *Cook*, 8 A. C. 577.) Where a testator in a foreign will expresses himself in the technical language of the place where the will is made, and where he is domiciled, to obtain the intention, the technical terms must be interpreted by the meaning put upon them in the system of law from which they are borrowed.

However, whilst in the case of immoveables no effect will be produced by any attempted disposition which conflicts with the *lex situs*, yet both as to immoveables and moveables, the operation of the will is largely affected by the law of the domicile at date of death.

If the testator's dispositions are invalid by that law, they will fail to take effect, and the disposition of the proceeds will be governed by the same law.

Thus, a widow's right to *legitim* depends on the law of

the domicile at the death of the testator. (*Lashley* v. *Hog,* 3 Hagg. Eccl. 415.)

Also the validity of conditions attached to bequests, the lapse of legacies, and a hundred other questions and points arising out of the construction of the will, depend upon the law of the domicile at date of death.

A class of cases calling for special comment consists of those instances in which the testator devises lands or makes bequests of mortgage debts to be used for charitable purposes.

So far as personal estate is concerned, the question must be decided wholly by the law of the domicile at date of death, but difficulties arise where the *lex situs* of the immoveables does not allow the charitable bequest.

For instance, the case of *Att.-Gen.* v. *Mill,* 2 Dow & Cl. 393. There a testator, a native of Montrose, made a will in England in English form, bequeathing the residue of his estate to trustees for the purchase of lands in fee simple, the rents of which were to be devoted to charitable purposes in Montrose, Scotland.

Held by the House of Lords that the bequest was void by the Statute of Mortmain, as the testator had not contemplated the purchase of lands in Scotland, he having referred to lands in fee simple, which was an English expression.

Similarly, questions have arisen as to election by an heir of real estate desiring to retain the estate and at the same time to upset the will as to some other provisions.

Also where the heir pays debts properly chargeable to personalty.

In all such cases the *lex domicilii* at date of death plays an important part.

Such being in outline the rules which determine the construction and operation of the will of a deceased person,

we must next consider in which Courts such questions should be decided. Should application be made in the Courts of the country of the domicile, or have the Courts of the country where the estate is situated equally jurisdiction to decide the matter?

It was at one time claimed by Lord Westbury that the Courts of the last domicile had exclusive jurisdiction in matters testamentary relating to moveable estate (*b*).

The idea was, however, repudiated, and the reverse is the case in English law at the present day (*c*).

The Courts of the last domicile are primarily entitled to construe the will of a deceased person, and to determine the effect to be given to his testamentary dispositions; but the Courts of this country have also jurisdiction to do so wherever they have jurisdiction to make an English grant in respect of the deceased's estate or any part of it.

In exercising that jurisdiction the English Courts will follow a decision of the Courts of the domicile, and give full effect to it here, whilst, if no such decision exists, the Courts here will determine for themselves the law of the domicile, and will apply such law in all matters of construction. So that where an English grant of probate has been taken out to the estate of a deceased person the beneficiaries under the will have a right to commence administration proceedings in the Courts of this country for the judicial construction of the deceased's will, or for the administration of the trusts of that will by the Court of Chancery, or for the determination of any matter arising out of the deceased's estate.

And this right is independent of the domicile of the deceased. If the last domicile of the deceased be foreign,

(*b*) In *Enohin* v. *Wylie*, *supra*.

(*c*) See remarks of Lord Selborne in *Ewing* v. *Orr-Ewing*, 9 A. C. 34, 39.

the Courts will endeavour to decide the matter in dispute precisely in the same manner that it ought to have been decided had the case arisen before the Courts of the country of the domicile. The *forum* to which beneficiaries under a will are required to resort is primarily that of the testator's domicile at the date of death, but resort may be had to the English Courts if jurisdiction exists to make a grant of representation here.

Whenever it is admitted that by the law of the domicile the testator possessed the requisite physical and intellectual capacity to make the will, that he has not thereby disposed of more than the proportion of his property allowed by the same law, nor in favour of beneficiaries whom he is unable to benefit, and that his testamentary dispositions are not subject to conditions which the law disallows, it frequently happens that the will requires judicial interpretation as to the meaning in detail of the testator's bequests.

If the executor, having obtained probate in England, properly and expeditiously carries out the terms of the will, pays the death duties, debts and legacies, and distributes the whole estate, no question will arise as to the proper *forum* for the beneficiaries to resort to for the purpose of enforcing their rights under the will.

But if there is any irregularity or uncertainty in the terms of the will, or on default being made by the executor in the carrying out of the wishes of the testator, then it may well happen that a beneficiary under the will may wish to seek the aid of the Courts.

Whilst the construction of a will is, as a rule, governed by the law of the domicile at date of death as to operation, and by the law of domicile at the time the will is made as to meaning, this may be negatived by any expression in the will of the testator's intention that some other system

of law should regulate his dispositions. A test of such intention might be the employment of technical terms only employed in a particular system of law, the writing of the will in the language of that country (although, otherwise, this fact alone would probably be insufficient to displace the usual rule), or other defined indications of an intention to adopt some system other than that prevailing in the country of the last domicile. (See *Anstruther* v. *Chalmers, post;* also *Re Price, Tomlin* v. *Latter*.)

The question sometimes arises when proceedings are pending both in this country and in a foreign country, whether one set of proceedings should not be stayed to abide the result of the other.

It is now clearly established that in a proper case the English Courts will restrain a party to proceedings pending before them, and over whom they have thus jurisdiction, from pursuing or continuing similar proceedings in another country, although such a power is never exercised, unless on the balance of convenience it appears to be the best thing for all parties, and even then, only in those cases where all the points raised can be satisfactorily disposed of in the English suit. (See *Hope* v. *Carnegie*, L. R. 1 Ch. 320; and compare the case of *Batthyany* v. *Welford*, 33 Ch. D. 628.)

Where, however, an action for administration has been properly instituted in the Courts of this country, it is very difficult to obtain a stay of the English proceedings pending the decision of a foreign Court.

In fact, it may be stated that if the English Court has unchallenged jurisdiction to dispose of the matters in question, the proceedings here will not be stayed. (See *Bonnefoi*, 57 S. J. 62 (C. A.) (since reported in [1912]

P. 233 (C. A.)), in which the Court of Appeal refused to stay the English proceedings, and reversed the decision of the President, who had directed the English proceedings to remain in abeyance until the will had been construed by the Italian Courts (*d*).)

(*d*) See the comments on this case in the *Law Magazine and Review*, February, 1913, at pp. 220 *et seq*.

CHAPTER XI.

RIGHTS OF BENEFICIARIES AB INTESTATO—
FORUM—STATUS OF BENEFICIARY—LEGITIMACY—FORUM.

When letters of administration have been obtained to the estate of the deceased, his administrator will proceed to "administer" the estate. That is, he will pay any legacy or other duty, funeral expenses, charges and debts, and do everything needful to clear the estate of liabilities.

When this has been done he will proceed to distribute the balance as to moveables according to the law of the domicile of the testator at the date of the death—as to immoveables according to the *lex situs*.

The general rule that the law of the domicile applies to the moveable property of a deceased person must be understood as meaning that it governs the devolution—"For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purposes of legal representation of collection and administration as distinguished from distribution amongst successors, they are governed not by the law of the owner's domicile, but by the law of their own locality." (*Blackwood* v. *Regina*, 8 A. C. 93.)

If, however, the administrator does not properly and expeditiously wind up the estate, a person interested may desire to obtain the intervention of the Court.

As in cases of testate succession the primary *forum* is that of the domicile, but if an English grant exists, or if the case is such that the English Courts have jurisdiction

to make a grant, the beneficiary is entitled to invoke the aid of the English Courts in administration proceedings.

If the aid of the Courts is invoked before complete distribution, the Court will itself distribute deceased's estate according to the appropriate law of succession, *i.e.*, as to immoveables, the *lex situs;* as to moveables, *lex domicilii* at date of death.

As to Immoveables.

Succession to immoveables on intestacy depends on the *lex loci rei sitæ*—but if that law applies some other law, then the latter will prevail.

It is the whole of the *lex situs* which applies to each particular case.

As to English Immoveables.

Where the immoveables are realty according to English law the strictest rules of inheritance apply, and only those who are born in wedlock can succeed. (*Doe* d. *Birtwhistle* v. *Vardill.*)

(Needless to say, this is only so in cases of intestacy. (See *Re Grey's Trusts, Grey* v. *Stamford,* [1892] 3 Ch. 88.))

As to immoveables which are personalty, probably in English law the case is different. (See Foote, pp. 232—237.)

As to them the Statute of Distributions determines the class of persons entitled to succeed—whether the claimants come within such class depends on their own personal law at birth (the domicile of origin). That is, the domicile of their father at date of birth if legitimate, and of their mother if illegitimate. (See *Re Goodman's Trusts* (1881), 17 Ch. D. 266; Court of Appeal overruling *Boyes*

v. *Bedale*, 1 H. & M. 798; see also Foote, pp. 90—96, and 278, 279.)

As to Moveables.

The distribution of these and succession thereto in intestacy depend (as to property which has not been affected by any settlement or marriage contract made by deceased in his lifetime) entirely on the law of the domicile of the deceased at the date of death. In other words, the law to be applied is the law the Court of the last domicile prescribes as applicable.

As to choses in action the same rule applies, and these, too, are governed by the law that would be applied by the Courts of the last domicile, as also are all other personal and moveable assets of whatever nature.

Status of Beneficiary.

The old rule that the domicile of the deceased governed the status of the beneficiary no longer forms part of English law. (*Re Goodman's Trusts, supra.*)

The status of a beneficiary is governed not by the domicile of the deceased, but by his own personal law at birth, which in English law is the law of his domicile of origin.

It is the law of the deceased's domicile at the date of his death which prescribes the rules of succession, as, for instance, on the death of an individual domiciled in the United Kingdom leaving no widow, but children him surviving, the Statutes of Distribution enact that the children take the personal estate in equal shares.

Whether or not a particular person answers to the description required by the law of the deceased's domicile depends on the law of the claimant's domicile of origin.

If this law of the claimant treats the claimant as a child

of the deceased, that claimant will, for all purposes of succession to personal property, be treated as a child of the deceased throughout the world.

The capacity of a person to succeed as *heres ab intestato* to moveable property depends therefore on such law, and such law alone. As to immoveables the status would be governed by such law, unless it conflicted with the *lex situs,* when the latter law would govern.

Legitimacy.

The question of capacity to succeed to an estate on intestacy most frequently arises in connection with cases in which the legitimacy of the claimant is questioned.

With regard to English freeholds the rule of English law is that a person seeking to inherit freehold lands in England on intestacy must not only be legitimate according to his personal law, but must have been born in wedlock. (*Doe* v. *Vardill.*)

With regard to other property, however, the rule is that legitimacy depends upon the law of the claimant's domicile of origin.

If that claimant can show that the law of his domicile of origin considers him "legitimate," then the English Courts will consider him legitimate for all purposes.

This is the direct result of the decision in *Re Goodman's Trusts,* as since followed and explained.

In the one special case of legitimation by subsequent marriage, however, a further condition must be complied with, namely, that the law of the domicile of the father at date of marriage and at date of birth of child both allow legitimation in this manner, and recognise such marriage for that purpose.

Until the decision in *Re Goodman's Trusts* (1881), 17 Ch. D. 266 (C. A.), it had been thought that the question

of the legitimacy of the successor to personal property of a deceased person was governed solely by the law of the domicile of the deceased. However, by that decision the modern rule was clearly laid down, namely, that the legitimacy of a successor depends upon the successor's domicile of origin.

There had been indications prior to this that certain judges had considered that this should be the rule, although the decision of the Master of the Rolls and the learned judgment of the dissenting member of the Court of Appeal (Lord Justice Lush) in *Re Goodman's Trusts*, show with what little support such a view had met down to that time.

Indeed, in the case of *Doe* v. *Vardill*, Lord Brougham had expressed the view that as to personal property legitimacy must be regarded as purely a question of status, and therefore be governed by the law of the successor's domicile of origin. (See 2 Cl. & F. 596; see also judgment of Lord Cranworth in the case of *Shaw* v. *Gould*, L. R. 3 H. L. 70; and Foote, p. 89 *et seq.*)

The legacy duty case of *Skottowe* v. *Young*, L. R. 2 Eq. 474, was also an authority in favour of this view, although the case of *Boyes* v. *Bedale*, 1 H. & M. 798 (Vice-Chancellor Wood), to the effect that the word "children" in an English will was not sufficiently extensive to include children whose only claim to be legitimate depended on the law of their domicile of origin, was certainly directly in opposition.

In *Re Goodman's Trusts*, in the Court of first instance (14 Ch. D. 619), Jessel, M. R., had followed *Boyes* v. *Bedale*, and had decided that the English Statute of Distributions could only extend to children recognised as such under English municipal law.

From this decision, a child who had been born out of

wedlock, but had been legitimated by the subsequent marriage of her parents in accordance with the law of Holland, where they were domiciled, appealed.

The headnote to the case in the report of the decision of the Appeal Court is as follows:—

"The English Statute of Distributions being a statute not for England only, but for all persons, English or not, dying intestate and domiciled in England, and applying universally to persons of all countries, races and religions whatever, the proper law for determining the 'kindred' under that statute is the international law adopted by the comity of States.

"Therefore, a child born before wedlock of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents, held, by James and Cotton, L. JJ. (Lush, L. J., *dissentiente*), entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin under the Statutes of Distribution. (*Boyes* v. *Bedale* disapproved; the decision of Jessel, M. R., reversed.)"

The argument for the appellant quotes Story, Huberus, Vinnius, and Burge; also *Goodman* v. *Goodman; Doe* v. *Vardill* (Lord Brougham); *Fenton* v. *Livingstone*, 3 Macq. 497, 547; *Skottowe* v. *Young*, L. R. 11 Eq. 474.

The dissentient judgment of Lush, L. J. (pp. 269—290), is an extremely learned dissertation, in which all the authorities are reviewed, and in which all that possibly can be advanced against the rule of the domicile is well put. It is not too much to say that such view is definitely disposed of by the judgments of Cotton and James, L. JJ., in this case. Cotton, L. J., says (at p. 291):—

"In support of the decision (of the Master of the Rolls)

it was urged that in an English Act of Parliament the nearest of kin must be taken to mean those who by the law of England are recognised as nephews and nieces, *i.e.*, as legitimate children of the intestate's brother. This is doubtless correct, but the question is, who are by the law of England recognised as legitimate ? It was urged in support of the decision of the Master of the Rolls that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of status, and in my opinion by the law of England questions of status depend on the law of the domicile. For this proposition there is authority. It is stated by Mr. Justice Story in his book on Conflict of Laws, para. 93, that 'foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin'; in para. 93, he states 'that the same general rule is avowedly adopted by the Courts of England,' and he refers to the opinion expressed by Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hagg. Const. 58, that by the law of England 'the status or condition of a claimant must be tried by reference to the law of the country where that status originated,' and later, at p. 292, the well-known passage:—'If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, *i.e.*, on his domicile of origin, I cannot understand upon what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in

England, recognises and acts on the status thus declared by the law of the domicile.'

"In fact, the respondents wish to use the proposition that 'in an English Act of Parliament those only are next of kin or children of a deceased whom the law of England recognises as legitimate,' as if it were 'whom the law of England would recognise as legitimate if at the time of their birth, their domicile, *i.e.*, the domicile of their parents, had been English.' But in my opinion, in deciding questions of legitimacy, *i.e.*, of status, the law of England looks to the law of the actual, not of an hypothetical domicile. I am of opinion, on principle, that since by the law of Holland, where the parents of Hannah Pieret were in fact domiciled at the time of her birth, she is legitimate, the law of England, for the purpose of succession to personal estate, ought to hold her legitimate."

Lord Justice James' judgment (pp. 296—301) is just as strong, and contains several well-known passages to the same effect.

It will be noted that, although the actual decision in *Re Goodman's Trusts* related to a case of intestacy, the judgments contain no suggestion that the principles would in any way differ had the case referred to a will.

Moreover, *Boyes* v. *Bedale*, which was a case of a will, was expressly overruled. In the later case of *Andros* v. *Andros*, 24 Ch. D. 637, the point arising was precisely similar to that in *Boyes* v. *Bedale*, and the decision was the reverse, as Kay, J. (see pp. 638—642 of the report), followed *Re Goodman's Trusts*.

The headnote to *Andros* v. *Andros* is as follows:—

"A bequest of personalty in an English will to the children of a foreigner must be construed to mean, to his legitimate children, and by international law, as recognised in this country, those children are legitimate whose

legitimacy is established by the law of their father's domicile."

This rule has since been extended to the case of a devise of land contained in a will. (See *Re Grey's Trusts*, [1892] 3 Ch. 88.)

The case of *Re Ferguson*, [1902] 1 Ch. 483, where the law of the domicile was not followed in construing a bequest to the next of kin of a deceased legatee, is not, in fact, contrary to the rule expressed above. In that case the words "next of kin" had to be construed, and the judge was guided purely by the testator's apparent intention. The question of legitimacy did not arise.

From these cases it may therefore be stated that, with the single exception of succession on intestacy to English freeholds, the legitimacy of a successor must be determined by the law of his own domicile of origin.

It is submitted that *Re Goodman's Trusts* is an authority for the widest possible interpretation of the rule —that is to say, that short of any provision of foreign law which would be considered contrary to *bonos mores* (*a*), wherever the law of the domicile of origin treats a person as legitimate, he will be considered legitimate here for all purposes except succession to English freeholds.

Thus, in some American States (Missouri, for example) the law provides that where one party to a marriage is innocent, and unaware of any defect, the children shall not be considered illegitimate.

Supposing, therefore, that a person already married when domiciled in Missouri contracted marriage with a native of that State, who was unaware of any reason for invalidating the marriage, the children of such a union,

(*a*) Such as polygamy. (See *Bethell* v. *Hildyard*, 38 C. D. 320; although see *Brinkley* v. *Att.-Gen.*, 15 P. D. 76 (Japanese marriage).)

provided they were born while the parents remained domiciled in Missouri, would, it is submitted, be entitled to be regarded as children here within the meaning of the Statutes of Distribution. It must be noted, however, that the rule only extends to cases in which the law of the domicile of origin treats the children as "legitimate." Nothing short of legitimacy will suffice—mere capacity to succeed on death is immaterial—the only test being, "are the parties legitimate in the eyes of the law of the domicile ?"

Thus, in *Atkinson* v. *Anderson,* 21 Ch. D. 100, where an Englishman having an Italian domicile had "recognised" certain natural born children, who had in consequence a right of succession by virtue of Italian law, it was held that such children were strangers in blood to the deceased, and that succession duty was payable at the rate of 10 per cent. upon certain real estate in this country.

It is pointed out by Mr. Foote, at p. 94, that this decision is unquestionable, and that had the parties been claiming under an intestacy, they must necessarily have failed.

The rule stated above as to legitimacy depending solely on the domicile of origin of the successor has, however, one important exception, namely, in cases of *legitimatio per subsequens matrimonium.*

Wherever it is sought to establish the legitimacy of a person born out of wedlock through the effect of the subsequent marriage of his parents, it is a rule of English law that two conditions must prevail, *i.e.*—

(a) The law of the domicile of the father at the date of birth of the child must contain a provision allowing *legitimatio per subsequens matrimonium,* and

(b) The law of the domicile of the father at the time of marriage must contain a similar provision, and must recognise the legitimacy of such children.

If either of these stipulations is uncomplied with, the legitimacy will not be established in English law. (See *Re Grove, Vaucher* v. *Treasury Solicitor*, 40 Ch. D. 216—243, where the rule was so stated by Stirling, J., in the lower Court, and affirmed, on appeal, by Cotton, Lopes and Fry, L. JJ.)

