

THE PRIVY COUNCIL AND MORTGAGES IN THE CONFLICT OF LAWS

Under the impression that it was well settled and almost obvious that a mortgagee of land has an interest in the land and that succession on death to such an interest is governed in the conflict of laws by the *lex rei sitae*,¹ I wrote a comment² on the case of *In re Dalrymple Estate*,³ in which the Court of Appeal for Saskatchewan, rightly as it seemed to me, held that the succession to a mortgagee's interest in the land was governed by the *lex rei sitae* (British Columbia) and not by the *lex domicilii* of the *de cujus* (Saskatchewan). My comment was directed chiefly to some modes of expression used in the judgments, and I observed, perhaps somewhat flippantly, that Mackenzie J. A. had by a casual citation effected a partial rescuscitation of *Harding v. Commissioner of Stamps for Queensland*,⁴ in which the Privy Council without adequate discussion, or indeed any discussion, of the specific point, had held that a mortgage on land situated in Queensland was movable in character and devolved under the *lex domicilii* of the *de cujus* (Victoria) and not under the law of the situs of the land. It now appears from the decision of the Supreme Court of Victoria (full court) in *In re Williams, National Trustees, Executors and Agency Co. of Australasia v. Brien*⁵ that the *Harding* case, so far from being a corpse, is very much alive and, if I may change the metaphor, constitutes a grave danger to navigation in the conflict of laws.

There were two mortgages in question in the *Williams* case, one in the usual common law form on land situated in England, the mortgage deed being held there, and the other in statutory form under the Torrens titles or land titles system, on land situated in New South Wales, one duplicate original being filed in the land registry there and the other duplicate original being held also in New South Wales. Matthew Williams was entitled in remainder to these two mortgages and on his death intestate, and domiciled in Victoria, the question arose whether they devolved as movables in accordance with the law of Victoria or as immovables in accordance with the laws of England and New South Wales respectively. It was held that they were movables and that the succession was governed by the law of the domicile.

¹ *In re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179.

² (1941), 19 Can. Bar Rev. 746.

³ [1941] 3 W.W.R. 605; *sub nom. Hogg v. Provincial Tax Commission*, [1941] 4 D.L.R. 501.

⁴ [1898] A.C. 769.

⁵ [1945] Vict. L.R. 213.

The conclusion reached in the *Williams* case is, it is submitted, both contrary to principle and practically undesirable and therefore it seems worth while to discuss the matter further from both points of view.

Few things are more firmly settled in the conflict of laws than the rule that succession to land (immovables) is governed by the *lex rei sitae*. Like the corresponding rule that the conveyance of land *inter vivos* is governed by the *lex rei sitae*, it is based "upon principles of obvious social convenience",⁶ it being practically inevitable that a court in one country, in so far as it is concerned at all with the title to land situated in another country, shall regard as conclusive whatever a court of the situs has decided or would decide with regard to the title.

Dicey, Conflict of Laws, states:

Rule 150. All rights over, or in relation to, an immovable (land) are (subject to the exceptions herein mentioned)⁷ governed by the law of the country where the immovable is situate (*lex situs*).

Westlake, Private International Law, states:

§156. All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.

Westlake also states:

§157. Interests in land which are limited in duration, whether for terms of years, for life, or otherwise; interests in land which are limited in their nature, as legal (*ex jure Quiritium* — Gaius) or beneficial (*in bonis* — Gaius); servitudes, charges, liens, and all other dismemberments of the property in land; are immovables as well as the land itself..

If, instead of the concluding words "are immovables as well as the land itself," we read "are property in immovables within the meaning of §156," confusion between the land and the property in land will be avoided and Westlake's meaning will be made clearer because the concluding words of §157 will be brought into accord with their immediate context ("dismemberments of the property in land") and with §156—the intention of the author obviously being to define in §157 what is included in "property in immovables" in §156.

