THE CANADIAN BAR REVIEW

VOL. XII. TORONTO, MARCH, 1934. No. 3

ADMINISTRATION AND SUCCESSION IN THE CONFLICT OF LAWS.*

II. ADMINISTRATION OF ESTATES.

3. *The Appointment of an Administrator.*

In the subsequent discussion the word *administrator* is, for the sake of brevity, used in a wide sense, including not only the personal representative duly appointed or authorized to administer the estate of the deceased person (whether he be technically known as executor, administrator, or administrator with the will annexed, or otherwise), but also, if the context permits, the beneficiary (whether he be technically known as heir, next of kin, devisee or legatee, or otherwise) to whom the property or any part of the property of the deceased person passes directly, and who may be charged with duties and liabilities in relation to the property or entitled to sue in respect of it. The expression *local administrator* is used in the sense of the administrator appointed or authorized within a particular country, and the expression *local administration* is used in the sense of the administration carried on in that country.[39]

It follows from the normally exclusive jurisdiction of every country over all things situated within its territory that the law of each country may, as it usually does, make provision for the appointment or authorization of an administrator by the proper court of that country.[40]

* The earlier portion of this article will be found at p. 67 ff. *ante*.

[39] As already pointed out in the earlier instalment of this article, "country", in its application to Canada, means a province of Canada.

[40] Under the system prevailing in countries the law of which is based upon English law the appointment takes the form of grant of probate or of letters of administration; and this act of conferring authority to administer is *administration* in the first sense mentioned in the speech of the Earl of Selborne in *Ewing* v. *Orr Ewing*, 1885, 10 App. Cas. 453, at p. 504. The outline which follows in the text of the conflict of laws aspects of the appointment of an administrator and of the stages of administration is expressed in terms

The proper court of a given country, in appointing an administrator may, and ordinarily does, follow its own rules of law (the *lex fori*) applicable to appointments of this kind, and it is not bound by the corresponding rules of law of any other country, even of the country of domicile of the *de cujus*. The generality of this statement may, however, require modification in three respects:

(*a*) The court of a country in which the *de cujus* was not domiciled is inclined as a matter of practice to pay a good deal of deference to the court of the country of domicile as regards the appointment of an administrator, especially if an appointment has already been made in the country of domicile and the appointee is not personally disqualified by the *lex fori*.[41]

(*b*) In the case of the appointment of an executor as distinguished from an administrator, the validity of the will is governed as to immovables by the *lex situs* of the land and as to movables by the *lex domicilii* of the *de cujus*, subject to the provisions of Lord Kingsdown's Act as regards the formal validity of a will of personal property.[42]

(*c*) As between two countries within the British Empire there are usually in force reciprocal legislative provisions enabling a person who has obtained a grant of probate or letters of administration in one country to produce the probate or letters of administration to the proper court of the other country, to be there sealed, without his being obliged to furnish all the proofs which would ordinarily be required in the case of an original application there. For example, by virtue of the Colonial Probates Act, 1892, passed by the British Parliament, and made applicable to Ontario by a British order in council,[43] and corresponding provisions in the Ontario Surrogate Courts Act, a reciprocal arrangement is in force between Ontario on the one hand and England, Scotland or Ireland on the other. The Ontario statute also provides for the sealing in Ontario of a probate, of letters of administration, or of any other legal document purport-

derived from the law and practice prevailing in England and in the common law provinces of Canada, and is not applicable in its entirety to the province of Quebec. The subject of administration of estates is very slightly discussed in Lafleur, Conflict of Laws, 1898, pp. 128 ff., 215, and no doubt will be more adequately discussed in the forthcoming second volume of Johnson's Conflict of Laws.

[41] *In the Goods of Meatyard*, [1903] P. 125; but *cf. Re O'Brien*, 1883, 3 O.R. 336; *In re Grewe*, 1922, 38 Times L.R. 440, 127 L.T. 371. See also Westlake, Private International Law, §§ 65 ff.; Dicey, Conflict of Laws, Rule 130.

[42] This summary statement is sufficient at this point, because the question of the validity of a will is discussed in Section III, Succession to Property, *infra*. As to the appointment of an executor, see *In the Estate of Cocquerel*, [1918] P. 4.