So far we have discussed the matter with reference to English freeholds on the one hand, and to personal estate in general on the other.

It has been doubted whether the rule as to leaseholds should be derived from *Doe* v. *Vardill* or *Re Goodman's Trusts*. It is submitted that the better view is that there is no reason whatever for the rule being any different as applied to leaseholds than to personal estate in general.

Freehold property stands on an entirely different footing, and *Doe* v. *Vardill* must in consequence be limited strictly to such property.

On this point, see Foote, pp. 232—237, for an admirable *résumé* of the arguments, both for and against this view, and in which he definitely decides in favour of the view expressed above.

PART II.

CHAPTER XII.

ESTATES OF DECEASED FOREIGNERS LEAVING PROPERTY WITHIN THE UNITED KINGDOM.

We propose in the next few chapters to discuss the law relating to the administration and succession of estates left in the United Kingdom by deceased foreigners. We shall observe the same divisions of the subject as employed in Part I., and therefore propose to deal first with testate succession, and then intestate succession.

(a) Testate Succession.

Firstly:—

When Probate will be granted.

Having dealt with the principles of private international law applying to the estates of deceased British subjects leaving property here and abroad, we turn to the converse case of a deceased foreign subject leaving property within the United Kingdom.

For the purposes of this part of our subject we define a foreigner to be any person other than a British subject.

The particular subject-matter of this and the succeeding chapters is, then, the dealing with and distribution of the property situated within the United Kingdom which forms part of the assets of a deceased foreigner.

To what extent do the English Courts control the dis-

tribution of the estate of a foreigner possessing property locally situate within the United Kingdom, and by what principles is such control fixed and determined ?

Prior to the passing of the Naturalization Act, 1870, an alien or foreign subject had no capacity to make a will according to English law, and any such attempted disposition of his property had no effect in law upon his property here.

Since that Act, however, nationality has little bearing in this country upon testamentary capacity, and a foreigner has, generally speaking, the same powers of testamentary disposition over his estate in the United Kingdom as a British subject. Before his estate in this country can be dealt with there is the same necessity for obtaining a grant of representation to his estate.

If there is a will, can probate be obtained ? As in the case of a British subject there are certain essentials before probate of a deceased foreigner's will can be granted by the Courts of this country. Thus, the applicant must show—

That the deceased has left a will, valid in form, which he had capacity to make. That such will exists at the time of death, and that its provisions are not invalid. Such will must also contain an appointment of one or more executors, which appointment does not infringe a municipal law of this country. It must also be shown that the executors are capable and willing to act, that there are assets within the jurisdiction of the Court.

The original will or a duly authenticated copy must be lodged in the Probate Registry, and the requirements of the Probate Registry must be properly complied with.

Unless these essentials exist a grant of probate will not be obtained, although it is possible that letters of administration *cum testamento annexo* might be granted.

Taking these requirements in the order mentioned:—

(1) *There must be a Will.*

The essentials that must exist before a document can be considered as a testamentary writing have already been examined.

English law will not recognise a document as a will which is in conflict with any fundamental principle, or which in the eyes of the English Courts lacks any of the essentials of a valid testamentary disposition.

Thus, under no circumstances will the English Courts give effect as a "will" to a document which from its terms is irrevocable; or which does not take effect upon the death of the maker; or which does not represent the free will of the testator; or which has in any way been obtained by fraud, or in a manner inconsistent with a voluntary expression of the testator's desire.

At the same time, the mere fact that such document is not in strict accordance with English municipal law will not prevent its obtaining recognition here if the law of the domicile permits a will to be made in such a form.

(2) *The Will must be valid as to Form.*

We are not concerned in this part of the subject with the effect that the will of a foreigner may have in his own country. It is its effect by English law upon property within the United Kingdom which we are considering.

The requirements as to formal validity of such testamentary dispositions depend upon the nature of the property.

As to Immoveables.

The formal validity of wills dealing with immoveables in the United Kingdom is governed by the *lex situs* (which in the case of a foreigner is the Wills Act, 1837).

In order, therefore, to dispose of immoveables locally situate in England, the will of a foreigner must comply as to form with the requirements of English law, *i.e.*, of the Wills Act, 1837.

This is so, whether the immoveable property is realty or personalty, *i.e.*, leaseholds which rank as personalty in the eyes of British law.

A will of a foreigner dealing with English leasehold properties must be in the form required by the *lex situs*, that is, must satisfy the requirements of the Wills Act, 1837. (See *In the goods of Gentili;* also *Duncan* v. *Lawson* and *Freke* v. *Lord Carbery*.)

Similarly, in the case of freeholds belonging to a partnership firm, although both such freeholds and leaseholds are personal estate in English law, and consequently could be bequeathed by a British subject by any will valid under Lord Kingsdown's Act, regardless of the Wills Act, 1837, yet, as foreigners are not included within the terms of sects. 1 and 2 of Lord Kingsdown's Act, their wills, to give valid effect to dispositions of such property, must follow the old rule and comply with the local *lex situs*, the property being in fact of an immoveable nature.

Whether a particular kind of property locally situate within the United Kingdom is immoveable or not depends on the *lex situs*.

As to Moveables.

With regard to formal validity, so far as moveables are concerned, the form of a will disposing of moveables within the United Kingdom made by a foreigner must comply as to form with the law of the domicile of the foreigner at the time of execution or death.

This is the joint effect of the old rule that the law of the domicile at the date of death governed the disposition

of the moveable estate of a deceased, and the provisions of sect. 3 of Lord Kingsdown's Act to the effect that no change of domicile subsequent to the making of a will renders that will invalid.

It will be remembered that this section does extend to foreigners as well as to British subjects. (*In re Groos.*)

(a) Therefore, under the common law rule any will of a foreigner disposing of moveables is valid as to form which is valid according to the law of the domicile of the deceased at the date of death.

(b) Any such will of moveables which is valid according to the law of the domicile of the testator at the date of its execution is, under some circumstances, also valid at death, as no change of domicile subsequently to the making of a will renders that will invalid. (Wills Act, 1861, s. 3.)

Validity by the Law of the Domicile at Death.

Under the operation of this rule it may happen that a will invalid as to form at the date of its execution will be valid in England if valid according to the domicile of the deceased at the date of death.

The rule of *locus regit actum* is not applied by English law to the wills of foreigners—unless, indeed, such principle forms part of the law of the domicile to which English law refers questions of form.

A will made by a foreigner in British form, but not valid in accordance with the law of the domicile, is treated as invalid here, and will not operate to pass even moveable estate in this country (*a*). (*Bremer* v. *Freeman.*)

On the other hand, the will of a foreigner made in

(*a*) Such a will, although invalid, might under some circumstances amount to a valid exercise of a power of appointment conferred by an English instrument. (See *Murphy* v. *Deichler*, and Chapter XVIII., *infra.*)

accordance with the law of his domicile of origin, but not in accordance with the domicile of choice at date of execution or of death, is equally invalid.

Whilst, even if a will is in accordance with the law of the domicile, it will be regarded as formally invalid so far as immoveables in England are concerned, unless the formalities of the Wills Act, 1837, are complied with. (*Pepin* v. *Bruyère*.)

(3) *The Will must be one which the Testator had the requisite capacity to make, and must remain in force at the Date of Death.*

Testamentary Capacity.

Capacity to execute a will as to immoveables is in English law governed by the *lex situs*, and as to moveables probably by the law of the domicile at the time of execution. (See, however, Westlake, p. 125, sect. 86.)

Whilst, however, it is true that capacity to execute a particular instrument must in general be gauged by reference to the laws applicable at the time of execution, according to Professor Westlake, it ought to be held that a will which the testator was under an incapacity to make at the date of execution, but as to which he obtained capacity to do so under the law of his domicile at the time of death, is treated as valid and enforceable here. So far as we are aware, there is no authority in support of this proposition in the shape of a decided case. However, it would seem to be certainly inaccurate as to certain grounds of incapacity, *e.g.*, lunacy or want of age. No will made by a lunatic, whilst under delusions, can be rendered valid by the fact that he subsequently recovers his sanity, nor

can a will executed by a minor acquire validity by the fact that he dies after acquiring full age.

Wills where there exists a Settlement or Marriage Contract.

If a will is made subsequently to a duly authenticated marriage settlement or contract of marriage, the testator will not be enabled to dispose of the property included in such settlement or contract except in the manner prescribed by the settlement.

The rights of the parties under such a settlement or marriage contract are determined by reference to the law of the contract, viz., the *lex loci contractus*. (See *De Nichols* v. *Curlier*.)

The will must remain effective and unrevoked at the date of death.

We have dealt with the principles of revocation of testamentary instruments.

In the case of revocation by the execution of a subsequent will, such revocation might depend upon a question of construction governed by the appropriate law of construction.

It must be remembered that only such wills are revoked by marriage as would by the law of the domicile of the testator at the time of marriage be revoked by such marriage. (Page 106, *supra*, and authorities there cited.)

Where at the time of marriage the law of the husband's domicile does not treat the will as revoked by marriage, such will remains valid and unaffected by the marriage, wherever the ceremony takes place, and irrespective of any subsequent change of domicile of the parties concerned.

Material Invalidity.

The provisions of the will must not be materially invalid.

It has been shown that a will valid as to form will generally be admitted to common form probate in this country without discussion of the validity of the principles upon which the will attempts to dispose of the property. But although this is no doubt true in practice, yet the question of validity may at any time be raised, and if so raised, must be proved.

The English law will not assist any devise or bequest for a purpose which is against English public policy or *contra bonos mores,* whether the law of the domicile allows it or not.

Hence, a possible exception to the universal validity of a will valid according to the law of the domicile, is where the will contains a disposition of property for the carrying out in England of some purpose disallowed by English law, such as a limitation for a superstitious purpose—but see *Re Elliott, Elliott* v. *Johnson* (1891), 39 W. R. 297.

Frequent instances of this kind of will are found in wills infringing the English Mortmain Acts on such questions as the gifts of lands for charitable purposes, &c. (See *Duncan* v. *Lawson* (1889), 41 Ch. D. 394.)

(4) *There must be an Appointment of Executors.*

What will amount to an appointment of an executor of a will, and the rules as to who can be so appointed according to English law, have been examined on a previous page.

It may be stated here that there is no objection to separate appointments of executors, each limited to the

estate in particular countries, such as one set of executors for estate in England, one for America, and one for France —and, indeed, such a case is by no means infrequent where the testator desires his various properties to be differently dealt with. (See *In re Winter* (1861), 30 L. J. (N. S.) P. & M. 56; and see *Re Von Brentano*, [1911] P. 172.)

Whether the appointment of executor is valid or not depends upon the true construction of the will, and the rules of construction apply. A will, as a rule, is construed according to the law of the domicile of the deceased either at the time of execution or at the date of death; but see p. 131 for a more detailed statement as to this.

(5) *The Appointment of Executors must not infringe a Municipal Law of this Country.*

No matter what the domicile of the deceased, nor what the Court of construction may decide, the English rule is to refuse to make a grant of probate in favour of any person who by the law of England is considered incapable of representing the deceased—such as a minor. (See Chapter XVI., *infra*, and cases there cited.)

(6) *The Executor must be capable of action and willing to act.*

The executors' powers must be still in force at the date that probate is applied for. When, therefore, the law of the domicile only gives the executors seisin for a limited period, as for instance, in France, where the seisin is limited to a year and a day from the death of the testator, the grant of probate must be applied for here within the time in which the executors are capable of acting abroad, and of necessity no probate can be granted unless the executor is willing to act and applies for the grant. (See

Re Groos, Laneuville v. *Anderson;* and as to the last sentence, see *Wankford* v. *Wankford.*)

An executor cannot be compelled to prove a will. He may renounce probate, but he can be compelled by citation to bring the will into the Principal Registry.

(7) *There must be some Estate in this Country at the time the grant is applied for.*

The jurisdiction of the English Probate Court is based upon the presence within its reach of assets belonging to the deceased. (See *In the goods of Tucker.*)

The English Court will not grant probate of a will dealing solely with property abroad, unless it can be shown that such will is incorporated in another will which does. (See *Re Murray,* [1896] P. 65; *Re Coode* (1867), L. R. 1 P. & M. 449; and also *Re Bolton* (1876), 12 P. D. 202 (different circumstances).)

It has been demonstrated that the actual value or amount of the assets so situate is immaterial. Assets of the slightest value are apparently sufficient to give the English Courts full jurisdiction to make a grant of representation to the estate, and thus to give jurisdiction to decide any matter connected therewith.

(8) *The original Will or some authenticated Copy must be brought into the Registry.*

Where it is possible, in accordance with the ordinary rule that the best evidence must be produced, the original will must be brought in and made an exhibit to the executor's oath.

Where, however, as in France, the foreign law forbids the handing over of the original wills, which are lodged with notaries, a notarial copy, or other accepted copy

authenticated in the manner provided by the law of the foreign country, must be produced and sworn to here. (*In the goods of Rule* (1878), 4 P. D. 76.)

(9) The formal requirements of the Probate Registry must be complied with just as in an inland case, and as the practice only differs in a few special instances, to which special attention is drawn elsewhere, we do not propose to set out here the common practice of the Division.

Subject to all the above requirements being complied with, probate will be granted here of the will of a deceased foreigner, no matter what his nationality or the country in which he was domiciled at the date of his death.

Secondly:—

When Letters of Administration with the Will annexed will be granted.

Where the deceased foreigner has left a will but has—

(1) Made no appointment of executors, either express or implied; or

(2) Has appointed executors who have predeceased him, who have renounced, whose term of office has expired, or who are incapable or unwilling to act, such will may be none the less valid, and may deal with the estate in this country.

In such circumstances, application should be made to the English Courts for a grant of letters of administration with the will annexed to the estate of the deceased.

If the will contains a residuary devise or bequest, the residuary legatee will, as a rule, be most entitled to take out such a grant, or failing him, the next of kin and heir-at-law (if real estate exists) have an equal right. (See Tristram & Coote's Probate Practice.)

Where the deceased died domiciled abroad, it may be

said, as a general rule, that the person entrusted with the administration of the estate in the country of the domicile is entitled to administration here with the will annexed, if the facts make such a grant the proper one in the circumstances. (See Chapter XVI., *infra*.)

The proper *forum* for all matters connected with such administration is determined by the same principles as those detailed in the similar chapter to this in Part I. hereof.

CHAPTER XIII.

INTESTATE SUCCESSION.

WHERE a deceased foreigner dies intestate leaving assets within the United Kingdom, a grant of administration must, as a general rule, be applied for to deal with the estate in this country (*a*).

Intestate in this sense means when the deceased has left—

(1) No will at all; or

(2) A will which is invalid on account of—
Formal invalidity; or
Testamentary incapacity; or
Material invalidity; or

(3) A valid will which has subsequently been revoked.

Where there is no will at all, no difficulty arises, as the administration of the English estate of a deceased foreigner is governed solely by the *lex fori*.

It is English law alone which determines the choice of the personal representative, and which defines the nature and extent of the grant of administration to be made. Such choice is determined by English rules, subject, however, to referring all questions of beneficial succession to the Courts of the domicile. If by the Courts of the domicile someone has been entrusted with the administration, the grant will usually be made to the same person.

(*a*) For exceptions, see Tristram & Coote.

Where, however, a document does exist, and the validity of such document as a will is doubtful, the matter must be further tested.

The principal grounds of invalidity of a will are: lack of formality; want of testing capacity; or material invalidity.

Lack of formality exists when the formalities required by the appropriate law for validity of the document as a will are lacking.

Want of capacity is evidenced where the testator is a person who, by his own personal law (ascertained either at his death or at the date of making the will), is incapable of executing a testamentary writing; or, if the estate consists of immoveables situate within the United Kingdom, is, by the *lex situs*, not considered as having testamentary power.

Material invalidity arises where there is a will valid in form, but the terms of the testator's bequests infringe the provisions of the law governing the construction and effect of the limitations of the will.

Should the will be defective in any of these particulars, it will be invalid according to English law, and, to the extent of the invalidity, there will be an intestacy.

If the will is wholly invalid the estate will be wholly intestate.

Formal Invalidity.

The requirements as to the form of the wills of foreigners dealing with estate in the United Kingdom have been considered. (Page 153.)

If the will does not answer to those requirements, it will be invalid here on account of its form, except that the English Courts will sometimes treat as formally valid, by exercising their jurisdiction in aiding the execution of the

document, a will which is not actually in the form required by the *lex situs* or the *lex domicilii*, as the case may be.

This will only be done where the English Courts are satisfied that the general principles of the law of the domicile would permit of such a course. (*Lyne* v. *De la Ferté*.)

Testamentary Incapacity.

The rules governing the capacity of a foreign subject to make a will dealing with assets in this country have been examined. (Page 156.)

If the testator does not possess the required capacity by reference to the law applicable, a will made by him will not be treated as valid here.

The question, however, arises: Suppose a testator executes a will which at the time of execution he has not the requisite capacity to make, but subsequently acquires capacity to execute, is such a will valid at his death?

According to Story, "The law of the actual domicile of the party at the time of the making of the will or testament was to govern that capacity or incapacity."

In English law the better opinion seems to be that the essential period of time for purposes of capacity to sign a particular document or perform a particular transaction is the time of signing or performance. (See, however, Westlake, sect. 86, at p. 125.)

Material Invalidity.

The validity of the provisions in a testator's will are determined by the law applicable at the moment of his death.

Thus, a will of moveables must be valid as to matter by the law of the domicile at the date of death of the deceased. (See Dicey, rule 187, and notes.)

And this being the rule, it is immaterial that at the date of execution the provisions were invalid. (See Dicey, rule 187, and notes thereon.)

A valid Will which has been revoked.

A will, which may have been perfectly valid at the date of execution, may subsequently cease to have any effect by reason of revocation.

A will which simply revokes a previous testamentary writing, and does nothing more, is not entitled to proof, and the deceased will be deemed to have died intestate.

Revocation by Marriage.

If the domicile of the testator is English at the time of his marriage, then by English law the marriage will revoke all previous testamentary dispositions.

When, however, the law of the domicile of the husband at the time of marriage does not render a will inoperative by reason of such marriage, the will remains valid and effectual, notwithstanding a subsequent marriage. (*Re Reid, Westerman* v. *Schwab.*)

If for any of the above reasons the deceased is considered to have died intestate within the meaning of English law, the beneficial succession to his moveable estate will be governed by the law of his domicile at the date of death.

The fact that the deceased has been domiciled in other countries at other periods of his life, or that his domicile of origin is not his domicile at death, is immaterial, as also is the place of death or the local situation of the assets.

There is no conflict between different domiciles in such a case. The only test is the law of the domicile at the date of death.

In order to obtain letters of administration the applicant must prove—

(1) That the deceased died intestate.
(2) That there are assets within the jurisdiction of the Court.
(3) That he is the proper party to apply for the grant.
(4) That the requirements of the Probate Registry have been complied with,

all of which points have already been considered.

CHAPTER XIV.

THE EFFECT OF AN ENGLISH GRANT OF PROBATE OR OF LETTERS OF ADMINISTRATION TO THE ESTATE OF A DECEASED FOREIGNER OWNING PROPERTY IN THE UNITED KINGDOM.

THE general position in law of an executor holding an English grant of probate, or of an administrator who has obtained a grant of letters of administration from the English Court has been dealt with previously.

Such position is not affected by the national character of the deceased.