Story, Conflict of Laws, §§424, 447 and 463, stated the same general principal. In §447, he said:

Fourthly, in relation to the subject matter, or what are to be deemed immovables. Here, as we have already seen, not only lands

⁶ COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), 253, quoted in my *Immovables in this Conflict of Laws* (1942), 20 Can. Bar Rev. at p. 16, and LAW OF MORTGAGES OF LAND (1942), 779, note a.

⁷ The "exceptions" are irrelevant to the present discussion.

and houses, but servitudes and easements, and other charges on land, as mortgages and rents, and trust estates, are deemed to be, in the sense of the law, immovables, and governed by the *lex rei sitae*.

That so important an interest in land as that of a mortgagee should form an exception to the general rule, as held in the *Williams* case,⁸ would seem to be inadmissible,⁹ either in the case of a mortgage or charge under the land titles or Torrens title system, like the mortgage on land situated in New South Wales in the *Williams* case or, *a fortiori*, in the case of a common law mortgage including a grant of the land subject to a defeasance clause, like the mortgage on land situated in England in the *Williams* case. What a court in England would have to say about the matter may be safely predicted in view of the decision of the Court of Appeal in England in *In re Hoyles*¹⁰ that a mortgagee of land has an interest in land, and that succession to it is governed by the *lex rei sitae*; and in New South Wales *In re Hoyles* was followed in *Re Donnelly*.¹¹ Inasmuch as the matter is one that must ultimately be decided by the courts of the situs, it is all the more remarkable that a court in Victoria should in the *Williams* case reach a different conclusion.

Not only is the conclusion wrong in principle, but it is also economically unreal, because it involves an artificial severance between the mortgage instrument and the interest in the land thereby conferred on the mortgagee and the characterization of the mortgage debt as the principal to which the security is merely accessory. Clearly, as stated by Lord Watson in *Walsh v. The Queen*,¹² the mortgagee's interest in the land is an asset in the country in which the land is situated and, though "the personal obligation to pay may not be an asset" in that country, the "market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt with as securities". There may of course be cases in which the personal obligation is taxable in one country and the interest in the land is taxable in another, provided that the legislatures of the two countries are not limited in their powers so as to be subject to a

⁸ *Supra*, note 5.

⁹ I have on various occasions spent much time, paper and ink in expounding various aspects of the general rule, including its application to a mortgagee's interest in land. See *Immovables in the Conflict of Laws* (1942), 20 Can. Bar Rev. 1, 9; LAW OF MORTGAGES (3rd ed. 1942) 763, 771; case comments (1941), 19 Can. Bar Rev. 746, [1941] 1 D.L.R. 703, (1944), 22 Can. Bar Rev. 713, [1944] 3 D.L.R. 405.

¹⁰ *Supra*, note 1.

¹¹ (1927) S.R. (N.S.W.) 34.

¹² [1894] A.C. 144, at p. 148.

common requirement of a single situs for the personal obligation and the interest in the land. Thus, it was possible for the Privy Council to say in the *Walsh* case that the mortgagee's interest was taxable in Queensland, where the land was situated, though the mortgage debt might also be taxable elsewhere, or to say in *Payne v. The King*¹³ that a debt secured by a mortgage in statutory form on land in New South Wales was a simple contract debt in Victoria, where both creditor and debtor resided and were domiciled, and was an asset in Victoria, subject to probate duty there, notwithstanding that it might be also subject to duty in New South Wales, as being a specialty debt situated there.

In the *Harding* case¹⁴ the Privy Council had to consider whether succession duty was payable under a statute of Queensland in respect of two debts secured by mortgages on land, stock and goods in Queensland, the creditor being domiciled in Victoria at the time of his death. The Privy Council construed the particular statute in question as being analogous to the British statutes respecting legacy or succession duties and therefore as being limited to movables belonging to a person who at the time of his death was domiciled in Queensland, and held the statute to be applicable to movables devolving under the law of a foreign domicile. The Privy Council said, however, that "it is clear that the assets now in question have locality in Queensland" and that they would have been subject to duty under a statute that purported to impose a tax on "property within Queensland" without regard to the domicile of the deceased. It is of course undeniable that the Privy Council described the assets in question as movables, but its attention was concentrated on the single question of the construction of the taxing statute and it is far-fetched to regard its judgment as a binding authority that in the conflict of laws succession to a mortgage debt is governed by the *lex domicilii* and not by the *lex rei situs*.