[43] 15 March, 1893: see Ontario Statutes, 1895, p.x.

ing to be of the same nature, granted by a court of competent jurisdiction in any province or territory of Canada, or in any other British possession. The document, when sealed in Ontario, is effective there as to personal property, and, in the case of a will which is shown to have been made in manner and form sufficient to pass real property in Ontario under the Wills Act it is also effective there as to real property[44]

4. *The Stages of Administration.*

Administration in the sense of the management and distribution of the estate *extra curiam* by the administrator[45] consists logically of three stages.[46]

(1) Getting in the Property.

The administrator must, in the first place, collect the debts owing to the estate so far as those debts belong to the local administration, and cause the other assets belonging to the local administration to be placed in his name or otherwise under his control, converting into money such assets as are not to be held in trust in their present state, and as cannot be distributed in their present state among the beneficiaries.

The rights and powers of the local administrator extend to all property which at the time of the death of the *de cujus* are situated within the country in and for which the administrator has been appointed, including immovable property, so far as that property devolves upon the personal representative under the local law,[47] and all movable property, without regard to the nationality or domicile

[44] The provision as to real property was added to the Ontario Surrogate Courts Act by the statute 1927, c. 31, s. 8, and is now incorporated in R.S.O. 1927, c. 94, s. 68.

[45] *Administration* in the second sense mentioned in the speech of the Earl of Selborne in *Ewing* v. *Orr Ewing*, 1885, 10 App. Cas. 453, at p. 504. *Administration* in the third sense there mentioned, namely, the judicial administration of the estate under the degree of a competent court, is discussed in the case itself with especial reference to the question of jurisdiction.

[46] Numbered (1), (2) and (3) in the subsequent discussion.

[47] In countries in which English law prevails, and apart from statute, it is only the personal property which devolves upon the personal representative (personal property including all movable property and some immovable property, that is, some interests in land, e.g. leaseholds), whereas real property descends to the heir (real property including freehold estates or any other interests in land that are not characterized as personal property); but it is now provided by statute in most of the provinces of Canada that real property as well as personal property devolves upon the personal representative for the purpose of administration. As to the distinction between real property and immovable property (or land), see further Section III, Succession to Property (Selection of the Proper Law), *infra*.

of the *de cujus*.[48] As to all the property which thus devolves upon the local administrator, he alone is entitled to recover possession and to sue in respect of it.[49] If, within the country in which he has been appointed, he reduces into possession property situated there, he may sue in respect of it elsewhere without obtaining a grant of administration in the country in which he sues. Thus, for example, if he obtains a judgment upon a debt in the country in which he has been appointed, he may sue elsewhere upon the judgment,[50] or if he takes possession of a negotiable instrument in that country, he may sue upon it elsewhere,[51] as obviously he might do, if the subject-matter were a tangible chattel which he has reduced into possession in his own country. Subject to this exception, no person may sue as administrator in a country in which he has not obtained a grant of administration.[52] This rule has, however, no application to a case in which a person is universal donee or otherwise entitled to property in his personal character by the *lex situs* of the property. That person may of course sue anywhere in that character, and not in a representative character, without obtaining a grant of administration in the country in which he sues.[53]

The administrator's cause of action must of course be governed by the law of the country in which he sues in any given case, including the rules of conflict of laws of the forum. In other respects the administration, in the sense of the getting in and management of the

[48] The Ontario Devolution of Estates Act, R.S.O. 1927, c. 148, s. 2, provides, *inter alia*, that all real and personal property which is vested in any person without a right in any other person to take by survivorship shall, on his death, whether testate or intestate, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representative from time to time as trustee for the persons by law beneficially entitled thereto and subject to the payment of his debts, etc. Sub-s. 3 contains the mystifying provision that the section "shall not apply . . . to the personal property, except chattels real, of any person who, at the time of his death, is domiciled out of Ontario." This provision first appeared in 1910 (c. 56, s. 37), and it is difficult to assign to it any intelligible meaning. If it negatives the vesting in the personal representative of movables situated within the province in case the *de cujus* was domiciled elsewhere, it is inconsistent with the settled law and practice. Possibly it may by a *tour de force* be construed as meaning merely that the provisions of the statute so far as they relate to the distribution of the surplus among the beneficiaries do not apply to movables in case the *de cujus* was domiciled elsewhere.