The powers and duties of executors and administrators of the estates of deceased foreigners are identical with those of the representatives of deceased British subjects. Under the English grant of representation, whether in the form of a probate or simple letters of administration, all the moveables and the personal estate of the deceased in this country pass to the English representative. This applies to all immoveables (which are personal estate), moveables, choses in action, ships and other property, and the English representative acquires a title to all such property independently of possession. Where the grant operates upon immoveables which are not personal estate, they will also, under the Land Transfer Act, 1897, vest in the legal personal representative. Thus, a good title to English freeholds belonging to a deceased person cannot be made

without the concurrence of the English proving executors (*a*).

Moveables cannot be disposed of except by them.

Stocks and shares and other choses in action locally situate here cannot be dealt with except by their instructions.

(*a*) Land Transfer Act, 1897 (and see *Pawley* v. *London and Provincial Bank*, [1905] 1 Ch. 58), as amended by Conveyancing Act, 1911, s. 12.

CHAPTER XV.

RIGHTS OF BENEFICIARIES UNDER THE WILL—FORUM—CONSTRUCTION, GENERAL INTERPRETATION.

If an English grant of representation has been taken out, the English Courts have jurisdiction over all matters connected with the estate, and the beneficiaries can apply to the Court for assistance or redress.

The rules as to jurisdiction have been set out in detail, and apply to the wills of foreigners as well as to those of British subjects.

There is no obligation on the part of parties interested under the will of a deceased foreigner domiciled abroad to apply first in the Courts of the domicile.

They are, of course, entitled to do so, if they so desire. Such applications would then be governed by the particular *lex fori*, and fall outside the scope of this treatise.

Should, however, the beneficiaries, or any of them, decide to avail themselves of the jurisdiction of the English Courts, what principles must apply ?

All matters of practice and procedure will be regulated purely by English law, and the beneficiaries setting the machinery of the Courts in motion would have to comply with the formalities of the *lex fori* in all respects in such matters.

Choice of Laws to apply.

When once the English Chancery Court (for administration suits and matters relating thereto are peculiarly the subject-matter of proceedings in that Division) is

validly seised of some proceedings relating to a question of administration of the trusts of the will of a deceased person, the question of the law to apply becomes important.

We have seen that the construction—*i.e.*, "operation"—of the will of a foreigner is, as to moveables, governed by the law of the domicile of the deceased at the time of his death; as to immoveables, the *lex situs* prevails.

When the law of the domicile applies, it is the whole law of the domicile which is referred to, and not only the internal or municipal laws of the country of the domicile. (See *Bonneval* v. *De Bonneval*, and later chapter on "*Renvoi*" (Chapter XX.).) If the English Courts have jurisdiction in any particular case, they have power to decide all matters of *forum*, testamentary capacity, material validity, and any other question arising out of the testator's will on the succession or intestacy to the deceased's estate. Each of these questions will be submitted to its appropriate test, and the system of law applicable will govern. As to how foreign law is proved in the Courts of this country, see p. 90, *supra*.

Rights of Beneficiaries ab intestato.

FORUM—CHOICE OF LAW—STATUS OF BENEFICIARY—LEGITIMACY.

The *forum* for beneficiaries to resort to does not vary in testate or intestate succession.

The jurisdiction to make an English grant of representation gives the English Courts jurisdiction to adjudicate upon all matters arising out of the estate, and in cases of testacy and intestacy the parties entitled to the estate can apply either to the Courts of the domicile or to the English Courts, or both.

The rules regulating the choice of law in cases of intestate succession are simpler than those of testate succession.

In intestate cases, the only law applicable as to moveables is that of the domicile of the deceased at the date of death.

Whilst, if the deceased left a will, there would in many cases be a conflict between the law of the domicile at the time the will was made and at death, or the testament might itself show an intention for some other system of law to govern the interpretation.

Status of Beneficiary and Legitimacy.

The law governing the succession determines the class of successors under the will, *i.e.*, the persons who as *heredes ab intestato* are entitled, and also regulates the proportions in which members of that class participate.

But it is upon the domicile of origin of the beneficiary that his claim for admission as a member of a particular class depends.

With this the domicile of the deceased or the law governing his succession have nothing to do, the capacity of a beneficiary being governed by his domicile of origin, as already stated at p. 144.

CHAPTER XVI.

GENERAL PRINCIPLES APPLICABLE TO PROBATE AND ADMINISTRATION WHEN A GRANT HAS ALREADY BEEN MADE ABROAD.

When once the rule had been adopted that the distribution of the moveable property of a deceased person and beneficial succession thereto was to be regulated by the law of his last domicile, it followed as a natural result, that the decisions of the Courts of the domicile should be accepted in this country.

From a very early period we find that when the Courts of the country of the domicile have had an opportunity of pronouncing judgment upon any matter connected with the disposition of moveables belonging to a deceased person or of succession to them, their orders and decrees have been greatly respected by the Courts of this country. In time, this respect became almost customary, and the general rule laid down was that the English Courts should in general "follow" the decision of the Court of the domicile.

The rule seems to have been well founded, for it cannot be doubted that, so far as possible, it is advisable to have a single succession governed by a single law.

Presumably the Courts of a particular country are best able to interpret the laws of that country, and it is very certain that no good result could accrue if each foreign tribunal were to take upon itself the construction of a testamentary document or the interpretation of a rule of law of another country.

Reason therefore points to the wisdom of following the

foreign grant, and we must consider the modern rule upon the subject, and precisely how far the Courts of this country are prepared to give effect to the orders and decrees of a foreign tribunal.

In the first place, let it be said, that the rule as to following a foreign grant has not always obtained.

In some of the earlier cases the judges of the Prerogative Court of Canterbury not infrequently refused to pay any attention to the foreign Court, and in all cases claimed a discretion as to following the grant or not.

Thus, in an early text-book, Toller on Executors, 7th ed., published in 1838, it is said, at p. 108:—

"A grant of administration in a foreign Court, as for example, in Paris, is not taken notice of in our Courts of Justice."

In order to appreciate the position at the present day, it will probably be best to take the principal cases which are included in the reports and examine them.

One of the earliest of these (*In the goods of Read* (1828), 1 Hagg. Eccl. 474) was a case in which the testator had died in India, and the Courts of Madras had made a grant of probate to the widow. The Courts here granted administration with the will annexed to the widow as relict and principal legatee, the difference being that as a result the widow was compelled to enter into a bond, and give security which would not have been required had probate been granted. In the course of the judgment reference is made to the peculiar circumstances frequently attending Indian cases, and then the learned judge uses these words:—"It is not fully decided whether this Court is bound in all cases and under all circumstances to follow the grant of probate made by a Court of competent jurisdiction."

The next important case appears to be that of *Viesca*

v. *D'Aramburu* (1839), 2 Curt. 277. In that case a testator had died domiciled in Spain, and suits were pending in the Spanish Courts as to which of two wills was valid; pending these suits a judicial administrator was appointed by the Court of Cadiz with certain powers of collecting the assets, and the English Court, carrying out the decree of the Court of the domicile, granted administration to the attorney in England of the judicial administrator so appointed, limited to carrying out the powers conferred by the Courts of the domicile. In that case counsel opposing the grant argued that the order of the Court of Cadiz was merely interlocutory, and amounted only to a direction pending the proceedings, and should not therefore be followed. It was, however, conceded on all hands that when the Courts of Cadiz had definitely decided as to the validity of the testator's will, such decision would be binding upon the English Court. In giving his decision, Sir Herbert Jenner said:—

"I do not know that this order is absolutely binding upon this Court; but if it be discretionary, the Court would be inclined to follow the decision of the tribunal to which all parties are subject, and which ought to have that which is incidental to the cause, viz., the care and security of the property."

The rule was not limited to following the decision of the foreign Court on such points as those mentioned, but also extended to regulating the choice of the party entitled to administration here. Thus, in the case of *In the goods of Rogerson* (1840), 2 Curt. 656, a Scotchman had died domiciled in Scotland leaving a widow and a brother; by Scotch law administration belonged to the brother, and he had obtained a decree in the Scotch Courts. Held, following *In re Isabella Stewart*, 1 Curt. 904, that administration should be granted to the brother, notwith-

standing the widow's prior claim according to English law.

In the later case of *Enohin* v. *Wylie*, House of Lords, 1862 (reported 10 H. L. C. 1), there is a celebrated *dictum* of Lord Westbury, which, however, has since been expressly dissented from on many occasions (judgment of Lord Selborne in *Ewing* v. *Orr-Ewing*). Lord Westbury says:—

"I hold it to be now put beyond all possibility of question, that the administration of the personal estate (moveables ?) of a deceased person belongs to the Court of the country where the deceased was domiciled at his death. All questions of testacy or intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representatives of the deceased. To the Court of the domicile belong the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicile. In short, the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort."

Later, in the same case, however, he makes some valuable observations as to the duty to follow the foreign grant, and the dangers that would arise were each Court to adopt its own principles of construction.

Thus, he says:—"When the Court of Probate was satisfied that the testator died domiciled in Russia, and that his will, containing a general appointment of executors, had been (as it was) duly authenticated by those executors in the proper Court in Russia, it was the duty of the Probate Court in this country at once to have revoked the former letters of administration which had

been granted, and to have clothed the Russian executors with ancillary letters of probate to have enabled them to get possession of that personal estate, which, in fact though not in law, was locally situate in England." . . .

The well-known case of *Doglioni* v. *Crispin*, 3 Sw. & Tr. 44, 96, also contains important references to the principle now under discussion.

The headnote to that case reads as follows:—"The judgment of the Court of the domicile of the deceased at the time of death is binding upon the Courts of a foreign country in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign Court which have been decided by the Court of the domicile."

Sir Cresswell Cresswell, in giving judgment, says:—

"I have not now to encounter the difficulty of arriving at a correct conclusion of foreign law; for, after consideration, I have come to the conclusion that it does not belong to this Court to sit as a Court of Appeal from the Portuguese Courts. It is beyond dispute that Henry Crispin died domiciled in Portugal, and therefore the succession to his personal estate must be determined by the law of Portugal (*Stanley* v. *Bernes*, 3 Hagg. 373, which related to an English subject domiciled in Portugal; *Bremer* v. *Freeman*, 10 Moo. P. C. 300, and many other cases), and the law of the domicile applies equally whether the party whose succession is in question dies testate or intestate." After quoting a passage from *Enohin* v. *Wylie*, in which reference is made to the resort to the Court of the domcile, he continues:—"To that Court the plaintiff did resort. The very same points were then raised that have been put in issue in this Court. A judgment was then pronounced in favour of the plaintiff, and that was affirmed

on appeal. By that it was decided that the plaintiff was entitled to the inheritance of the deceased Henry Crispin. By that judgment I feel I am bound."

There are other early cases in which the grant of the foreign Court is followed, such as *In the goods of Bianchi* (1862), 3 Sw. & Tr. 16, where a Sardinian, who had settled in Brazil, died intestate during a voyage to Genoa —an agreement was come to between the Brazilian and Italian Governments whereby Italy assumed entire control of the administration of the estate.

By a decree of the Court of Turin it was declared that the infant children were domiciled in Italy, and that their guardian was entitled to administer the estate. The Court (Sir Cresswell Cresswell) followed the decree of the Italian Court, and granted letters of administration to the guardian.

There is also the case of *In the goods of Steigerwald* (1864), 10 Jur. N. S. 159, the decision in which may be said to be as follows:—The Court of Probate will make a grant to a provisional executor appointed by the proper Court of the domicile of the deceased; but it will limit it for such time as the appointment by the Court of the domicile remains unrescinded and in force. (See, however, *In the goods of Levy*, [1908] P. 108, referred to on p. 181.)

In the case of *In the goods of Probart* (1866), 36 L. J. P. 71 (Sir J. P. Wilde), a lady and her husband were domiciled in the Cape of Good Hope, and were married under the provisions of a deed whereby the husband was entirely excluded from any share in his wife's estate. On her death administration was granted to a brother, following *In the goods of Isabella Stewart*, referred to above.

The next case may be described as the starting point

of the general rule (*In the goods of Earl* (1867), L. R. 1 P. & D. 450), a most important decision, in which Sir J. P. Wilde authoritatively states the English law upon this subject. Although in that particular case, as will be explained later, the actual form of the foreign grant was not followed here, the principles laid down are of general application.

Sir J. P. Wilde says, in the course of his judgment:—

"I think this Court ought to act upon sect. 73 of the Court of Probate Act, and make a grant in all such cases as the present to the person who has been clothed by the Court of the country of the domicile with the power of duly administering the estate, no matter who he is or on what ground he has been clothed with that power."

Very similar language is used by the same learned judge in the later case of *In the goods of Smith* (1868), 16 W. R. 1130.

There the deceased died domiciled in India, and had by his will appointed three executors. Two had proved in the Indian Courts, and applied for a grant to their attorney in this country, no evidence being given as to whether the third executor had renounced.

Sir J. P. Wilde, in granting the application, said:—

"It is a general rule upon which I have already acted, that where a person died domiciled in a foreign country, and the Court of that country invests anybody, no matter whom, with the right to administer the estate, this Court ought to follow the grant simply because it is the grant of a foreign Court, without investigating the grounds on which it was made, and without reference to the principle upon which grants are made in this country. I shall therefore make the grant in this case under sect. 73, inserting a clause which will enable the third executor to come in

and claim his share of the representation if he should see fit."

Similar decisions have frequently been given by the Courts of this country since that time. Thus, in the case of *In the goods of Dost Aly Khan* (1880), 6 P. D. 6, the English Court granted letters of administration to the estate of a Persian subject in accordance with Persian law to the party appointed by the Persian Courts.

The limitations upon the rule of following the foreign grant are considered on a subsequent page, but during the course of their settlement the rule itself has undergone slight modifications.

The principles applied by the English Courts at the present day are well set out in the modern case of *In the goods of Briesemann*, [1894] P. 260.

In that case Sir Francis Jeune says:—

"The principle is that regard should be had to the law of the domicile, in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed upon him."

The case of *In the goods of Meatyard*, [1903] P. 125, illustrates this same principle. In that case the testator was domiciled in Belgium (so found by Sir F. Jeune (President), see p. 129), and made an English will appointing executors, and later executed a will in the Belgian form in Brussels. Orders were made by the Court of Appeal in Brussels appointing two Belgian notaries receivers, entrusting them with the administration of the personal estate and effects, as well in Belgium as in England, with full powers, and in pursuance of those orders the Belgian receivers applied for administration with the will annexed of the English estate. The grant

was opposed by the executors of the English will, and Sir Francis Jeune, in granting the motion, says:—

"According to the law of Belgium, this appointment of executors in the will made in English form is not one that the Belgium Courts would accept and act upon. The duty of this Court is to follow, so far as it can, the law of the testator's domicile, namely, the law of Belgium, by recognising the persons whom the Belgian Court has invested with the power and duties of administrators. This is in accord with more than one authority, the strongest of which is perhaps *In the goods of Earl*, in which Lord Penzance had before him a very similar case; and the principle there laid down is that this Court ought to act in accordance with the law of the testator's domicile."

He also refers to his own decision in *In the goods of Briesemann*, and later says:—

"For this Court to insist on appointing the executors named in this testator's will would be to fly in the face of the law of the testator's domicile, and that is what this Court never does, if it can avoid it."

With the principles thus clearly established, it became the common practice at the Principal Probate Registry for the orders and decrees of the Court of the domicile to be followed without question, and in the absence of any exceptional circumstances, the decisions are not reported, and in most cases being grants made in the Registry never came before a judge at all.

In the case of *In the estate of Levy* (deceased), [1908] 8 P. 108, however, in a case where the Court of the domicile of a deceased person, part of whose estate consisted of personal estate in England, had made an appointment of a judicial administrator for a limited period of time, this Court, under sect. 73 of the Probate Act, 1857, made a general grant to the foreign administrator (follow-

ing a similar grant in the case of *In the goods of Abaroa* (deceased), [1902], Gorell Barnes, J., unreported).

It must, however, at once be said that there is considerable doubt whether *In re Levy* would be followed at the present time (see "Law Quarterly Review," January, 1913, p. 40), and in practice grants in similar circumstances are invariably limited to the time during which the foreign grant is in force. (See *Re Gouin*, cited in "Law Quarterly Review," as above; see also case of *In the goods of Steigerwald, supra*, which was not referred to in *Re Levy*.)

Having considered the general rule, we proceed at once to deal with the exceptions, that is, with those cases in which the foreign grant is not completely obeyed. Such exceptions are principally of three kinds:—

(a) Where the grant is made abroad to a party as executor, who would not be considered an executor of English law.

(b) Where the grant is made abroad to someone who is not regarded by English law as having the requisite capacity to act as administrator, as for instance, a grant made to a minor.

(c) Where the grant is made abroad, not to a party entitled but to someone else, as for instance, to a nominee of the person entitled or to a creditor.

Let us take these in their order:—

(a) It is abundantly clear that probate can only be granted to an executor recognised as such by the English Courts. If the powers given to him fall short of those of a testamentary executor in English law, probate will not be granted here, whether such a grant has been made in the Courts of the domicile or not; although, no doubt, in a proper case a grant of administration with the will annexed will be made.

See *In the goods of Read* (*supra*), and also *In the goods of Mackenzie* (1856), Deane, 17, where Sir John Dodson, following *Re Read*, made a grant in these circumstances. A person had been appointed personal representative by the Courts of the domicile (Scotland) who would not have been so entitled by English law. A grant was made to the same party limited to the property in England, the character varying so as to bring the grant into conformity with the English practice.

In the later case of *Laneuville* v. *Anderson* (1860), 30 L. J. P. 25, there is a detailed judgment of Sir C. Cresswell which is of great importance upon this point. The headnote reads as follows:—

"When an executor is appointed by a foreign will, the nature and extent of the office conferred by the appointment are regulated by the law of the testator's domicile and not by English law, even as to property situate in England. If by the law of the domicile the executorship lasts only for a limited period, the Court of Probate cannot after that period has expired grant probate to the executor. A domiciled Frenchman by his will appointed A. *exécuteur testamentaire*, and B. his universal legatee. A French Court having decided that A.'s executorship had expired, and that he had no longer any right to intermeddle with the estate of the testator, either in France or England, but that such right belonged exclusively to the representatives of B., the Court of Probate, holding that it was bound by that decision, refused to grant probate to A., and granted administration with the will annexed to the representatives of B."

In the case of *In the goods of Oliphant* (1860), 30 L. J. P., it was laid down that the proper course was to grant a residuary legatee letters of administration with the will annexed, and not probate.

Other authorities as to foreign executors not always being recognised by the Courts of this country are *In the goods of Cosnahan* (1866), L. R. 1 P. & D. 183, where it was decided that the English Court of Probate follows the grant of the Court of the testator's domicile, as to the document which that Court has admitted to probate, but not as to the person to whom the grant is made. Probate had been granted in the Isle of Man to a person as executor according to the tenor, who would not have been so entitled here; a grant was therefore made of administration with the will annexed under the 73rd section. The next case of importance was that already quoted of *In the goods of Earl*. There the testator died domiciled in New South Wales, and probate of his will was granted by the Courts of the domicile to an executor according to the tenor. By English law, the applicant would not have been considered an executor according to the tenor, but nevertheless the Court here granted administration with the will annexed to the executor as the person entitled to administer under the grant of the Court of the domicile.

This was followed in *In the goods of Briesemann* (*supra*), and subsequently in *Re Von Linden*, [1896] P. 148, in which latter case Sir Francis Jeune (President) discusses the nature of an executorship according to English law. He says:—

"Where in a foreign will a person is in terms named executor, probate will be granted in this country to that person, but where the powers granted to a person in the will fall short of the powers of executors according to English law, there will be a grant to him of administration, with powers as near as may be to those granted by the will. The present case lies between those two cases. On the one hand, the applicant has not been in terms appointed executrix, but we are able to infer that it was

the intention of the testator that she should have the powers of an executrix—that is, she is an executrix according to the tenor. In dealing with a foreign will, it is, of course, even more necessary than in the case of an English one, that the Court should be satisfied that the powers granted by the will are those of a full executor."