If the question is one of succession on the mortgagee's death, it would obviously be impracticable that the succession to the personal obligation and the succession to the interest in the land should be governed by the laws of two different countries. As regards a question of succession on death in the conflict of laws it is submitted that it is immaterial that in English domestic law a mortgagee's interest in land is, or was, personal property,¹⁵ or

¹³ [1902] A.C. 552.

¹⁴ *Supra*, note 4.

¹⁵ Except of course as regards a question of the formal validity of a will under Lord Kingsdown's Act. By reason of the unfortunate legislative error occurring in this statute, in its reference to "personal estate" instead of movables, it results that for the single purpose of the statute, by exception,

that under the former English domestic law the mortgage debt and the mortgagee's interest in the land devolved in different ways, or that for some taxation purposes the debt and the security are severable, or even that for some purposes the security is regarded as accessory to the debt. The error of which the Supreme Court of Victoria was guilty in the *Williams* case was, it is respectfully submitted, to regard itself as being bound, on a question of succession on death, by inferences drawn from expressions used by the Privy Council when it was considering other questions, especially questions of taxation, turning so often on the wording of particular taxing statutes. As pointed out by Duff J. (afterwards C.J.C.) in *Royal Trust Co. v. Provincial Secretary-Treasurer of New Brunswick*,¹⁶ although from the legal point of view the personal obligation is for many purposes regarded as distinct from the charge on the land, the asset, from the economic or business point of view, is of course the security in its entirety, the personal obligation plus the charge; the mortgage does, unquestionably, create an interest in the land in the country where the land is situated and is "as much an asset [there] as the real estate which it affects".¹⁷ Duff J. added: "For the purpose of applying the rules of private international law as recognized under the law of England, such a security is an 'immovable' ".¹⁸ This very learned judge saw no inconsistency between holding that for taxation purposes a mortgage on land may be regarded as a thing distinct from the interest in the land¹⁹ and holding that for succession purposes "the security in its entirety" is immovable in character, so as to be governed by the law of the situs of the land.

the distinction between realty and personalty prevailing in domestic English law is material also in English conflict of laws. See my comment, [1941] 1 D.L.R. 703, on *Re Landry and Steinhoff*, [1941] O.R. 67, [1941] 1 D.L.R. 699, and my comment, (1944), 22 Can. Bar Rev. 713, [1944] 3 D.L.R. 405, on *Re Gauthier*, [1944] O.R. 401, [1944] 3 D.L.R. 401. The point of criticism of Lord Kingsdown's Act is of course not that the legislature of a particular country may not in its discretion base its conflict rules on the distinction between realty and personalty—see COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) 291, note 20—but that in the case of Lord Kingsdown's Act the legislature did so inadvertently and thereby created an exception to the general and convenient rule based on the distinction between immovables and movables: see my *Immovables in the Conflict of Laws* (1942), 20 Can. Bar Rev. 3, 4; LAW OF MORTGAGES (3rd ed. 1942) 766.

¹⁶ [1925] S.C.R. 94, [1925] 2 D.L.R. 49.

¹⁷ Quoting these words from the judgment of Lord Watson in *Henty v. The Queen*, [1896] A.C. 567, at p. 574.

¹⁸ Citing *In re Hoyles*, [1911] 1 Ch. 179.

¹⁹ With respect, I do not think that on this point he satisfactorily distinguished *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, in which the Privy Council at least reached a conclusion which was satisfactory in the sense that the mortgage was situated in the province of the situs of the mortgaged land.