[49] *Currie* v. *Bircham*, 1822, 1 Dowl. & Ry. 35; *Preston* v. *Melville*, 1841, 8 Cl. & F. 1; *Ewing* v. *Orr Ewing*, 1885, 10 App. Cas. 453.

[50] *Vanquelin* v. *Bouard*, 1863, 15 C.B.N.S. 341; *Re Macnichol*, 1874, L.R. 19 Eq. 81.

[51] *Crosby* v. *Prescott*, [1923] S.C.R. 446, 2 D.L.R. 937, affirming the decision of the Court of Appeal for Manitoba, *Prescott* v. *Crosby*, 1922, 32 Man. R. 108, 68 D.L.R. 250.

[52] *Whyte* v. *Rose*, 1841, 3 Q.B. 493; *White* v. *Hunter*, 1841, 1 U.C.R. 452; *Pritchard* v. *Standard Life Assurance Co.*, 1884, 7 O.R. 188; *Fidelity Trust Co.* v. *Fenwick*, 1921, 51 O.L.R. 23, 64 D.L.R. 647.

[53] *Vanquelin* v. *Bouard*, *supra*.

property belonging to the local administration is governed by the law of the country in which the administrator has been appointed and is subject only to the control of the proper court of that country.

(2) Payment of Creditors' Claims.

The administrator must, in the second place, pay the debts of the *de cujus* and the funeral and administration expenses, all in accordance with the local law of the country in which he has been appointed. Foreign and domestic creditors are alike to be paid in that order of priority which according to the nature of the claims or of the assets is prescribed by the law of that country.[54] Foreign creditors must therefore prove their claims in accordance with that law.[55]

(3) Distribution of the Surplus.

Lastly, the administrator must distribute the beneficial interest in the surplus. Whether there is a surplus or not depends upon the result of the administration in its earlier stages in accordance with the *lex fori*, that is, the local law of the country of the local administration, or, in other words, in accordance with the *lex situs* of the property included in that administration. Normally the local administrator himself distributes the surplus among the beneficiaries,[56] but, if the *de cujus* was domiciled elsewhere, the proper court of the country in which the local administration takes place may, in its discretion, direct the local administrator to pay the surplus to the domiciliary administrator.[57] It is submitted that payment to the domiciliary administrator ought not to be directed if the beneficiaries are not domiciled or resident abroad or if there is any doubt that the domiciliary administrator will distribute the surplus in accordance with the rules of conflict of laws of the forum.

III. Succession to Property.

1. *Selection of the Proper Law.*

As already pointed out, the local administrator is subject only to the control of the proper court of his own country as to the manner in which he is bound to conduct the administration. This is true not

[54] *In re Kloebe*, 1884, 28 Ch. D. 175; *Milne* v. *Moore*, 1894, 24 O.R. 456.
[55] *In re Lorillard, Griffiths* v. *Catforth*, [1922] 2 Ch. 638, 13 Brit. R.C. 560.
[56] As to the law which he should apply for the purpose of ascertaining the beneficiaries, see Section III, Succession to Property, *infra*.
[57] *In re Lorillard, supra*: *cf. Shaver* v. *Gray*, 1871, 18 Gr. 419; *Young* v. *Cashion*, 1909, 19 O.L.R. 491; *Re Donnelly*, 1911, 2 O.W.N. 1388, explained in *Re Scatcherd*, 1918, 15 O.W.N. 222; *Re Law*, 1915, 34 O.L.R. 222, 24 D.L.R. 871; 2 C.E.D. (Ontario) 699-700; *In re Achillopoulos, Johnson* v. *Mavromichali*, [1928] Ch. 433.

only with regard to the earlier stages of administration, but also with regard to the distribution of the beneficial interest in the surplus. At this last stage of administration, however, there is an essential difference as to the law which the local administrator will apply, or which the proper court of his country will compel him to apply. In the earlier stages of the administration the law applicable is ordinarily the *lex fori* (which happens also to be the *lex situs* of the property), there being no reference to any other law by the rules of conflict of laws of the forum. In this last stage of administration, however, that part of the *lex fori* which is distinguished from its local rules of law,[58] namely, its rules of conflict of laws, may compel the local administrator to apply the local rules of law of some other country.