Since that decision, in a case of *Re Mary Moffatt*, [1900] P. 152, the deceased died domiciled in Hayti, and left a will, but appointed no executors expressly; by consent a grant was made in England, under the 73rd section, with the will annexed without citing the next of kin.

The rule of foreign law that an executorship only lasts for a period of a year and a day from the death of the testator (see *Re Groos*, [1904] P. 269 (Gorell Barnes, J.); and Tristram & Coote's Probate Practice, at p. 53) is now fully recognised in the Principal Probate Registry, and the executors appointed by the deceased will be passed over, without further proof, once their period of activity has expired, that is to say, a grant of *probate* will no longer be made to them.

Secondly.—(b) The foreign grant will not be followed where the grant is made to someone who is considered not to possess the requisite capacity in English law. Thus, in *In the goods of Duchess of Orleans* (1859), 28 L. J. P. 129, the headnote is worded as follows:—"Although the Court of Probate in granting administration of the effects of a person who died domiciled abroad generally follows the law of the domicile, it will not grant administration to a person who by the law of England is incapacitated from taking upon himself the liabilities of an administrator. It will, therefore, refuse to grant administration to a minor, even though by the law of the domicile such a minor might be entitled to administer the estate of the deceased."

In that case administration was granted to the lawful guardian of the minor.

There is a *dictum* of Sir Francis Jeune to the same effect in the case already cited, *In re Meatyard,* where he says (at p. 130):—

"This Court cannot follow the foreign law so far as to grant administration to anyone who is personally disqualified from taking the grant. For instance, however much the foreign Courts may think that a minor should have the grant, this Court cannot go so far as to give it to such a person."

Although this is undoubtedly the modern rule of law, there is one reported case in which a grant was made to a minor, viz., in the case of *In the goods of Da Cunha* (1828), 1 Hagg. Eccl. 237. The facts of that case were certainly very special, and the decision was practically a consent judgment; however, there a residuary legatee under a will was a minor, and was married, the husband being also under age. By Portuguese law, which was the law of the domicile, guardians could not be appointed, and ultimately administration was granted here to the residuary legatee, limited to the receipt of dividends upon a large sum of Consols standing in the name of the deceased in the books of the Bank of England.

This case is an isolated one, and would probably not be followed at the present time. It was not cited in the case of *In the goods of Duchess of Orleans.* Mr. Nelson, in his book on Private International Law, seeks to distinguish the two cases (see p. 209). It is certainly true that in the case of *Da Cunha* there were practically no administrative duties to perform, and that the decision, given at a very early stage of the history of private international law upon this subject, was an eminently "convenient" one in the particular cases.

It is submitted, however, that the law is as stated, and that this case could in no way be treated as an authority for the proposition that a minor could now obtain a grant. The headnote to the case of *In the goods of Briesemann*, already cited, is also in point: "The Court will follow the grant of the foreign domicile, unless the administrators appointed by the foreign Court are by the law and practice of this country personally disqualified from taking a grant here."

Under this heading may also be included those cases in which the English Court refuses to give effect to the foreign grant as being inconsistent with its own practice. Such cases are *In the goods of Joaquim Jose Ferreira Veiga*, 3 Sw. & Tr. 13.

There the deceased died domiciled in Portugal, and a grant was made by the Prerogative Court of Canterbury to an executor entitled according to the law of Portugal; ultimately changes took place in the executors in Portugal, and on one executor renouncing in conformity with the law of Portugal, another person was named executor for all purposes by the Portuguese Courts. The Court, however, refused to grant administration *de bonis non* to the new executor on the ground that there was no authority for an executor who took such a grant in the English Courts renouncing, and that, therefore, there was still a legal personal representative of the deceased in this country, and in face of this fact the Court could not follow the grant of the foreign Court as it otherwise would have done. (For the case of an almost opposite decision, where, however, no previous English grant had been made, see *In the goods of Black* (1887), 13 P. D. 5, where, on an appointment of the Administrator-General of British Guiana consequent upon the renunciation of an executor,

administration was granted here to the Administrator-General.)

Another case which illustrates the rule that a grant will not be followed which violates the English practice, is *Re Vannini*, [1901] P. 330, which is an authority for the statement that even where the husband consents, the Court will refuse to grant probate to the executor named in the will of a married woman who dies domiciled abroad, although with such consent the Court will make a grant of administration with the will annexed. (And see *In the goods of Hallyburton*, L. R. 1 P. & M. 90; and *In the goods of Tréfond*, [1899] P. 247.)

(c) The third exception to the rule of following the foreign grant occurs when the grant is made abroad, not to a party entitled, but to someone else, as for instance, to a nominee of the party entitled, or to a creditor.

Thus, the case of *In the goods of Weaver* (1866), 36 L. J. P. 4, shows that where administration of the estate of an intestate who dies domiciled abroad, is granted by the foreign Court to a person entitled in his own right to administration, the Court of Probate will follow the foreign grant; but it will not do so where the foreign grant is made to a nominee of the person entitled, except upon the express consent of the latter.

Sir J. P. Wilde says in his judgment:—

"It is said the Court ought to dispense with the consent, because it is bound to follow the American grant; when the Court of a foreign country, in which a person dies domiciled, grants administration to one who by the law of that country is entitled to the grant, this Court in making a grant with reference to the property situate in England, follows the foreign grant. But this case does not fall within that rule, for here the grant was made, not to persons entitled to it, but to persons nominated by the

widow, and if the foreign law is to be followed, this Court should require, as was the case in the American Court, the widow's consent before the grant is made."

(It appears that subsequently this consent was forthcoming, and on the motion being renewed a grant was made in the terms of the motion.)

In the later case of *In the goods of Clayton* (1886), 11 P. D. 76, a grant was made to a nominee, but the circumstances were very special. In that case trustees for carrying on the deceased's business had been appointed, and this appointment had been confirmed by the Chancery Division. A grant of administration was accordingly made by the Probate Court to the trustees for the sake of convenience.

Grants to creditors abroad stand upon the same footing as grants made to parties other than those entitled in their own right. In the case of *Blackwood* v. *The Queen* (1882), 8 A. C. 82 (Privy Council), the judgment was delivered by Sir Arthur Hobhouse, and contains the following statement:—

"The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction—even that privilege is not necessarily extended to all legal personal representatives—as for instance, when a creditor gets letters of administration in the Court of the domicile." (See pp. 92 and 93 of the report.)

Generally speaking, therefore, it may be said that the authorities quoted above show that it would require a very strong case of inconvenience to induce the English Courts not to follow the foreign grant.

It certainly seems eminently desirable that the rule should prevail as frequently as circumstances will allow, and that proper effect should be given by the English Courts to the decisions of the Courts of the domicile in all cases, except those in which the decision given conflicts with the established principles of the English law.

It must be added that the rule of following the foreign grant is not limited to cases in which the Court of the domicile has made a grant in accordance with its own *lex fori*—the rule extends to and covers cases in which the Court of the domicile refers the matter to some other legal system for decision, as for instance, where the *lex domicilii* adopts the theory of the *renvoi*.

Thus, in *Re Trufort, Trafford* v. *Blanc* (1887), 36 C. D. 600, Stirling, J., held that the decision of the Swiss Courts, which by the law of the domicile were the proper *forum* to determine all questions relating to the succession, was binding upon the English Court, and he decreed accordingly.

Moreover, although in the cases cited, we have in each case been dealing with those cases wherein an actual formal decision of the Court of the domicile has been pronounced, the rule is precisely similar where some person is entitled by the law of the foreign country to administer the estate, and such person, on proof of his authority according to the *lex domicilii*, will be entitled to administration here.

Thus, *In the goods of Beggia* (1822), 1 Add. 340, a public functionary of Morocco died leaving estate in this country, and a grant was made to an appointee of the Emperor in accordance with the law of Morocco. (See also *In the goods of Stewart* and *Re Rogerson*, cited above; also *In the goods of Maraver* (1828), 1 Hagg. Eccl. 498, where probate of the will of a married woman domiciled in Spain was granted to the son, as executor, on an affidavit

as to Spanish law; and, further, *In the goods of Sartoris* (1838), 1 Curt. 910, where a deceased died intestate in Paris leaving children under age. The nearer parties having renounced, administration was granted to the guardian of the minors, who had been appointed by the proper authorities in Paris.

Another case to the same effect, and which exactly illustrates this point, is *In the goods of Hill* (1870), L. R. 2 P. & D. 89, 90 (Lord Penzance). The headnote of that case is as follows:—

"When the deceased dies domiciled in a foreign country, and an application is made to this Court, either for an original or a *de bonis non* grant of administration, this Court will be prepared to make it to the person recognised by the proper Court of the foreign country."

Similarly, *In the goods of Oldenburg* (1884), 9 P. D. 234, which had reference to the estate of Prince Peter Georgevitch Oldenburg of Russia. By the law of Russia no will or codicil of a deceased member of the royal family has any effect as such, but the deceased's property is distributed according to an "*acte définitif*," decreed by the other members of the family and confirmed by the Emperor. This having been done in the present case probate was granted in the English Courts of the "*acte définitif*," although a will and several codicils were in existence.

Scotch, Irish and Colonial Grants.

Special legislative provision has been made for dealing with Scotch, Irish and Colonial grants of representation, and for providing for such grants being made executory here, and for English grants being extended for use there. Scotch grants are covered by the Confirmations and Probate Act, 1858 (21 & 22 Vict. c. 56), Ireland by the

Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), and the British Colonies by the Colonial Probates Act, 1892 (55 Vict. c. 6). (For details of the practice under these Acts, see Tristram & Coote's Probate Practice.)

It will have been gathered from the foregoing statements upon the practice of the English Courts to follow the foreign grant, that the rules which in this chapter are more particularly dealt with, are of greater practical importance in cases of administration than in those of probate.

Probate in this country being confined to executors in the English sense, it follows (as has already been pointed out) that no decision of the Court of the domicile could operate to extend the powers given to a person by will, and convert such person into an executor entitled to probate unless that would be the view taken of his powers in this country. Although this is true, it must not, however, be supposed that the decision of a foreign Court is unimportant in cases of probate; whilst the decision of the Court of the domicile would not in all cases be followed here, in that a grant of probate might not be made, it is abundantly clear that the English Courts will consider themselves bound by the decision of the foreign Court as to the testamentary character of an instrument, and even if unable to make a grant of probate, will give effect to the foreign decision, and make a grant of administration with the will annexed to the party entitled. (See *Miller* v. *James,* L. R. 3 P. & D. 4.)

We have hitherto dealt with the question of following the foreign grant entirely from the standpoint of the English Court before which a foreign grant is pleaded; the position in general holds good when the opposite position is taken, that is, when the foreign Courts have to

consider the effect of an English grant of administration. Without going into the matter in greater detail, it may be stated that the English Courts expect reciprocal treatment at the hands of foreign judges, and a study of the decisions of the principal Continental countries tends to show that the practice of respecting the decision of the Courts of the domicile is not confined to this country, but is very generally met with in other parts of the civilised world.

CHAPTER XVII.

GENERAL MATTERS—RIGHTS OF CREDITORS.

THE position of a creditor, his rights and obligations, are governed by the *lex fori*, as the payment of debts due from the estate of a deceased person constitutes a part of the process of administration.

As to immoveables administration, however, is governed in general by the *lex situs*.

Therefore, as against immoveable property of the deceased creditors will rank in accordance with the priorities prescribed by the *lex situs*, and their powers of enforcing payment of their accounts, the nature and extent to which they are secured, and all other questions relating to the enforcement of their rights will be determined by the same law.

This statement of the law presupposes that the deceased has not left a will in which a contrary intention is shown. It must not be assumed, however, that a creditor's rights can be reduced by any provisions in the testator's will, although it is possible for a testator to so dispose of his property as to give creditors important rights over property which they might not otherwise possess.

If the testator has shown an intention to override the general rule, his assets will, if necessary, be marshalled according to that intention, whether they be moveable or immoveable.

With regard to moveables the English law is clear.

Creditors' rights and liabilities are limited by the *lex*

fori, and by English law the creditors all take *pari passu*, whether they are English or foreign creditors.

In the case of *In re Kloebe, Kannreuther* v. *Geiselbrecht* (1884), 28 Ch. D. 175, the authorities were considered by Pearson, J., and the above rule strongly laid down.

The deceased, a domiciled Greek, left assets here and partnership debts owing to English and foreign creditors. It was contended on behalf of the English creditors, that the English estate must first be distributed amongst themselves, and then the balance handed to the foreign administrator for distribution in his own *forum*. This view, however, was not successful.

Mr. Justice Pearson, in his judgment, approved a passage from Professor Westlake upon the subject, and continues:—"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."

The matter is well put in the old case of *De la Vega* v. *Vanna*, 1 B. & Ad. 284, where 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."

At a later place in his judgment in *In re Kloebe*, Pearson, J., says:—"Whatever the law in France or India may be, 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 farthest north or farthest south, is entitled to be paid equally with other creditors in the same class." The general proposition in the matter so far as international law is concerned, is stated in the Privy Council case of *Blackwood* v. *The Queen* (1882), H. C. 82, where Sir Arthur Hobhouse, in giving the judgment of the Court, says:—"The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most, it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as for instance, when a creditor gets letters of administration in the Court of the domicile."

And when the legal personal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors such priority as regards foreign assets as is shown by the cases of *Preston* v. *Melville* (1840), 8 Cl. & F. 1, and *Cook* v. *Gregson* (1854), 2 Drew, 286. For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality.

The subject of priorities deserves attention.

Whilst it is undoubted law that in administration in this country all creditors take according to English law, yet where foreign assets are being administered here with the consent of the foreign administrator, as to those assets foreign creditors will retain any priorities given them by the foreign law. (*Cook* v. *Gregson.*)

When Creditors are entitled to a Grant of Administration.

A creditor's title to obtain a grant of representation to the estate of a deceased person is inferior to the right of all other interested parties, and the ground of making the grant at all is the obvious one, of enabling him to pay himself his debt.

He can only apply if all other interested parties renounce, or having been cited refrain from taking out administration. The amount of the debt and the nature of it (whether judgment, special, or simple contract) is immaterial, unless there is a contest between the creditors themselves, when the grant is usually made in favour of the largest creditor.

The case of a creditor's grant is one of the exceptions to the rule of following the decision of the Court of the domicile.

Where a creditor obtains a grant in the Court of the domicile, that grant will not be followed here, and administration here must be applied for in strict accordance with English rules. (*Blackwood* v. *The Queen.*)

Liability of Administrator.

The liability of an administrator is primarily confined to such cases as are recognised and enforced by the Courts in whose jurisdiction he has obtained his powers.

But an English administrator is liable for all the assets he has received, wherever they were originally situate.

Thus, he must account for assets abroad which he has reduced into possession, provided, of course, that he has not done so under a foreign grant.

Again, by English law a foreign administrator who allows assets of a moveable nature belonging to the estate to be brought to this country without accounting for them to his own Courts, may be sued in this country for the administration of those assets, provided the action is properly constituted.

CHAPTER XVIII.

THE EXERCISE OF POWERS OF APPOINTMENT BY WILL.

To the general rule that a will disposing of moveables must be in the form required by the law of the testator's domicile, there is one further important exception, that is, in the case of wills operating to exercise a power of appointment over moveables, by virtue of some English instrument creating the power.

English rules treat the law of the domicile of the donor of the power of appointment as a more important factor in such matters than the law of the donee, and attach even greater importance to the proper law of the settlement or will under which the power of appointment arises.

The proper law of the settlement or will would, in accordance with the ordinary rules, be the law of the place where it was executed, or if the settlor had clearly intended some other system of law to apply, then such other system would govern.

The matter is one of considerable importance, as one of the commonest interests in property which is met with in British settlements and wills is that of the donee of a power of appointment. The donor has by his will or settlement granted to the donee an "authority" of some kind to dispose of certain property.

By the terms of the instrument creating it the exercise of this power or "authority" may be carried out in a number of ways, the most important way for our purpose being the appointment by will, in which case the document exercising the power must answer to the test of a will.

Where this is so, and it is desired to exercise the power, what is the test of capacity and what form should the will take ?

Again, if the deceased has left a will, by what test are we to determine whether the power has been exercised or not ?

The rules governing the matter in English private international law are somewhat complex, and depend considerably upon the terms of the instrument creating the power, and upon the circumstances of each case.

First, of capacity to execute a will for the purpose of exercising a power of appointment over personal property.

A person who is entitled to make a will by the law of his domicile, can, unless the instrument creating the power imposes special conditions, validly exercise a simple power to appoint personally by will, by any will valid according to the law of the domicile—even if such person has no testamentary capacity according to English law.

This is the result of the case of *D'Huart* v. *Harkness* (1865), 34 B. 328, read with the decisions on capacity, viz., *In re d'Angibau*, a case of appointment by an infant, and *Barnes* v. *Vincent*, a case of appointment by will of a married woman before testamentary capacity had been acquired.

In the case of *D'Huart* v. *Harkness* (1865), 34 B. 328, a will valid as to form by the law of the domicile, but invalid by English law, was held sufficient to exercise an English power of appointment over personal estate.

Conversely, a person can validly exercise such a power by a will made in English form, even when according to the law of the domicile the testator has no testamentary capacity at all.

This has now been definitely decided by the House of Lords in the Irish appeal case of *Murphy* v. *Deichler*,

[1909] A. C. 446. In that case a will executed in the English form by a domiciled German was held to be a good exercise of an English power of appointment, although the will was not properly executed in accordance with the law of the domicile.

The decision was not given as being right in principle, but simply on the ground that the Court did not see its way to modify a well-established practice by which such wills were treated as valid for this purpose.

The decision of the highest tribunal set doubts at rest which had arisen as to the correctness or otherwise of such cases as *Tatnell* v. *Hankey, Crookenden* v. *Fuller, Re Alexander, Re Hallyburton, Re Huber,* and others which are now devoid of interest except to the student of legal history.

It must not be taken for granted that the House of Lords approves this state of the law, indeed in the case referred to the Lord Chancellor intimated that if the matter had come before them, in an early stage in the history of the law upon the subject, they probably would have arrived at a different conclusion.

The reason for these rules is that the exercise of a power of appointment does not strictly call for testamentary capacity at all. The donees derive their title from the instrument creating the power, and do not depend on the general law for their capacity to exercise the same, even though the document by which the exercise is effected takes the form of a will.

Where the terms of the instrument granting the power are not complied with as to the formalities of execution, no will can operate as an exercise of the powers unless it complies with the Wills Act, 1837—*i.e.*, attested by two witnesses.

By the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26,

s. 10), it is specially enacted that a will well executed according to the provisions of that Act is "a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." (See *Re Daly's Settlement* (1858), 25 Beav. 456.)

In that case a testatrix whilst domiciled in England, but residing in France, made a will (before Lord Kingsdown's Act, and died prior thereto) valid according to French law, but not executed according to the Wills Act, 1837. The will did not therefore exercise the power.

The above section of the Wills Act, 1837, and sect. 9, as to execution of an English will, as well, do not, of course, apply to persons who are not domiciled here. (*Bremer* v. *Freeman* (1857), 10 Moo. P. C. 306.) Therefore, as the enabling provisions of sect. 10 of the above Act are limited to the wills of persons dying domiciled in England, no will of a person dying domiciled abroad can ever operate as an exercise of a power of appointment arising under an instrument whereby special formalities are prescribed, unless those special formalities are complied with (*In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442; *Barretto* v. *Young*, [1900] 2 Ch. 339), even though the will may be executed in strict accordance with sect. 9 of the Wills Act, 1837.