In view of the limitation imposed on the legislative power of the provincial legislatures in Canada by the words "direct taxation within the province in order to the raising of a revenue for provincial purposes" in clause 2 of s. 92 of the British North America Act, 1867, "the same property [cannot be] subject to taxation identical in character in more than one province",²⁰ but a provincial legislature may impose direct taxation upon either a person within the province or a thing within the province²¹ and consequently there may *in effect* be double taxation if one province taxes a person within the province in respect of a thing situated in another province and the other province taxes the thing. On the other hand, if the question is simply one of succession on death, a thing must in its devolution be subject to a single law, that is, as a general rule, the law of the domicile as regards movables and intangibles and the law of the situs as regards interests in land. In the case of a mortgage on land it would seem to be obvious that that single law ought to be the law of the situs of the land, as was held in *In re Hoyles*, and that any cases in which, for purposes of taxation or for purposes other than succession, the mortgage instrument is said to be a movable, severable from the mortgagee's interest and capable of having a separate situs, must be disregarded.

In Canada on various occasions *In re Hoyles*, or the principle for which it stands, has been followed or adopted in succession cases²² without regard to implications to be drawn from the language of the Privy Council in taxation cases. Now, however, in the *Williams* case, the Supreme Court of Victoria has examined the language used by the Privy Council in various taxation cases, including the *Harding* case already discussed and another Australian appeal, *Commissioners of Stamps v. Hope*,²³ and the Canadian appeals in *Lambe v. Manuel*²⁴ and *Toronto General Trusts Corporation v. The King*,²⁵ and of course has there found express or implied statements in favour of the view that a mortgage on land is movable in character; and has come to this conclusion that it is bound in a succession case by these statements contained in taxation cases.

²⁰ Cf. Anglin J. in *Smith v. Provincial Treasurer for Nova Scotia* (1919), 58 Can. S.C.R. 570, at p. 590, 47 D.L.R. 108, at p. 121.

²¹ Cf. Laskin, *Taxation and Situs: Company Shares* (1941), 19 Can. Bar Rev. 617, at p. 618.

²² *Henderson v. Bank of Hamilton* (1894), 23 Can. S.C.R. 716, at p. 721, Strong C. J.; *Re Burke* (1923), 22 Sask. L.R. 142, [1928] 1 D.L.R. 318, [1927] 3 W.W.R. 713; *In re Dalrymple Estate*, supra, note 1; *Re Gauthier*, [1944] O.R. 401, [1944] 3 D.L.R. 401.

²³ [1891] A.C. 476.

²⁴ [1903] A.C. 68.

²⁵ [1919] A.C. 679.

The result, if there is no appeal from this decision, or if it is affirmed on appeal by the High Court of Australia, would be a deplorable discrepancy between the conflict rules of Victoria (or possibly of all states of Australia) and the conflict rules prevailing in England and in the common law provinces of Canada on the subject of succession on death.

The Privy Council has admittedly had a difficult task in taxation cases and few persons would be so rash as to suggest that it has always succeeded in steering a clear course through the great variety of taxing statutes, complicated frequently by questions of legislative power. This much seems, however, to be clear, that in its concentration on taxation questions it has been far from satisfactory in its pronouncements on questions of the conflict of laws incidentally arising in taxation cases and in its use in taxation cases of language that expressly or impliedly seems to state principles of the conflict of laws, without adequate consideration of those principles.

Even when it purports to state principles in cases involving primarily or solely questions of the conflict of laws, the Privy Council, as it is respectfully submitted, is even less satisfactory than it is in its *obiter dicta* in taxation cases on the subject of the conflict of laws. To say that the Privy Council's statements in conflict of laws cases are "less satisfactory" is indeed a serious understatement of the harm done by that tribunal. In taxation cases, the casual statements made by the Privy Council with regard to the conflict of laws may be disregarded with comparative ease, but its statements made in conflict of laws cases are not so easily disregarded in subsequent conflict of laws cases. It is therefore all the more important that its *obiter dicta* should be distinguished from its decisions and that the former should not be regarded as sacrosanct even in cases in which its decisions are binding.