Where the will is not made in accordance with the terms of the power, and is not executed in accordance with the Wills Act, 1837, although it cannot operate to exercise the power, yet the will may be admissible to probate so far as the personal estate is concerned. (*In re Kirwan's Trusts* (1883), 25 Ch. D. 373.)

Where the terms of the instrument creating the power are complied with, a will made in any of the following

forms will be formally valid, and be capable of operating as an exercise of the power, if the construction allows:—

(a) If it complies with the Wills Act, 1837; or

(b) The Wills Act, 1861 (Lord Kingsdown's Act); or

(c) The law of the domicile either at date of making the will or at date of death.

Under the Wills Act, 1837.

Where the terms of the instrument creating the power prescribe a will and certain formalities.

Once the document complies with these formalities it is merely necessary as to form to show that the instrument is a valid will by English law.

It has now been decided that a will made in accordance with the English Wills Act, 1837, is valid as to form for purposes of exercising a power created by an English instrument, although it may not be in the form required by the law of the domicile. (*Murphy* v. *Deichler* (H. L.).)

Under the Wills Act, 1861.

Where the terms of the power are complied with, a will valid in accordance with the above Act will be sufficient as to form. This was not formerly the case, see *Hummel* v. *Hummel,* [1898] 1 Ch. 642; but see *In re Walker, McColl* v. *Bruce,* [1908] 1 Ch. 566.

By the Law of the Domicile.

Where the terms of the power are complied with, the English Courts will consider a will valid as to form if made in accordance with any law which the law of the domicile would apply.

Where the terms of the instrument creating the power refer to "a will," "a valid will," or "a duly executed

will," any valid will is sufficient in form. (*D'Huart* v. *Harkness*, 34 B. 328.)

Construction of Wills as to Exercise of Powers.

Of course, if a will which is valid in form contains an express reference to the property over which the testator has a power to appoint, little question can arise as to the effect of the will in its operation, and the question of whether or not the power has been exercised is not likely to arise.

Where, however, no reference is made, or where the reference is not clear, questions arise, and the rules governing such cases are of extreme importance.

It is assumed throughout this chapter that the matter arises under a British instrument, and is tried in a British Court.

This being so, the rules of evidence are governed in accordance with the usual principle by the *lex fori*.

If, therefore, a will made in France by a person domiciled there contains no reference to the appointed property, unsigned or unattested memoranda admissible in evidence by French law, cannot be given in evidence here to show the testator's intention, as such memoranda are not admissible according to English rules of evidence. (*In re Scholefield, Scholefield* v. *St. John* and *In re Young, Smith* v. *St. John*, reported together at p. 408 in [1905] 2 Ch. D.) These cases were taken to the Appeal Court, but were settled before argument. (See [1907] 1 Ch. 664.)

The facts were these: A testatrix domiciled in France, who had a general power over personalty, appointed her niece universal legatee of her property in England and France by a holographic will in French form. The will contained no reference to the power or the property, but certain memoranda in the testator's handwriting showed

a clear intention to appoint to the niece. Evidence showed that by French law everything would pass under the will, and the memoranda would be admissible as to intention. It was held by Mr. Justice Kekewich that the question of the exercise of the power was to be determined by evidence admissible by the law of England, and that the will did not operate to exercise the power.

Powers of appointment over property being peculiarly the creatures of English jurisprudence, are governed in English law, and when English rules apply, by special provisions.

Thus, sect. 27 of the Wills Act, 1837, makes a general bequest of the property of a testator operate as an exercise of a general power of appointment.

If, therefore, the will is made by a person domiciled in England, this section will apply, as in that case the construction would be governed by English law.

Moreover, if the domicile of the testator is foreign, but English rules of construction apply owing to the wording of the will, the same result will ensue.

Thus, in the case of *In re Price, Tomlin* v. *Latter,* [1900] 1 Ch. 442, a French subject domiciled in France made a will in holographic form, but containing the following words: "I desire my will to take effect in England as in France." The will contained a general bequest. It was held that this showed a desire on the part of the testatrix for English principles to govern her will, and English principles were admitted. Sect. 27 of the Wills Act, 1837, took its place, and therefore the will operated by the application of that section to exercise the power.

As this was a will of a testatrix domiciled in France, the will would have been construed according to the law

of the domicile had it not been for the reference to English principles made by the testator.

Thus, in the case of *In re D'Este's Settlement Trusts, Poulter* v. *D'Este*, [1903] 1 Ch. Ap. 898, a will made in French form by a person domiciled in France, and containing no indication of the testator's intention for the will to be governed by a different system of law, was construed according to the law of the domicile, and sect. 27 did not apply.

Consequently, although the will was valid for probate (as far as moveables were concerned), and although it contained a general bequest, the power was not exercised, and the property passed in default of appointment.

The general leaning of the Court is towards applying English rules of construction wherever possible, and comparatively slight indications of a desire for English rules to govern seem sufficient. See *Re Baker's Settlement Trusts*, (1908) W. N. 161, where a general bequest made in a will in English form by a testatrix domiciled in Switzerland operated to exercise a general power of appointment.

The facts were that Mrs. Baker under her English marriage settlement had a power of appointment over one-half of the trust property in the event of her surviving her husband. She survived her husband, resided for many years in Switzerland, and acquired a domicile there. Shortly before her death she executed a will in English form, attested in accordance with English law, containing a general residuary bequest.

The judgment of Parker, J., in this case is as instructive as it is short. He said the effect of the decisions *In re Price, In re D'Este's Settlement Trusts*, and *In re Scholefield* was that a general power of appointment could be exercised by a will which, though not conforming to the

requirements of English law, was valid by the law of testator's domicile, or by a will which, whether valid by that law or not, was valid according to the forms of English law; and that in the former event—that of the will being valid only by the law of the domicile—*primâ facie* sect. 27 of the Wills Act was not incorporated, and the will would be construed irrespective of the section, although any indication on the face of the document that it was to be construed according to English law, would justify that construction being given to it with reference to sect. 27. The question, therefore, was whether the will ought to be construed by the law of the domicile or according to English law, and in the latter event, whether with or without reference to sect. 27. If it could be so construed, the general residuary bequest was sufficient to exercise the power. Clearly for some purposes the document must be construed according to English law, inasmuch as if it had been a valid will by the law of the place of domicile, the first thing to be done would have been to ascertain the meaning of the terms used, and what was intended to pass by the general bequest. The most reasonable principle to apply was that the will should be construed, not according to hypothetical constructions which the foreign Courts might place upon it, but wholly with reference to English law. That being the case, sect. 27 was clearly applicable, and the power was therefore exercised by the will.

A further question, however, arises. Assuming that the will does operate as a valid and sufficient exercise of the power of appointment, what is the effect of such an exercise ?

By English principles the operation of a general power of appointment over moveables is such that the property becomes general assets of the testator for all purposes. (*Re Hadley*, [1909] 1 Ch. 20.)

Where, therefore, the law of the domicile of the testatrix gave the mother certain rights of *legitim* over the deceased's estate, it was held that the mother was entitled to her appropriate share of the appointed property. (*In re Pryce, Lawford* v. *Pryce*, [1911] 2 Ch. 286 (C. A.).)

This decision reversed that of Mr. Justice Parker in the Court of first instance.

It had previously been held in *Re Hadley*, [1909] 1 Ch. 20 (C. A.), that upon the exercise of a general power of appointment by a testator, the property concerned became general assets, and therefore estate duty on that property was payable out of the whole of the general estate, and not merely out of the proceeds of the property itself.

The later decision now under discussion expressly follows *In re Hadley*, and the result would appear to be the logical inference from the earlier decision.

The case of *In re Megret, Tweedie* v. *Maunder*, [1901] 1 Ch. 541, seems to suggest that whereas upon the exercise by will of a general power of appointment, the property subject thereto becomes subject to the provisions of the testamentary law of the domicile of the testator, different considerations may possibly arise where the power is created by an English settlement.

The suggestion apparently is this: If a power is reserved by a settlement to appoint property, the capacity to entirely dispose of that property is not affected by a subsequent change of domicile of the donee of the power of appointment.

If the test to apply is the law of the settlement, this would of course be so, but the limitation seems to require rather stronger justification than the difference between two forms of legal instruments. In the above case an Englishwoman had power to appoint property by virtue of an English settlement; she subsequently married a

Frenchman domiciled in France, and died leaving a will. Cozens-Hardy, J., decided that the limitations upon her testamentary capacity imposed by the law of the domicile had no application to the property comprised in the settlement, over which her power to dispose remained absolute.

In the later case of *In re Pryce* (referred to above), the Court of Appeal further commented on this case, and *In re Bald* and *Pouey* v. *Hordern*.

Looking closely at the judgment of Cozens-Hardy, M. R., it would seem that the true test depends upon the nature of the limits of disposition allowed by the power to appoint.

If the power is a special one, or if the terms of the power do not allow the donee to make the appointed property general assets for all purposes, then the limitations (if any) on testamentary power of the appointor imposed by the law of the domicile will not apply, and the capacity to appoint will be governed solely by the law of the instrument under which the power is created.

If this is the true test, it is immaterial whether the power is created by a settlement or will, and the result as to the effect of appointment will be the same in each case.

It may be confidently asserted that the law upon this branch of our subject has not yet received its final treatment at the hands of English judges.

There are a number of earlier decisions that appear inconsistent with the principles of the judgments in later cases, and which could not, therefore, be relied upon as authoritative at the present time. The idea in this work has been, as far as possible, to give an accurate statement of the law as it would be enforced in the Courts of this country at the present time, and matters merely of historical interest have not been dealt with at length.

CHAPTER XIX.

DEATH DUTIES.

It is now an almost universal rule that a State levies some imposition upon the possessions of a citizen which pass to other parties by reason of his death.

In this country heavy duties are payable by a deceased's estate upon all property within the United Kingdom, and where the deceased died domiciled therein duties are also payable upon all moveable property of the deceased wherever situate.

Domicile is therefore an important factor. Independently, however, of domicile, the property within the jurisdiction of the English Courts is liable to English estate duty where the requisite conditions exist, and in many instances certain other duties besides.

The death duties which at present are in force in English law are:—

Estate Duty, which is a tax on property passing on death according to its capital value.

Legacy Duty and Succession Duty: Duties payable by those entitled to property on death, and varying in scale according to the relationship between deceased and successor.

Settlement Estate Duty: A special duty payable on any settlement created by the will of the deceased, or on property which, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of it.

Estate Duty.

Mr. Bentwich says (*a*):—

"English estate duty is due on all the property which was subject to probate, legacy and succession duty, and is levied, in addition to the two latter, in cases to which they apply."

The duty depends on the *situs* of the property, and is a tax on the property itself.

Domicile does not affect the liability of assets in this country, although the fact of a testator being domiciled here makes the duty applicable to all moveable property of the deceased wherever situate—both in this country and elsewhere.

"A tax to the British Government can obviously not be exacted in respect of property locally situate abroad which passes on the death of a person abroad domiciled abroad to foreign trustees for foreign beneficiaries. To attract the duty, there must be some British element in the case." (See Soward's Death Duties.)

Immoveable property situate abroad is not subject to British death duties, even when owned by a British subject domiciled and resident here. When situate here, such property is liable to these duties, even when owned by a foreigner who is neither domiciled nor resident here.

Yet, if immoveables abroad are to be sold, and a British trust of the proceeds is created, it will then probably become subject to such duties. (See *In re Smith, Leach* v. *Leach*, [1898] 1 Ch. 89; *Att.-Gen.* v. *Sudeley*, [1897] A. C. 1; *In re Cigala's Settlement*, 7 Ch. D. 351.)

Moveables, if situate here, are liable; if elsewhere, only liable if they pass "to persons who become entitled by

(*a*) Domicile and Succession, p. 156.

virtue of the laws of this country." (*Att.-Gen.* v. *Wallace* (1865), L. R. 1 Ch. 1.) That means, where the deceased was domiciled here.

Moveable property at an embassy here is "locally situated abroad," and is not chargeable, unless the owner dies domiciled here. If not at an embassy, even though owned by a foreign sovereign, ambassador or diplomatic agent or member of suite, &c., such moveable property is chargeable with duty.

As to foreign moveables, *i.e.*, moveable property of a deceased person which are neither situate here in fact, nor are deemed by law to be so situate, duty is not leviable if the deceased was domiciled abroad. (*Thomson* v. *Adv.-Gen.* (1845), 12 Cl. & F. 1; and see Finance Act, 1894, s. 2 (2).)

This sub-section is as follows:—"Property passing on the death of the deceased when situate out of the United Kingdom shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

Legacy and succession duty are only payable on property abroad if deceased is domiciled here, or the property is made subject to English law by the terms of an English settlement, trust or power of appointment.

Foreign Immoveables.

Estate duty is not leviable in respect of real property and immoveable personal property situate out of the United Kingdom, unless such immoveables are assets of a partnership whose principal business establishment is situate in this country. (*Forbes* v. *Steven*, L. R. 10 Eq. 178; *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275.)

Moveables.

Reference must be made to the important statute—the Revenue Act, 1889 (52 & 53 Vict. c. 42)—by which it is provided that shares in British registered companies on colonial registers are to be considered as situate in the United Kingdom. (Repealing sect. 7 (b), Companies (Colonial Registers) Act, 1883 (46 & 47 Vict. c. 30).)

Estate duty is not leviable in respect of money which deceased has a general power to charge on realty situate out of the United Kingdom; nor on similar property, the subject of a special power of appointment.

Estate duty is not leviable in respect of any interest or any annuity not payable or recoverable within the United Kingdom.

Legacy Duty.

Legacy duty is charged under 36 Geo. 3, c. 52 (1796), and subsequent Acts.

If a deceased is domiciled in the United Kingdom, no matter where he die, his personal property divisible amongst his next of kin or under the trusts of his will is liable to legacy duty wherever that property be situated, for the *situs* of the property does not concern the question (*b*). (*Stokes* v. *Ducroz* (1883).)

Should the deceased be domiciled elsewhere than in the United Kingdom legacy duty will not be payable. (*Thomson* v. *Adv.-Gen.*, 13 Sim. 153.)

In that case Lord Chief Justice Tindal, in delivering judgment, says:—

"The question is this: A. B., a British subject born in England, resided in a British colony, he made his will and died domiciled there. At the time of his death he had

(*b*) In certain cases where net estate under 1,000*l.* payment of estate duty alone is sufficient, and no other duties are chargeable.

debts owing to him in England, which his executors collected, and out of the funds collected paid legacies to certain legatees in England. The question is, are these legacies liable to the payment of legacy duty? It is the opinion of all the judges who have heard the case argued, that the said legacies are not liable to the payment of legacy duty."

The question of liability to legacy duty is therefore largely one of fact. Was the deceased domiciled in the United Kingdom or not? and for the purposes of legacy duty the domicile of the deceased is ascertained according to English law, in precisely the same manner as it is for all other purposes of administration and succession. For estate duty and other death duty purposes the domicile of the deceased means in every case the domicile at date of death.

In fact, a large number of the cases which are authorities upon matters of domicile in succession are revenue cases, in which the question of domicile has been litigated with reference to liability to duty.

The *incidence* of legacy duty depends upon a domicile within the United Kingdom.

The duty extends to "everything of a personal nature by which anyone benefits, either under a will or by the death of a person intestate under the statute for the distribution of an intestate's effects."

Succession Duty.

This is charged by the Succession Duty Act (16 & 17 Vict. c. 51), 19th May, 1853, which imposes this duty in its present form.

The tax is limited to property in Great Britain and Ireland. If the domicile of the deceased is foreign at the

date of his death, personal property here is not liable to succession duty (*Wallace* v. *Att.-Gen.* and *Jeves* v. *Shadwell* (1865), L. R. 1 Ch. 2), except, as under, in the cases of English trusts.

Where a fund is subject to an English trust, and becomes divisible on a death, the property is liable to succession duty here.

Thus, in *Re Badart's Trust*, L. R. 10 Eq. 288, the testator, whose domicile was foreign, directed a sum of money to be invested in the English funds, and the dividends to be paid to a tenant for life, and thereafter the capital and income to be divided among his nephews and nieces. Held by Malins, V.-C., that on the death of the tenant for life there was a succession within the meaning of the Act, and that duty was payable, following the decision of Stewart, V.-C., in *Re Smith's Trusts*, 12 W. R. 933.

These cases were confirmed in the House of Lords in *Att.-Gen.* v. *Campbell*, L. R. 5 E. & I. 524 (A. C.), and *Lyall* v. *Lyall*, L. R. 15 Eq. 1. Since then the case of *In re Cigala's Trust*, L. R. 7 Ch. 357, which is probably the best known authority, has been decided.

There an English lady, who had acquired an Italian domicile by marriage, assigned certain property belonging to her in France, consisting of French *Rentes* and other securities, to trustees of an English settlement, executed in England, upon trust after the death of her husband and herself for the children of the marriage. The husband survived, and died leaving the funds in the hands of English trustees.

It was there held that the succession duty was payable as the settlement was a British settlement, the trustees were British, the legal ownership of the property was in persons subject to British jurisdiction, and the *forum* for deciding

the claim was a British Court, as if the children wished to obtain the trust fund, administration proceedings would have had to be commenced here.

Similarly, funds the subject of an English power of appointment are liable to duty, even though the appointor is a foreigner with a foreign domicile. (*In re Lovelace's Settlement*, 28 L. J. Ch. 489; *In re Wallop's Trusts*.)

Settlement Estate Duty.

This duty is payable whenever a settlement is created by the deceased, even though the testator be a foreign subject with a foreign domicile. The duty is payable upon so much of the settled fund as is provided by English assets.

Thus, the usual method of calculation is represented by the following equation:—

$$\frac{\text{English estate}}{\text{Total estate}} \times \text{of settled fund} = \text{fund on which settlement estate duty is payable.}$$

From which it will be seen that duty is payable upon the proportion of the settled funds which the English estate bears to the whole estate.

Presumably, therefore, if the deceased's will expressly limits the settlement to foreign assets, no duty would be payable here in respect of such settlement.

Income Tax and Super-Tax.

Although super-tax is not a death duty in the proper sense of the term, in that it is payable during the lifetime of a person, yet as an estate may be liable in respect of this tax it is important to note the following.

When the income enjoyed by a person since deceased

was of such an amount as to render him liable in his life-time to assessment to super-tax as imposed by the Finance (1909-10) Act, 1910, and the deceased dies without the current tax having been discharged, his estate will be liable for the super-tax so unpaid.

It was at one time expressly contended that super-tax was not capable of apportionment, and that if the deceased died after the commencement of a financial year, the full year's tax became due on his estate.

It is, however, expressly provided by sect. 6 of the Finance Act, 1912, that the duty in such cases shall be apportioned, and only the proportion of income due from the commencement of the financial year to the date of death shall be liable to be taken into account for the purposes of calculation of the tax.

As the whole principle upon which super-tax is assessed is similar to that under the Income Tax Acts, residence and domicile are not material.

It will be remembered that income tax is only payable by foreigners upon profits or incomes made or derived from this country.

If, therefore, a foreigner permanently resident out of the United Kingdom, and domiciled abroad, receives dividends of over 5,000*l.* in value per annum, such foreigner will be liable to super-tax here, in spite of such foreign residence and domicile.

CHAPTER XX.

THE THEORY OF RENVOI.

Reference has already been made to the doctrine of the *Renvoi,* or throwing back from one Court to another. The subject is by no means free from difficulty, and it may assist if we endeavour to deal with the matter very simply.

It will probably be most convenient to do this under three headings:—

(1) What is *Renvoi?*

(2) Is *Renvoi* accepted by the Courts of this country? and

(3) Is it desirable that the *Renvoi* doctrine should be accepted by the English Courts?

Our first consideration will therefore be, what is *Renvoi?* The word *Renvoi,* and, indeed, the doctrine which the word is used to denote, are of French origin.

In the year 1871 a case came before the French Courts (*a*), in which a deceased person, who was a subject of the Grand Duchy of Hesse, had died intestate in France at Versailles, leaving moveable property in France. Litigation ensued as to the persons entitled respectively by German and French law. During the course of the case the following point was established, viz., that the law which was to be applied to the distribution of the moveables belonging to the deceased was the law of the nationality. The full effect of such a decision does not appear to have been at once appreciated.

Wherever the law of the country of which the deceased

(*a*) See the full report in Mr. Sewell's "French Law affecting British Subjects," pp. 36—46.

was a subject admitted the law of the nationality as the test of personal law, no difficulty arose. Eventually, however, a further case came before the French Courts, where the deceased was a subject of a country (Bavaria) where domicile was recognised as the test of personal law and not the law of the nationality.

What effect was to be given to this? Such was the point at issue in the celebrated *Forgo case* (*b*), which, after a chequered career, finally came on before the Cour de Cassation on the 22nd of February, 1882. (See Dalloz, R. P. 82, 1, 301; and also Clunet, 10, 1883, p. 64.)

The decision then given was to the following effect (*c*):—

"Whereas it is proved in fact, by the judgment under appeal, that François Xavier Forgo, a natural child, born Bavarian, died intestate at Pau, where he resided for many years; that the French Government obtained a grant to his estate, which was composed exclusively of moveable property in France, and whereas the said *Forgo,* not having been naturalised in France, not having lost his nationality of origin, and not having obtained from the French Government authorisation to fix his domicile in France, his succession ought to be governed by Bavarian law; but whereas in Bavarian law in the matter of the '*statut personnel*' the law of the domicile or the habitual residence of the deceased is applicable, and in the matter of the '*statut réel*' the law of the situation of the property, whether moveable or immoveable: that therefore in this case, without having to inquire whether, according to Bavarian law, intestate successions depend on the '*statut personnel*' or on the '*statut réel,*' French law was alone

(*b*) See Sewell, pp. 46—65, for a full report, and also the following pages for some comments of French jurists thereon.

(*c*) Sewell, p. 65.

applicable: whence it follows that the judgment under appeal was right in refusing to admit the claim made against the French Government by the collateral relatives of the natural mother of *Forgo*."

Professor Labbé's views on this case are well known. (See "Journal du Droit International Privé," 1885, and the passages referred to by Farwell, J., in *Re Johnson*, *infra*.)

Many distinguished jurists, both in France and other countries, have since followed Professor Labbé's lead, and still denounce the principles underlying the above decision.

From these two decisions the whole of the *Renvoi* controversy may be said to derive its origin.

Secondly.—Is the *Renvoi* accepted by the Courts of this country? In this country opinion is sharply divided both as to the wisdom of the doctrine theoretically, and as to whether the English Courts can be said to have in any way countenanced the theory, by judgments given in decided cases.

Before discussing these further it will be convenient to shortly review the contributions to literature upon this subject by English text-book writers.

The principal of these are as follows:—

(a) Professor Dicey, see Conflict of Laws, 2nd ed., pp. 715—723. Professor Dicey seems to have consistently been an advocate of the system of following the whole of the law of a foreign country, when reference was made thereto, and there is no trace in his writings of any support to the theory that such reference should be limited to the internal or municipal law.

From such an attitude, it might have been predicted that this learned jurist would probably incline in favour of the *Renvoi* theory. Although the subject is not dealt with in the first edition of his work on the Conflict of Laws, a

definite stand seems to have been taken in favour in the second edition at the pages indicated.

Professor Dicey deals with the *Renvoi* doctrine when discussing the meaning of the law of a country, and the opening sentence of his notes on this subject is as follows:—

"*Meaning of the Law of a Country and the Doctrine of the* Renvoi.

"My aim in this note is first to insist in connection with the meaning given by the English Courts to the term 'law of a country,' that they do virtually accept the doctrine of the *Renvoi:* and next to show the way in which this doctrine is generally applied by an English Court to a given case."

"With the inquiry, whether the English Courts act wisely or unwisely, logically or illogically, in accepting the doctrine of the *Renvoi,* I have in this note no concern whatever."

The subsequent pages referred to, bear out the views expressed in the passage quoted.

(b) Professor Westlake, Private International Law, 5th ed., Chapter II., pp. 31—42. Thus, he says (at p. 31):—

"On one view, which is called in French '*Renvoi,*' and in German '*ruckverweisung,*' the rules of private international law are understood as referring a judge to the whole law of a given country, and not merely to its internal laws, so that in the case there stated the principle of domicile would be understood as referring the English or Danish judge who might be seised of the case to the whole law of Italy: this reference being made, the principle of nationality included in the law of Italy would refer the same judge back to the whole law of his own

country; that law would send him again to Italy, and so on for ever. No result is arrived at: there is a *circulus inextricabilis*. It is needless to say that some means must in practice be found, and are found even by the partisans of the *Renvoi*, to stop the series of references back. But the opponents of the *Renvoi* treat the theoretical possibility of the *circulus inextricabilis* as proof that the rules of private international law never refer a judge to the whole law of another country, but only to its internal laws."

He then proceeds to discuss the theoretical objections advanced against the *Renvoi*, and also the decision in *Re Johnson*.

After referring to the fact, as established by Dr. Pawley Bate, that at present on the Continent of Europe the Courts of law seem to adopt the *Renvoi* oftener than to reject it, he concludes his observations thus (pp. 41, 42):—

"Thus, the *Renvoi* is adopted by the English cases when the international domicile fails as a ground of decision, either because (1) nationality and not domicile is adopted as the criterion in the foreign country in question (Baden, *In re Johnson*), or (2) the international domicile has not been accompanied by a legal sanction necessary in that country (France, *In re Bowes*).

"I conclude with the opinion, as founded in reason, that a rule referring to a foreign law should be understood as referring to the whole of that law, necessarily including the limits which it sets to its own application, without a regard to which, it would not be really that law which was applied. It is also the only opinion accepted in the English judgments, and is at least strongly supported on the Continent."

With reference to the second instance of the acceptance of the *Renvoi* in England (2), it may be pointed out, that supposing, in *Re Bowes* and similar cases, the deceased

had in fact obtained an authorisation from the French Government to fix his domicile there, the law applied in both the English and French Courts would probably have been French municipal law.

The Courts of the domicile would in such an event make no reference to any other system of law, and there would therefore be no question of *Renvoi* to consider.

(c) Dr. Pawley Bate, see Notes on the *Renvoi* and numerous contributions to the discussions of the International Law Association (*d*). No one acquainted with the Notes on the *Renvoi* by this writer could possibly underestimate their value. Dr. Pawley Bate has contributed extremely useful matter for a study of comparative law upon this subject.

His attitude to the *Renvoi* reminds a reader of Austin's Jurisprudence. It is an extremely learned criticism of the shortcomings, from a logical point of view, of many of the theories connected with the *Renvoi*, and an elaborate statement of the essentials which should exist before *Renvoi* could be worthy of acceptance.

The writer is the head of the school who deny the reference to the whole of the foreign law, and the cases usually relied upon in support of this proposition are dealt with at length and in some detail. Moreover, the writer appears to contend that unless the *Renvoi* is to be introduced wholesale into all branches of English private international law, its admission into any one branch should be strenuously opposed. The writer apparently does not share the view that questions of succession and administration can properly be treated on a distinct footing.

Attention is particularly called to the report to the Paris Conference already referred to, as from this it would

(*d*) See particularly a report on "The Renvoi and English Law" presented to the Conference in Paris on 29th May, 1912.

appear that the writer agrees with the results obtained by the acceptance of the *Renvoi* doctrine, but would prefer that such results were attained by some other process of reasoning.

In justice to the writer's opinions it may be admitted that the supporters of the *Renvoi* doctrine do not claim that such doctrine is the ideal decision in the matters to which it is applied. It is admittedly in the nature of a compromise, and must necessarily, therefore, be distasteful to the strict logician.

However, it is contended that in default of a practical agreement by the comity of nations on the points in question, the *Renvoi* doctrine does in actual cases provide a solution, which is usually satisfactory to the parties concerned, and which, in the opinion of many English jurists, is preferable to any decision which could be obtained without reference to that doctrine.

(d) Mr. Bentwich, see Domicile and Succession, Chapter VIII., pp. 164—188. The chapter referred to is a very valuable one, both for a clear statement of the English practice, and also for many important decisions of other countries, which are thus rendered accessible to English readers.

Mr. Bentwich perhaps puts the rules relating to *Renvoi* in this chapter a little further than any decided English case yet warrants, but in our view, such chapter is none the less valuable on that account.

Mr. Bentwich is an entire advocate of following the whole of the foreign law, and he defines *Renvoi* in general terms as follows:—

"The doctrine of *Renvoi*, therefore, may be taken to include all cases where the Court administering a succession accepts a reference of the law of the country (which, upon its own principles of private international law, it

would apply to the question before it) to the internal provisions of any other law, whether its own or that of another country."

The English cases upon the subject are also well treated and discussed. The more valuable part of the chapter, in our opinion, is, however, that in which the theoretical objections to the *Renvoi* doctrine are successively considered and, in our view, disposed of. Thus, the "*circulus inextricabilis*" of the theorists receives a very practical comment. (See pp. 183 and 184.)

After consideration of the instances of the adoption of the *Renvoi* by other countries, and of the tendency to the same result of modern legislation (German Civil Code), as indicated in the chapter under discussion, it is in our opinion very difficult to contend that the *Renvoi* doctrine is losing support. On the contrary, all the indications available seem to us to point to its general acceptance in the Courts of the countries principally concerned with questions on the conflict of laws.

(e) Mr. Edwin H. Abbot, junior, see "Law Quarterly Review," Vol. 24, 1909, p. 133 *et seq.*, Article entitled, "Is the *Renvoi* part of the Common Law?" In this interesting article the writer shows an undoubted hostility to the *Renvoi* doctrine, and contends that such doctrine has no place in English law.

Several of the author's criticisms are certainly well merited, particularly those dealing with *In re Johnson, Roberts* v. *Att.-Gen.*; although, as has also been pointed out by Mr. Bentwich (p. 171), such criticism is considerably weakened by the admission, which all supporters of the *Renvoi* doctrine are willing to make, viz., that parts of Farwell's, J., judgment in *In re Johnson* consist of "*obiter dicta*," and were unnecessary for the decision in that case.

In our view, Mr. Abbot's deductions from *Bremer* v. *Freeman* are incapable of support, and in our opinion there is nothing in the judgment of the Privy Council in that case which is inconsistent with the principles contained in the *Renvoi* doctrine.

(f) Mr. W. Jethro Brown, "Law Quarterly Review," Vol. 25, 1908, p. 145 *et seq.*, an Article entitled, "*In re Johnson.*" This learned author is entirely in favour of the view that a reference to a foreign law includes the whole of that law, and in fact his definition of *Renvoi* includes very little beside this rule.

He criticises Mr. Abbot's views of *Bremer* v. *Freeman*, and his general conclusion is entirely in agreement with our own, viz., that the judges of this country should in all cases apply whatever law the Courts of the country to which reference is made would themselves have applied.

There is a note in the "Law Quarterly Review," Vol. 14, 1898, pp. 231, 232, giving a useful description of the difficulties connected with the *Renvoi* doctrine.

There is also a very valuable contribution to the subject in the same journal, Vol. 19, 1903, pp. 243—247, in which Professor Dicey criticises both the *ratio decidendi* and the decision itself in the *Johnson case*. At the conclusion of Professor Dicey's note there is a learned commentary, presumably by the editor (Sir Frederick Pollock). The latter supports the decision, and does so expressly on *Renvoi* grounds.

There are other articles in the "Law Quarterly Review" bearing upon certain aspects of this subject, but which do not call for individual comment.

As to the relation of *Re Johnson* and *Re Bowes* to the question of what is domicile, see Laws of England, Vol. 6, p. 221, sect. 334.

Even with such sources of information available, it appears, however, that confusion still exists in the minds

of many as to several important points connected with the *Renvoi* doctrine. In the midst of whatever confusion there may be, there are, however, certain points which, it is submitted, are clearly established in English law. Of these the most important is the rule of following the whole of a foreign law and not merely adopting the internal rules or territorial and municipal law.

After the emphatic statements to this effect made by several different judges in the earlier cases, which seem to have been consistently followed in practice, it seems to us quite impossible to controvert this proposition.

There are those who would have us believe that each of the cases usually referred to in support of this statement can be distinguished and explained away upon some minor point of detail.

We are, however, more ready to peruse the original reports of these cases, and to draw what seems to us to be the irresistible inference from that perusal, namely, that reference to foreign law means a reference to any law that the foreign law would hold applicable. (See Laws of England, Vol. 6, p. 221.) Once this point is established, the acceptance or not of the *Renvoi* becomes a question of terms, and we must define the expressions used.

The word "*Renvoi*" itself is used to denote all or any of the following, and is thus extremely ambiguous:—

(1) The actual reference made by the Court seised of a matter to a foreign system of law.

(2) The reference back made by the foreign law, either to the original system (*ruckverweisung*), or to some other (*weiterverweisung*).

(3) The branch of law relating to the propriety of such references, and the acceptance or refusal of them.

(4) The special doctrine that when the laws of one country refer the matter in dispute to the law of the domicile, and the law of the country of the domicile refers such a matter to the law of the nationality, the English Courts would apply the latter law, usually the law of the domicile of origin.

(5) The general statement that the Courts of this country will, if necessary, adopt the view of the matter taken by the foreign Court, and decide accordingly.

It will readily be seen that the question of the attitude of the English Courts to the *Renvoi* depends very largely upon which of the above significations is contemplated by those who ask the question.

Authority in the form of decided English cases upon the matter is very slight, and the competing theories are so diverse, that some assistance can almost always be obtained from the few cases there are in support of any particular point of view.

Practically speaking, the only English authorities which in any way relate to the subject, in so far as administration and succession are concerned, are the following:—

Balfour v. *Scott*; *De Bonneval* v. *De Bonneval*; *Collier* v. *Rivaz*; *Frere* v. *Frere*; *Crookenden* v. *Fuller*; *Laneuville* v. *Anderson*; *Bremer* v. *Freeman*; *Hamilton* v. *Dallas*; *In the goods of Lacroix*; *Re Trufort*; *Re Brown Sequard*; *In re Martin*, *Loustalan* v. *Loustalan*; *Re Johnson*, *Roberts* v. *Att.-Gen.*; and in *Re Bowes*, *Bates* v. *Wengel* (each of which has been previously referred to in the text). (See Table of Cases.) Of these, all except *Re Trufort*, *Re Brown Sequard*, *In re Martin*, *Re Johnson* and *Re Bowes* are anterior in date to the French case originating the *Renvoi* dispute, and therefore, although

somewhat similar points arose, such cases cannot in strictness be referred to on the matter.

Of the remaining cases, *Re Trufort* related to the succession to English moveables of a deceased subject who had died domiciled in France. The English Court (Stirling, J.) followed the decision of the Court of the domicile, France, which would have applied the law of the nationality, namely, Swiss law, and therefore the English Court accepted the *Renvoi* made by the law of the domicile to the law of the nationality, and applied the latter law.

As the *Renvoi* was in this case a reference to a system of law other than the *lex fori*, the case is an instance of "*weiterverweisung*" and not "*ruckverweisung*."

The only possible exception to this case as a decision bearing upon *Renvoi* would appear to be, that it was a case of the ordinary rule of following the decision of a competent foreign Court, and therefore the English judge had very little option in the matter.

Reference, however, to the judgment of Stirling, J., shows that in the learned judge's view the matter could be considered on far broader lines than this.

In the goods of Brown Sequard related to the form of a will (see Chapter VII., *supra*), and it was there held that where a will was made in accordance with a law other than the law of the domicile, but which nevertheless would have been treated as valid by the Courts of the domicile, such will was valid here.

In the case of *In re Martin* (already referred to) there is an important *dictum* of Sir F. Jeune ([1900] P. 216) as follows:—

"Supposing it were possible to say that the domicile of the husband, although French according to English law, was English according to French law, then I think some

very difficult questions would arise; and I am very far indeed from saying that I have arrived at a clear view of those questions. I have considered the evidence given, and I confess it is extremely likely (I go no further) that, in that case, we should again have to apply English law, though I am not insensible to the difficulty Mr. Costelloe (counsel for the plaintiff) has pointed out, as to what he termed an 'infinite series.'"

This *dictum* is very valuable when we have to comment on *Re Bowes*.

In re Johnson and *Re Bowes* have already been partially considered on a previous page.

In re Johnson (which has been discussed at length by every writer on this subject) is treated by many as the first case in which the doctrine of *Renvoi* was first actually before an English Court. Others consider the case fully bears out the proposition already stated, that where the law of the country to which English law refers a matter, does not recognise the principle of domicile at all, the English Courts will apply the law of the domicile of origin. (See Foote, p. 270, where *Renvoi* is never mentioned in discussing this case.)

It is worthy of note that the French case of 1905, in which the *Renvoi* doctrine was repudiated (referred to by Farwell, J., in *Re Johnson*), has since been reversed. (See Bentwich, at pp. 176, 177, and cases there cited; although Westlake still refers to the 1905 decision, see p. 38.)

In *In re Bowes* the case was different, as it could not be said that French law did not recognise domicile, although in the circumstances such recognition was very different to the English view. However, Swinfen Eady, J., held that the case fell precisely within the "*ratio decidendi*" of *Re Johnson*, and decreed accordingly.

The case is not very satisfactory, and is only reported in rather a meagre way in the "Times Law Reports." It appears to have been a case in which all parties before the Court were anxious for English rules of construction to apply, and amounted practically to a consent judgment.

The same result would have been arrived at by a direct application of the *Renvoi* doctrine. The *lex fori* referred the matter to French law as the law of the domicile; by French law, however, as the deceased had not acquired a domicile in France in the eyes of the French law, the law which would be applied in France to the estate would be English law, the law of the nationality; the English Court therefore accepts the reference from the French Courts to its own system, and applies English law.

This is exactly in accordance with the *dictum* of Sir Francis Jeune, referred to above. Some authorities endeavour to explain away these decisions by praying in aid the purely English doctrine of the domicile of origin. These writers put the case thus:—Where an English Court is seised of a question of administration or of succession, which according to English law, as the *lex fori,* is governed by the law of the domicile, if the country where the deceased was domiciled in the English sense does not recognise domicile, then the English Courts will treat the deceased as having failed to acquire a domicile of choice in that country, and if the deceased was born within the British Empire will determine the matter by reference to the domicile of origin.

This rule they state is a judge-made rule of English law, and although bearing a resemblance to the *Renvoi* principles, is in fact independent of that doctrine.

In our view the above statement of the law does not seem satisfactory for these reasons:—

(a) Whether a person is domiciled in a given country

or not depends, it is submitted, solely on English law, and has nothing to do with whether the country in question gives effect to or recognises the principle of domicile as understood in this country.

(b) Wherever a person is in the view of English law domiciled in a given country, reference is in fact made to the law of that country to determine the law applicable. If on investigation it is shown that on the matter arising in the Courts of that country, a rule of law of some other system would be applied, then it appears to us undoubted law that such rule would be adopted in the English Courts. It seems to us therefore, that if, as a matter of fact, the law of the domicile of origin is ultimately applied by the Courts of this country (and it is not admitted that such is necessarily the case), then it is precisely because that law would have been applied in the foreign Court of the domicile. To put this more exactly, if the country of the domicile referred the matter to the law of the nationality; that is to say, if the Courts of the country of the domicile would have in fact applied the law of the country of political allegiance, *i.e.*, the national law, the domicile of origin would in all probability be the law answering this description, inasmuch as no British subject has in fact a national law properly so called.