There are two outstanding defects in the Privy Council's treatment of conflict problems.²⁶ In the first place, a decision of the Privy Council is stated by a single member of the Board and whatever he says in the reasons for judgment must theoretically be accepted as embodying the reasons for judgment of the Board, although practically one may suspect that there may have been dissenting opinions and be reasonably certain that if each member of the Board had been at liberty to state his reasons

²⁶ These defects have already been more fully discussed by me in *Bills of Lading: Proper Law and Renvoi* (1940), 18 Can. Bar Rev. 77, and in a comment (1941), 19 Can Bar Rev. 682, on *Jaber Elias Kotia v. Katr Blint Jryes Nahas*, [1941] A.C. 403.

for judgment his reasons would not have been identical with those stated in the official version. The net result is that the reasons for judgment as published are apt to be of a categorical and jejune character, containing general propositions unsupported by an adequate course of reasoning and representing presumably the maximum of reasoning for which the support of a majority of the Board can be secured, a sort of common denominator from which have been eliminated all the delicately shaded differences of judicial opinion which appear, for example, in judgments of the House of Lords. It happens that in the conflict of laws, which is still in the formative stage, the cross-currents of judicial opinion may be extremely valuable and the scientific development of the subject is impeded and prejudiced by some of the judgments delivered by the Privy Council. Another defect of judgments of the Privy Council in conflict of laws cases consists in what may be called a confusion of fora. The Privy Council is sometimes inclined to regard itself as an English court, because it sits in England, and to decide cases from an English point of view, whereas in each case it is the supreme appellate tribunal for some country outside of England and is obliged to administer the law of the forum, including the conflict rules of that law, the forum not being England but being the country from which the appeal comes.²⁷

The case of *In re Williams*²⁸, decided by the Supreme Court of Victoria, raises again the curious and embarrassing problem in *stare decisis* arising from the fact that in England a judgment of the Privy Council may be disregarded by the Court of Appeal,²⁹ and even in a divisional court of the High Court of Justice, while it "ought of course to be . . . entitled to very great weight indeed" or is "to be treated with the utmost respect", it is not a binding authority, and need not be followed.³⁰ On the other hand, we have been informed by the Privy Council itself³¹ that quite a different rule prevails as regards a country from which an appeal lies to the Privy Council. In the words of Lord Dunedin:

When an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in Eng-

²⁷ Cf. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942), 458, 459.

²⁸ *Supra*, note 5.

²⁹ *Fanton v. Denville*, [1932] 2 K.B. 309, at p. 332, Greer L.J.

³⁰ *Dulieu v. White & Sons*, [1901] 2 K.B. 669, at p. 677, Kennedy J., and at p. 683, Phillimore J.; cf. *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141, at pp. 154, 161, C.A..

³¹ *Robins v. National Trust Co.*, [1927] A.C. 515, at p. 519, [1927] 2 D.L.R. 97, at p. 100, [1927] 1 W.W.R. 692, at p. 696.

land is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board.

Obviously, if the foregoing statement of Lord Dunedin is accepted at its face value,³² it is all the more important that only the decisions, and not the *obiter dicta*, of the Privy Council should be regarded as binding. Even a decision of the Privy Council should be strictly limited to its proper field and should not be extended by implication into another field. It is submitted that in the *Williams* case the Supreme Court of Victoria has applied, in an extreme and unjustifiable form, the doctrine of the binding force of Privy Council judgments, including not only the actual decisions but also inferences from the reasons and *obiter dicta*.

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³² In *Negro v. Pietro's Bread Co.*, [1933] O.R. 112, [1933] 1 D.L.R. 490, the question arose whether the Court of Appeal for Ontario was bound to follow the decision of the Privy Council in *Victoria Railway Commissioners v. Coultas* (1887), 13 App. Cas. 222, on appeal from the Supreme Court of Victoria, in view of the adverse criticism of that decision in the courts of England, Ireland and Scotland. Middleton J. A., delivering the judgment of the Court of Appeal, succeeded in distinguishing the *Coultas* case on the facts, but he also, without express reference to the *Robins* case, elaborated his opinion that the *Coultas* case, a Victorian appeal, was not binding in an Ontario case.