(c) If the English Court came to the conclusion that the domicile in the foreign country had not been effectually acquired as a domicile of choice, then unless the previous domicile of choice had been definitely abandoned, such prior domicile of choice would attach in preference to the domicile of origin.

(d) The rule seems incomplete—supposing the deceased were not a British subject, what would be the result? And on what logical grounds can it be said that there should be a difference between the rule to be applied

accordingly as to whether the deceased was of British or foreign nationality ?

(e) The rule would appear to possess no advantage—whereas it will be shown, that, in our opinion, the *Renvoi* doctrine possesses the outstanding advantage that, by reference thereto, conflicts can be decided on a basis satisfactory to all parties, and which in practice work without any apparent hardship.

Thirdly.—Is it desirable that the *Renvoi* doctrine should be accepted by the English Courts ?

Some writers suggest that where the law of the country where the deceased dies domiciled according to English law does not recognise domicile at all, the English Courts should accept such a position, and pay no further reference to the law of that country on the ground, as the French writers put it, *qu'elle se désintéresse*.

They argue, however, that where domicile is recognised, but in some different manner to the English system, a distinction must be drawn, and in such a case the reference to the foreign law must be persisted in and the appropriate law applied.

It seems to us that if any countenance is given to such suggestions as this, the English rule that the law of the domicile governs will be seriously encroached upon.

Would it not be simpler in every case to decide the question of domicile purely by English law, and having done so, and the reference to the law of the domicile having been made, to apply to the estate whatever rule of law would have been applied by the Courts of the country referred to ?

Why should the Courts of this country be concerned with the view taken of domicile by any foreign legal system ?

It is contended that the rule suggested above would not only be a simple solution, which could be universally applied to such cases, but that it is in fact the view taken by the English Courts at the present day. The decision in *Re Bowes* is exactly in point, so also is the judgment in *Bremer* v. *Freeman*. It does not appear to us to be possible that on distributing the moveables here belonging to a deceased person who died domiciled in France in the English sense, but not in the French sense, the English Courts would apply the French internal law, when the Courts of that country under similar circumstances would have applied the English law. Could any result be less conducive to the practical settlement of such matters?

In our opinion the difficulties that must inevitably arise, should such a rule be adopted, need only be demonstrated, and the opposite point of view would certainly be taken.

If our view of what would occur in such a case as is referred to above is correct, and the result arrived at in *Re Bowes* is followed, the same law would be applied, whether the matter arose in the French or English Courts. Such a solution seems eminently desirable, and to be in perfect accord with the aims of international jurists.

For the reasons given above, we are therefore of opinion that the *Renvoi* doctrine should be accepted by the Courts of this country until express provision is made by legislation or by the comity of nations for the more satisfactory solution of similar problems.

CHAPTER XXI.

THE VALIDITY OF THE ENGLISH PRINCIPLES OF PRIVATE INTERNATIONAL LAW.

When the personal theory of law was adopted, two opposing theories were derived from it. On the one hand, there was the conception of a national law denoting a personal tie between the subject of a State and the Sovereign power; and on the other hand, there was the notion of domicile or voluntarily chosen "home."

These great conceptions were at first not clearly separated, but after a time the cleavage became complete, and rival systems of law grew up with the different views of the personal theory of law as their basis. With such a tendency appearing so early in the history of the law, it is not surprising that the rival systems occasioned frequent conflict.

For a great length of time the frequent clashing of the rules of law adopted in the countries professing the rival theories has caused jurists and statesmen alike to exert all their efforts in favour of introducing uniformity and concord.

Such a task, however, is a formidable one, if indeed it is possible at all. Such countries as the Continental States, the South American Republics and the greater number of Continental countries have adopted the national law as the basis of their codes, whilst Great Britain and the United States have consistently retained *domicile* as their important conception.

As a justification of the continuing difference in treatment of the same branch of law at the hands of these

different countries' Courts, it will perhaps be useful to consider the position from the English point of view.

There are many advantages possessed by the system of the domicile. The law of domicile as understood and accepted in England is, in substance, an elaborate attempt on the part of the judicial authorities to determine the intentions of a man with regard to the centre of his interests, his permanent residence and his habitual sphere of influence.

It is the law governing these factors which regulates his capacity to perform legal acts, and which generally governs all his dealings with his moveable property and belongings.

Although, in some cases, the determination of the domicile is an expensive process, and unsatisfactory owing to the indefinite information at the disposal of the Court, yet in the great majority of cases domicile by English rules is fairly easy of ascertainment.

At the same time, the domicile is flexible and can vary almost at the will of its owner. It is in accordance with the freedom of English public institutions that a man should be allowed to readily change his domicile, and by the necessary residence to become domiciled in the new country of his choice.

Whilst the system of domicile possesses advantages of this character, the system of a national law can be strongly opposed for several reasons. It cannot be a universal criterion.

There are people whose nationality is unknown and unknowable, and to such as these the countries applying the theory of a national law habitually apply the test of the domicile. Nationality cannot be changed with the same ease, but only by a cumbersome and expensive process of diplomatic interference and recognition.

Nationality is, further, an extremely unsatisfactory test. In many cases the party concerned has never been within the borders of his "*patria*," and to say that in spite of, it may be, a lifelong residence in some country, the personal capacity and actions of a person are to be governed by the laws of a country he has never had anything to do with seems an outrage upon the probable and, maybe, the express intentions of the individual. Further, nationality cannot be used as the test in such countries as England, Scotland, Ireland, Wales, U.S.A., Canada and the colonies where, in spite of the prevalence of different legal systems, there is no difference in national law. A British subject has no national law in the Continental sense, and in the nature of things cannot have.

The above are, in the writer's opinion, cogent reasons for the rejection of proposals which are occasionally put forward for the breaking down of the exclusive barrier of domicile, and for assimilating Continental ideas to the jurisprudence of this country.

Suggestions of the nature referred to have from time to time been made to the conferences at the Hague, but those who study the doings of these assemblies will find very little support given to them by any country in which domicile is the recognised criterion.

It may be argued, therefore, that England is right in continuing the principle it has always adopted, and in not yielding to the demands of Continental jurists on this point. At the same time, it cannot seriously be contended that modifications of the English rules are not necessary.

In the next chapter considerations are advanced for modifications along certain lines, which, in the writer's opinion, would serve to make the general private international law of the civilised world a more logical and more scientific whole.

CHAPTER XXII.

SUGGESTED AMENDMENTS IN THE PRESENT ENGLISH PRACTICE.

It will, we think, be readily conceded that the object of jurists and statesmen in all countries in matters of private international law dealing with succession to estates of deceased persons has been to secure, as far as possible, practical uniformity of treatment of any particular estate, no matter what Courts the case may come before for decision.

It has long been felt on all sides that for a testator's will to have one construction in England, a diametrically opposite construction in France, and yet a third in Germany, is an anomaly which should be rectified at the earliest possible moment.

If such a desire for uniformity of treatment by the different Courts still exists, and in our view, there seems greater reason to-day for such a desire than ever before, it would seem to follow that the English Courts should desire to give reciprocal treatment to foreigners and their estates in this country, in the same way as the foreign Courts recognise the British subject and estates in the foreign country.

If this be a correct view, it would follow that any instance in which the English Courts set themselves against granting reciprocal treatment to the estate of a foreigner, would require strong justification before being allowed to continue unaltered.

What, however, is in fact the position in English law at the present time ?

Taking first the rule of *locus regit actum,* so much adopted by Continental nations, we have seen that in the United Kingdom the rule was completely unknown, so far as wills were concerned, until the passing of Lord Kingsdown's Act in 1861. By that Act the principle is introduced into English testamentary law subject to two important limitations:—

(a) It is confined to British subjects.

(b) It is further restricted to wills of personal estate.

Whilst, therefore, an English subject abroad can make a valid will by complying, *inter alia,* with the laws of the country where the will is made, as to which he can readily obtain the requisite advice and assistance by consulting any legal practitioner of that country, the position of a foreigner residing here is very different. In order for him to make a valid will of moveables, inquiry must first be made as to his domicile in the English acceptance of the word, and when that has been ascertained the forms prescribed by that law must be followed. Circumstances can easily be imagined, under which it would be extremely difficult, if not impossible, for a foreigner to obtain legal assistance on such a matter, and at all events he would probably only be able to do so at great expense to himself. And yet if the will does not comply with the law of the domicile, it will not be considered as valid in this country, and unless other testamentary dispositions existed of a valid character, the English estate would be distributed under the rules applicable to an absolute intestacy.

But it might well be, in such a case, that the will so made would be valid in the foreigner's own country. Suppose a Frenchman makes a will whilst domiciled in England in some form other than that allowed by English law, clearly the will would be invalid here. However, by French law, the rule of *locus regit actum* applies

throughout the testamentary law, and therefore the will of the Frenchman made in accordance with the laws of the place where made would be valid in France, although very probably it would be invalid here.

Moreover, in many Continental countries (*e.g.*, France) a member of those States can make a will wherever he may in fact be stationed by complying with his own national law. In such a case, again, had the domicile, in the eyes of the English Courts, been anything other than the country of which he was a citizen, such will would be invalid here.

From such examples, which are merely given as illustrations, it is apparent that, in one respect at all events, the English rules are not reciprocal, and could, in our view, be amended with advantage. The suggestion we have to make on this heading would be, that Lord Kingsdown's Act should be extended to all persons, foreigners and British subjects alike.

Discussing this matter Mr. Bentwich says at p. 119 of his work, to which we already made reference:—"It may be said that the differentiation made by Lord Kingsdown's Act between British subjects and others is fundamentally false to the principle of English international jurisprudence, which pays close attention to domicile and not to political nationality."

Mr. Bentwich appears also to be a strong advocate of the extension of Lord Kingsdown's Act on the lines suggested above; and he points out (p. 122) that Scotch law has regularly accepted the rule of *locus regit actum*, and only the refusal of this country prevents a harmonious concord of nations on this subject. Another branch of the subject which might with advantage be simplified is that dealing with the exercise by will of powers of appointment. Some rule could probably be devised whereby

many of the technical results arising from a non-compliance with the forms specified in the instrument creating the power could be avoided.

Further, we think, either that statutory recognition should be given to the *Renvoi* doctrine, or some effort made to secure a working arrangement by mutual agreement and the comity of States. The reasons which prompt us to this have already been considered.

Moreover, we think this country might with advantage to its legal system take a more prominent part in the official conferences of the nations upon matters of international law. It is only too frequently that the records of these conferences disclose the fact that England stood on one side and took no part in the discussion or voting.

In spite, however, of all that can possibly be said against certain minor points of English private international law, we think that on the important points and in the main that branch of the English legal system is one of which the country may well be proud, and to which no jurist can give too great attention. It is hoped that a perusal of the foregoing chapters may induce many to make further researches in this important subject.

APPENDIX.

DOMICILE—HISTORICAL NOTE.

The evolution of the conception of domicile in English law has been a very gradual process. We can, however, trace with considerable accuracy the historical progress of the doctrine from the latter half of the 18th century onwards.

This is due in no small measure to the excellent series of private reports which have been published, dealing with the early cases in the Ecclesiastical and Admiralty Courts, the Prerogative Court of Canterbury and the House of Lords.

In these early reports it is customary to set out the arguments adduced by each side with extreme detail, and, although this practice makes the decision appear a very ponderous one, it has the merit of aiding the student of the history of our law.

We have been concerned in this book with domicile in its reference to succession and administration of the estates of deceased persons. Upon this branch of the subject many of the early reported cases occupy fifty, sixty, and even ninety pages of a volume of reports.

There is therefore no lack of detail connected with the history of the matter.

The term "domicile" is of Latin origin, and is extensively met with in Roman law. It was apparently well understood in this country, at least as early as the reign of Charles II.

In Wynne's Life of Sir Leoline Jenkins, who was a judge of the High Court of Admiralty and Prerogative Court of Canterbury, and also an ambassador at Cologne and Nimeguen, and Secretary of State to Charles II., in Vol. 11, at p. 785, there is published a letter written from Nimeguen by Sir L. Jenkins to the King, and dated August 2nd, 1676.

He had apparently been commissioned by the King to report upon the sufficiency or otherwise of the reasons given by the Courts for a decision relating to a ship of war. In the course of the letter the writer says:—"Their Lordships seem to lay stress in that the proofs of the privateer do express the master to have had a house and to have had his domicile at Amsterdam—to this I shall crave leave to say, that the term domicile is a term of law, the import whereof is not vulgarly known—he might have had a house at Amsterdam and yet have no domicile there"; and the letter contains other references to the law of domicile, showing that, at all events, the learned writer had had occasion to study the nature and effect of domicile, and was well acquainted with its legal significance.

For some considerable time after this date there is no reported English authority dealing expressly with the matter, although there are a large number of Scotch cases which will be referred to later.

In 1744, in the case of *Pipon* v. *Pipon*, 2 Ambler, 25, Lord Hardwicke makes reference to the rule that "the personal estate follows the person and becomes distributable according to the law and custom of the place where the intestate lived," but he gives no indication of the authority for the rule.

In 1750, in the case of *Thorne* v. *Watkins*, 2 Ves. sen. 35, the argument is repeated by the same judge.

Later, in *Kilpatrick* v. *Kilpatrick*, 6 Bro. P. C. 58, a similar rule is applied to a case in which the deceased left a will. However, it was not until 1790, when the case of *Bruce* v. *Bruce* came before the House of Lords on appeal from the Court of Session, that any reasoned judgment was given dealing with the question.

In *Bruce* v. *Bruce*, reported in Morrison, 4617, and 3 Paton, 163, it was argued, in support of the *lex domicilii*, that domicile, in the legal sense, is a word of very different import from residence or habitation, because ambassadors, envoys, exiles, &c., do not lose their domicile, although they reside in a foreign country—mere length of time or mere

residence in a place does not *per se* constitute domicile; three rules are invariable:—

(1) Every man has a domicile in his native country, until he acquires another.

(2) That he can acquire another only by establishing himself there *animo remanendi*.

(3) That however long he remains abroad in certain capacities, still his domicile remains at home in his native country, to which he belongs, where he was born, and to which, it is reasonable to presume, he has always an intention of returning, although the time of doing so be undetermined.

Whilst for the *respondent* it was contended that by the various decisions of the Court of Session it has been established that the personal property of an intestate must be distributed according to the law of the place in which such property was situated.

Moreover, a large number of Scotch, French and Dutch authorities were cited, and passages from several writers on the civil law quoted, besides express reference being made to the English cases of *Thorne* v. *Watkins, Kilpatrick* v. *Kilpatrick* and *Burn* v. *Cole*. Lord Thurlow's judgment is given at length in a note to the case of *Marsh* v. *Hutchinson*, reported in 3 Bos. & Pul. 229; apparently at the express request of counsel in the case he stated the law upon this subject at length, including points not covered by the facts of the present cases. He held that the true ground upon which the case turned (namely, that the estate of the late Major Bruce should be distributed as far as moveables were concerned by reference to English law) was, that the domicile of the deceased was in India at the time of death. He proceeds to say:—"He was born in Scotland, but had no property there. A person's origin in a question of where is his domicile is to be reckoned as but one circumstance in evidence which may aid other circumstances, but it is an erroneous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person being at a place is *primâ facie* evidence that he is domiciled at that place, and it lies on those

who say otherwise to rebut that evidence—it may be rebutted, no doubt; a person travelling, on a visit, he may be there for some time on account of his health or business, a soldier may be ordered to Flanders and be detained at one place there for many months, the case of ambassadors, &c. But what will make a person's domicile or home in contradiction to these cases must occur to everyone. A British man settles as a merchant abroad, he enjoys the privileges of the place, he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his domicile at home?"

These were the grounds of his opinion, though he would move a simple affirmance of the decree, but he would not hesitate as for himself to lay down for law generally, "That personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicile, for the actual *situs* of the goods has no influence."

He observed that some of the best writers in Scotland lay this down expressly to be the law of that country, and he quoted Mr. Erskine's Institutes as directly in point. In one case it was clearly so decided in the Court of Session, and in the other cases which had been relied upon as favouring the doctrine of *lex loci rei sitæ*, he thought he saw ingredients which made the Court, as in the present case, join both *domicilium* and *situs*.

But to say that the *lex loci rei sitæ* is to govern though the *domicilium* of the deceased be without contradiction in a different country, is a gross misapplication of the rules of the civil law and *jus gentium*, though the law of Scotland on this point is constantly asserted to be founded on them.

In the bankruptcy case of *Sill* v. *Worswick* (1791), reported 1 Hy. B. L. 665, Lord Loughborough, then Lord Chief Justice, treats the question of the application of the *lex domicilii* to the moveable estate of a person as definitely decided. He quotes Lord Hardwicke's judgment in *Pipon* v. *Pipon*.

He says in a well-known passage:—"With respect to the disposition of personal property, with respect to the trans-

mission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country."

And throughout his judgment he constantly refers to personal property as being governed by the law which governs the person of the owner.

In the case of *Hog* v. *Lashley* (1792), 6 Bro. Rep. (H. L.), 577, the Court of Session had found by its interlocutor "that there is no ground for distinguishing between Scotch and English effects because the succession to a defunct's effects ought to be regulated, not by the different laws of the many different countries in which these may happen to be locally situated at the time of his death, but by the law of the domicile," and also that "the succession to the personal effects of the deceased, wherever situated, must be regulated by the *lex domicilii*."

The appellant who sought to have these findings set aside pleaded the Scotch authorities in support of the *lex loci* (which are set out in detail in the report of *Balfour* v. *Scott, post*), and also that whatever might be the case on intestacy, the power of making a will was *juris gentium*, and therefore any restraint upon the liberty of testing, imposed by the *lex domicilii*, must be confined to effects over which that law extends, and can be attended with no consequence in other countries where no such restraints prevail. The arguments urged on each side are reported at considerable length (see pp. 577—600), and afford very useful information as to the state of opinion upon the matter at that date (see especially pp. 583, 584).

It is there urged, and we think rightly so, "that if the succession *ab intestato* is to be regulated by the law of the domicile, the same law must likewise regulate the power of testing upon personal estate. The writers upon the law

of nations and the civilians are equally clear upon the point."

The various English authorities are quoted, and extracts given from such writers as Vattel, Voet, Huber and Grotius. The appeal was dismissed without detailed reasons being given, but from that fact alone, and especially after Lord Thurlow's judgment in the earlier case of *Bruce* v. *Bruce*, it may be inferred that the House was not much impressed with the theory of the *lex loci rei sitæ*, which it had already expressly dissented from in similar circumstances.

The next case in point of time is the well-known decision of *Balfour* v. *Scott*, 11th April, 1793 (reported in 6 Bro. Rep. (H. L.), pp. 550—577).

The actual decision in that case amounts to this. If a Scotchman dies intestate, having his domicile in England, his whole personal estate, as well in Scotland as England, shall be distributed according to the law of England.

The report of the case was not compiled until after the decision in *Ommaney* v. *Douglas*, 8th March, 1796, where the House of Lords also declared that the succession to the testator's property should be regulated by the law of England.

The question there was principally as to the fact of his domicile. The Court of Session held that his succession should be regulated by the law of Scotland "in respect that he was born in Scotland and occasionally had a domicile there, that he died in Scotland where some of his children were boarded, and that he had not at that time a domicile anywhere else."

The House of Lords reversed the interlocutor of the Court of Session on the ground that the facts of the case did not bear it out. The respondents in their printed case admitted it as completely fixed and settled that the *lex domicilii*, and not the *lex loci rei sitæ*, governs the whole moveable succession of the deceased, both testate and intestate, where there is personal property in different places and subject to different laws. The headnote to these two cases contains this interesting announcement:—

"The arguments at large on the question of the preference

of the *lex domicilii* to the *lex loci rei sitæ* as curious and likely to be applicable to future cases are collected in an appendix to this case."

The reports and appendix are extremely valuable, as showing the undecided nature of the question of the domicile and its application at this date.

At page 553 there are set out long lists of Scotch authorities in which the *lex loci rei sitæ* had been held to govern the question of intestate succession according to the law of Scotland.

On the hearing of the appeal a further and more elaborate list of authorities to the same effect and going back to the year 1611 is set out; together with extracts from Lord Stair's Institutes to the effect that the *lex loci rei sitæ* governs the succession to personal as well as real property. In the appendix, pages 566 to 600, there are quoted many valuable extracts from the pleadings in the case of *Bruce* v. *Bruce*, and also the opinions of well-known writers on international law of most of the systems of law in which domicile had any place at that time—the whole being very illuminating and instructive.

In the first place, the authorities quoted in support of the *lex loci rei sitæ* are critically examined and discussed, and proved in most cases to have but little bearing upon the point at issue.

Extracts are then given from Erskine's Institutes, B. III., vol. 9, § 4, and Lord Kaine's Principles of Equity, B. III., chap. 8, § 4, to the effect that—

"The succession to moveables is regulated not by the law of the country in which they locally are, but by the owner's '*patria*' or domicile, whence he came and whither he intends to return."

A well-known quotation is also given from Vattel, Liv. II., chap. 8, § 110—

"Puisque l'étranger demeure citoyen de son pays et membre de sa nation, les biens qu'il délaisse en mourant dans un pays étranger doivent naturellement passer à ceux qui sont héritiers suivant les lois de l'état dont il est membre —mais cette règle générale n'empêche point que les biens

immeubles ne doivent suivre les dispositions des lois du pays où ils sont situés."

Further quotations are also given from Voet and other civilians, and the English authorities of *Pipon* v. *Pipon*, *Thorne* v. *Watkins*, *Burn* v. *Cole* and *Kilpatrick* v. *Kilpatrick* are considered, as also are the Dutch and French laws in favour of the *lex domicilii*. In this case also, the further question of what is domicile is discussed. See p. 575, where the following propositions are laid down:—

(1) That every man has a domicile in his native country until he acquire another.

(2) That he can acquire another only by establishing himself there "*animo morandi*," in support of which a further quotation from Vattel, Liv. I., chap. 19, § 218, is given:—

"Le domicile est l'habitation en quelque lieu dans l'intention d'y demeurer toujours. Un homme n'établit donc point son domicile quelque part, à moins qu'il se fasse suffisamment connaître, soit tacitement soit par une déclaration expresse, son intention de s'y fixer."

In the later case of *Ommaney* v. *Bingham* (1796) already referred to, and reported in full 3 Hagg. Eccl. 414, the dispute was as to the domicile of the deceased, and whether this was Scotch or English at the date of death. The Scotch decision was reversed by the House of Lords, who held that the deceased's last domicile was English.

The case contains a valuable examination of the facts which go to determine the question of whether or not an individual is domiciled in a particular country. (See Lord Chancellor Loughborough's judgment at pp. 458—462.)

In the same year (1796, June 12th), another important case was decided on this point—*Bempde* v. *Johnstone*, 3 Ves. 198; *Graham* v. *Johnstone*—and the headnote to which is:—

"The personal property of an intestate, wherever situated, must be distributed by the law of the country where his domicile was, which is *primâ facie* the place of his residence, but that may be rebutted and supported by circumstances."

The case contains a very *good definition* of domicile at p. 201, where the Master of the Rolls (Sir R. P. Arden)

says:—"The question of domicile is *primâ facie* much more a question of fact than of law. The actual place where he is is *primâ facie* to a great many given purposes his domicile. You encounter that if you show it is either constrained, or from the necessity of his affairs, or transitory, that he is a *sojourner,* and you take from it all character of permanency. If on the contrary you show that the place of his residence is the seat of his fortune, if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends and connections, and all the links that attach him to society are found there, if you add to that that he had no other fixed residence upon an establishment of his own, you answer the question, which would be, where does he reside? In London. Is that his domicile? It is unless you show that is not the place where he would be if there was no particular circumstance to determine his possession in some other place at that period."

The next case (*Somerville* v. *Lord Somerville; Baynton* v. *Lord Somerville* (1801), 5 Ves. 749) is of the greatest importance.

The headnote is:—

"The succession to the personal estate of an intestate is regulated by the law of that place which was his domicile at the date of death. For that purpose there can be but one domicile, and the *lex loci rei sitæ* does not prevail.

"The mere place of birth or death does not constitute the domicile. The domicile of origin, which arises from birth and connections, remains until abandoned and another taken.

"In the case of Lord Somerville of two acknowledged domiciles—the family seat in Scotland and a leasehold house in London—upon the circumstances the former, which was the original domicile, prevailed."

In opening the case for the plaintiffs the Attorney-General argued as follows (see pp. 753, 754):—

"The question in these cases must now be understood to depend entirely upon the domicile of the late Lord Somerville, the cases decided having put entirely out of sight the *lex loci rei sitæ* with reference to this question. It was

never understood in this or any country but Scotland that the succession to moveable property could be regulated by two different laws. Some decisions in that country certainly did assert that proposition, but in the *Annandale case* it was not thought a subject of question; and Lord Hardwicke in *Thorne* v. *Watkins,* the House of Lords in *Pipon* v. *Pipon,* and Lord Macclesfield and Sir Joseph Jekyl in prior cases had no doubt upon it; but the point was completely decided in *Balfour* v. *Scott, Lady Tichfield's case,* in which the ground of the judgment of the House of Lords was expressly declared to be that the personal estate of the intestate was to be distributed by the law of England, where he had his domicile.

"That declaration was certainly intended to put an end to the possibility of raising the question in the future."

The point then turns upon what is domicile, what facts are evidence of domicile, and what is the correct inference to draw from certain facts.

The whole of the authorities prior in date are elaborately referred to in the argument of the Attorney-General (see pp. 753—762). For the defence it was argued that as the evidence was equally strong in favour of domicile either in England or Scotland, that the Court should apply its own law to the estate, and the authorities cited are criticised (see pp. 763—779).

The Master of the Rolls, Sir R. P. Arden (who heard the case for the Lord Chancellor) in an elaborate judgment lays down three important rules on the subject:—

(1) That succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of birth or death, or the situation of the property at that time.

(2) That although a man may have two domiciles for some purposes, he can have only one for the purpose of succession.

(3) That the original domicile, or domicile of origin, is to prevail until the party has not only acquired

another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile.

He applies these rules to the facts of the case, and ultimately decrees in favour of a Scotch domicile.

The case is one of interest for many reasons, not the least being that the custom of the province of York had to be discussed and applied.

There is also a dictum of note at p. 787, that a domicile cannot be acquired during pupilage or until *sui juris*.

After such a series of decisions, many of them in the highest Court in the land, one would have thought that both the question of what is domicile and the application of the *lex domicilii* to the moveable succession in cases of both testacy and intestacy, would have been definitely recognized by all branches of the English judiciary.

The contrary, however, appears to have been the case.

In the case of *Curling* v. *Thornton* (1823), 2 Addams Rep. 6—24, Sir John Nicholl decided that a will made in English form by an English subject, who had been authorized to acquire a domicile in France, and had in fact resided there for the greater part of his life, was valid.

His judgment appears to us to be very confused. He apparently disputes many points of private international law which had already been well settled by the earlier cases. For instance, his judgment contains a complete repudiation of the idea that the *lex domicilii* governs a will of moveable property.

Moreover, the judge in this case based his judgment upon the Continental rule relating to contracts made in a foreign country, namely, that the *lex loci actus* governs.

Perhaps the most extraordinary part of the judgment, however, is that in which Sir John Nicholl doubts whether a British subject can ever so far "*exuere patriam*" as to acquire a domicile in a foreign country. He says:—

"It may even be doubted whether this can be—whether a British subject is entitled so far *exuere patriam* as to select a foreign domicile in complete derogation of his British, which he must at all events do in order to render his pro-

perty in this country liable to distribution according to any foreign law."

Reference was made in support of this theory to the *Duchess of Kingston's* case, in which it had been held that, in the case of an English subject domiciled in a foreign country, compliance with the English forms regulating a will of personalty was sufficient to render the will valid as to form.

At the conclusion of the report of *Curling* v. *Thornton*, there is printed a note of the case of *Hare* v. *Nasmyth* (1816), 2 Addams, 25. There the testator was a domiciled inhabitant of Scotland, and suits were brought here to prove the will; the proceedings here were suspended to await the decision of the Courts of the domicile. Ultimately, after an appeal from the Scotch Courts to the House of Lords, the deceased was held to have died intestate.

As against the decision in *Curling* v. *Thornton*, there is the case of *Gordon* v. *Brown* (1830), House of Lords, cited in 3 Hagg. Eccl. at p. 455, which establishes the fact that a British subject may acquire a foreign domicile in complete derogation of his British, and that then his will must be construed by the law of that domicile, and also the very important case of *Stanley* v. *Bernes* (1831), 3 Hagg. Eccl., the report of which covers over ninety pages, viz., pp. 374—465.

In that case a British subject had died domiciled, and even actually naturalised in Portugal, and had left a will and four codicils, the will and the first two codicils being executed in accordance with the law of Portugal (*lex domicilii*), and the other two codicils being executed in accordance with the English formalities.

Sir John Nicholl, following his own previous decision in *Curling* v. *Thornton*, upheld the will and all four codicils, and decreed accordingly.

An appeal was taken to the Court of Delegates and the matter elaborately argued, the whole of the earlier decisions on the subject being carefully reviewed.

The various English authorities on domicile were quoted, and are collected at p. 460 of the report.

The matter was argued for the respondents as if no decision had ever been given, depriving a British subject of the power of making a will in the English form, and from the very decided manner in which the sway of the law of the domicile was disputed, it may safely be said that the decision is a landmark in the history of the law of domicile in this country.

In the result the appeal was allowed and probate decreed of the will and the two codicils which were valid according to the law of the domicile.

There followed a few years later the case of *De Bonneval* v. *De Bonneval* (1838), 1 Curt. 856, the headnote to which is:—

"The domicile of origin continues until another is acquired. A new domicile is not acquired unless it be taken up with an intention of abandoning the former domicile. A Frenchman having quitted France in 1792 in consequence of the Revolution in that country, and having resided in England until 1814, when he returned to France, and from that time resided occasionally in both countries, held not to have abandoned his original domicile."

"The validity of a will is to be determined by the law of the country where the deceased was domiciled at his death."

Sir Herbert Jenner in his judgment at p. 858 says:—"The simple question is, whether the deceased was domiciled in France or in this country? On that point it will depend by the laws of which country the validity or invalidity of the will is to be tried, for it is now settled by the case of *Stanley* v. *Bernes* that the law of the place of domicile, and not the *lex loci rei sitæ*, governs the distribution of and succession to personal property in testacy or intestacy."

He also (see p. 863 *et seq.*) discusses the principles upon which domicile should be ascertained.

Moreover, the decision is of interest, as being a further case in which proceedings were stayed here, to abide the decision of the Courts of the domicile (following *Hare* v. *Nasmyth, supra*).

Sir Herbert Jenner concludes his judgment thus (see p. 869): "I am, therefore, of opinion that the deceased continued a domiciled French subject to the time of his death, and consequently that the validity or invalidity of his will must be determined by the French tribunals and not by this Court. The precise form in which the Court must pronounce its sentence is this: That the deceased, at the time of his death, was a domiciled subject of France, and that the Courts of that country are the competent authority to determine the validity of his will and the successor to his personal estate. And, as in the case of *Hare* v. *Nasmyth*, the Court suspends the proceedings here, as to the validity of the will, till it is pronounced valid or invalid by the tribunals of France."

The weight to be given to the various circumstances attending the life of the testator is also discussed at length by the learned judge in that case.

In Toller on Executors, 7th ed. (1838), the subject of domicile is very briefly alluded to.

Thus at p. 386:—"The personal property of an intestate wherever situated must be distributed according to the law of the country where his domicile was, and such is *primâ facie* the place of his residence, but that may be rebutted or supported by circumstances." (See 2 Ves. jun. 198, and *Sir Charles Douglas' case* there cited.) "For although the locality of the party's abode at the time of his death does determine the rule of distribution, yet it must be a stationary and not an occasional residence in order that the municipal institutions may attach to the property." (See 1 Wooddes, 385.)

In *Craigie* v. *Lewin* (1842), 3 Curt. 435, an Anglo-Indian case, the judgment of Sir Herbert Jenner Fust is of importance on these points, viz., change of domicile (see pp. 447 and 448), and as to the necessity of the will complying with the *lex domicilii*. As to the first of these, the case is an authority for saying: "That the domicile of origin does not revive until an acquired domicile is finally abandoned." As to the second, the learned judge says at p. 450:—"The distinction adverted to in the course of the argument between

cases of testacy and intestacy makes no difference. It has been held in the cases of *Stanley* v. *Bernes, Curling* v. *Thornton* and *De Bonneval* v. *De Bonneval* that a person in order to make a valid will must conform to the law of the country where he is domiciled—just as where he makes no will, he must be supposed to have intended distribution according to the law of that country."

De Zichy Ferraris v. *Hertford* (1843), 3 Curt. 468, is an authority for the proposition that:—

"A will is not valid unless executed in conformity with the law prevailing in the country where the testator is domiciled, and the fact of the property (personal) bequeathed by such will being locally situate in another country, and of the will being duly executed according to the law of that country, will work no distinction."

The case occurred shortly after the passing of the Wills Act, 1837, and contains a strikingly elaborate judgment of Sir H. Jenner Fust as to the necessity in all cases of attestation, and the incorporation of one testamentary paper in another. The judgment covers forty-seven pages of the report (pp. 475—522).

Then comes the case of *Bremer* v. *Freeman* (1857), 1 Deane Ecc. Rep. 192, and later, on appeal in the Privy Council, 10 Moo. P. C. 306. The headnote to the case reads as follows:—

"The forms and solemnities of a will are governed by the law of the domicile of the testator. The maxim *mobilia sequuntur personam* is part of the *jus gentium*. It follows, therefore, that the postmortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, and it equally follows that if the law of the country allowed the deceased to make a will, the will must be in the form and executed with the solemnities which that law requires. An Englishwoman, domiciled at the time in France, made in 1842 a will in Paris in the English form, executed according to the Wills Act 1 Vict. c. 26, but not in accordance with the require-

ments of the French law. The deceased, at the time of making the will and at her death, was not naturalised in France, nor had she obtained any authorisation as required by the 13th Art. of the Code Napoleon. Held, that the testatrix being domiciled in France, the authorisation of the French government was not necessary to give her the right of testacy; that the will, not having been executed in conformity with the requirements of the law of the domicile was invalid, and probate refused. The *onus probandi* lies upon a party impeaching a will to show that it ought not to be admitted to proof; but where the party impeaching the will establishes the fact that a testatrix had lost her English domicile, having gained another elsewhere, and died in the acquired domicile, the *onus probandi* is in such circumstances shifted, and it lies upon the party propounding the will to prove that the law of the domicile was such as to authorise a will in the form propounded."

There follows:—*Hodgson* v. *De Beauchesne* (1848), 12 Moo. P. C. 285. Very important case as to the impossibility of an officer in the military service of the Crown acquiring a domicile of choice in a foreign State, and also on the following points taken from the headnote, p. 286.

The presumption of law is against the intention to abandon the domicile of origin.

Length of residence in a foreign country *per se*, according to time and circumstances, raises a presumption of intention to abandon the domicile of origin and to acquire a new domicile, but such presumption may be rebutted by facts showing that there was no such intention.

A change of domicile is not to be inferred from the fact of a lengthened residence in a foreign country. To constitute a change of domicile it must be *animo et facto*.

Very important judgment, first by Sir John Dodson and on appeal by Doctor Lushington, involving a consideration of *Bremer* v. *Freeman*, of the effect of Art. 13 of the French Civil Code, and the necessity or otherwise to obtain such authority as preliminary to acquiring a domicile in France.

The two important cases of *Whicker* v. *Hume* (1858), 7 H. L. 124—167, and *Moorhouse* v. *Lord* (1863), 10 H. L. C.

272—293, have already been dealt with at length in Chap. II., *supra*. It will be remembered that *Moorhouse* v. *Lord* is the case which (so far as English authorities are concerned) gave rise to the theory that domicile and nationality were closely connected, and that a domicile cannot be acquired unless there is an intention to change the political status. For the reasons given in Chap. II. we are of opinion that the said doctrine is wholly false.

Bell v. *Kennedy* (1868), L. R. 1 Sc. App. 307, is important as to the distinction between domicile and residence.

Udny v. *Udny* (1869), L. R. 1 Sc. App. 441, has also been dealt with in detail in Chap. II., as have most of the more modern cases on domicile.

There remains to be noticed the three following cases, viz.: *Brunel* v. *Brunel* (1871), L. R. 12 Eq. 298, which bears a headnote to this effect:—

"A French subject by establishing himself in business in this country, marrying and continuing to reside here for more than thirty years, making only occasional visits to France. Held, to have lost his domicile of origin and acquired an English domicile, notwithstanding his refusal to take out letters of naturalisation in this country, on the ground that he might return to France, and would not give up his status as a French citizen."

The case was comparatively a simple one, and the facts far less involved than in many of the cases on this subject.

In his judgment, Sir James Bacon, V.-C., immediately deals with *Udny* v. *Udny*, which he says "cuts down or rather explains the expressions in *Moorhouse* v. *Lord*, that for a change of natural domicile there must be a definite and effectual change of nationality, that a man must intend '*exuere patriam*,'" and he adopts Lord Westbury's words as to the acquisition of a domicile of choice.

And *Hamilton* v. *Dallas* (1875), 1 Ch. D. 257. The headnote to which case is:—

"A peer of the British Parliament is not, by reason of

his obligation to attend the House of Peers whenever his presence is there required, incapacitated from acquiring a domicile of choice in a foreign country."

"A *de facto domicile* governing the succession to personal property of which he dies intestate may be acquired in France by a foreigner who has not obtained the Government authorisation imposed by the Code of Napoleon, Art. 13, as the condition for enjoyment by a foreigner resident in that country of full civil rights."

The decision is an extremely interesting one, and the matter is gone into at great length, both as to English and French authorities.

Vice-Chancellor Bacon's judgment, pp. 267—273, sets out the matter very clearly, and discusses the point as to how far the municipal rules of another State can interfere with recognized rules of international law.

Also see *Doucet* v. *Geoghegan* (1877), C. A. (1878), 9 Ch. D. 441.

The testator in the suit was a Frenchman, but had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business. Paid occasional visits to France. He married in England. He made his will in English form and left his property in a manner inconsistent with French law. Upon an action to establish a French domicile, numerous witnesses deposed to the fact that he had made various parol declarations that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalised in England, and would not take a lease of more than three years of his house.

Held by the Court of Appeal, Jessel, M. R., James and Brett, L. JJ. (affirming Malins, V.-C.), that the acts of the testator manifested an intention to acquire an English domicil, and that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages.

The above list of cases, which is, of course, not intended

to be exhaustive, as the reported decisions on domicile are extremely numerous, is designed to show the gradual development of the conception of domicile in English law, and the way in which the rule of the application of the *lex domicilii* to testate and intestate succession to moveables became established.

It is hoped that by presenting the cases in chronological order in this manner much research amongst the earlier reports may be avoided, and at the same time a clearer perception gained of the position at the present time.

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