As regards all interests in land or immovable property situated within the country, the law to be applied is the local *lex situs*, and ordinarily no question arises as to the applicability of any other law.

Interests in land and immovables are synonymous, and either expression includes not only an interest in land which is technically known in English law as real property, but also a leasehold estate, or land subject to a trust for sale but not yet sold, or a mortgage security, or any other interest in land, without regard to the fact that it may be technically known in English law as personal property. In other words, even in a country such as the province of Ontario, the local law of which distinguishes real property from personal property and ignores the distinction between immovable property and movable property,[59] nevertheless for the purpose of its rules of conflict of laws the material distinction to be drawn in the first place is that between immovables and movables, and the distinction between real property and personal property becomes material only in the event of its being decided that the local law of the country is the one to be applied, or that the law to be applied is the local law of some other country which itself distinguishes between real property and personal

[58] Sometimes called the internal or territorial law of the country.

[59] Halsbury's Laws of England, Hailsham edition, vol. 6, p. 214, note (*e*), contains this amazing sentence: "This division [between movables and immovables] was introduced into Ontario by the Montreal Act of 1792 (see *Re Hoyles, Row* v. *Jagg*, [1911] 1 Ch. 179, C.A.; 11 Digest 340, *290*)." So far as the sentence has any meaning at all (what is the Montreal Act?), it is of course inaccurate. It was decided in *In re Hoyles* that a mortgage on land in Ontario is in England to be characterized as immovable because it is characterized in Ontario (that is, by the Ontario rules of conflict of laws) as immovable.

property. The characterization of property as immovable or movable is to be made in accordance with the *lex situs* of the property.[60]

As regards interests in land which happen to be characterized in English law as personal property, a complicating element is Lord Kingsdown's Act,[61] by which a will, even though not made in accordance with the *lex situs*, is valid in point of form as to personal property, if it is made by a British subject in accordance with any one of several specified laws.[62] These provisions of Lord Kingsdown's Act relate only to the formalities of making of a will, and do not touch any question of intrinsic validity. In other words, a will which is valid as regards formalities by virtue of Lord Kingsdown's Act may nevertheless be wholly or partially inoperative because, for example, of the incapacity of the testator or of limitations on his disposing power, or of the fact that some or all of the provisions of the will are illegal or void, under the *lex situs* in the case of land or the *lex domicilii* in the case of movables; and as regards intrinsic validity it is immaterial that any interest in land that is in question is characterized in English law as personal property.[63] And of course Lord Kingsdown's Act does not touch the question of either the formal validity or the intrinsic validity of a will of any interest in land which is characterized in English law as real property. As to matters not covered by Lord Kingsdown's Act, and as to all questions of succession on intestacy, or partial intestacy, the *lex situs* is the sole governing law as to immovable property.[64]

As regards all movable property, that is, pure personalty, or personal property other than any interest in land, the governing law as to either formal or intrinsic validity of a will, or as to succession on total or partial intestacy, is the law of the last domicile of the deceased

[60] Generally, as to characterization of property as movable or immovable, see *In re Berchtold, Berchtold* v. *Capron*, [1923] 1 Ch. 192; my Law of Mortgages, 2nd ed. 1929, pp. 733-737; Annotation to *Re Colville*, [1932] 1 D.L.R. 53; Contract and Conveyance in the Conflict of Laws, 81 University of Pennsylvania Law Review 662 (April, 1933), [1934] 2 D.L.R. 1.

[61] Now cited in England as the Wills Act, 1861; in force in Ontario, R.S.O. 1927, c. 149, s. 19, and in some of the other provinces of Canada.

[62] The various laws to which, in the alternative, resort may be had are stated below in connection with wills of movables.

[63] *Freke* v. *Lord Carbery*, 1873, L.R. 16 Eq. 461; *Duncan* v. *Lawson*, 1889, 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; *In re Grassi*, [1905] 1 Ch. 584; *Re Dartnell*, 1916, 37 O.L.R. 483; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

[64] *In re Berchtold*, [1923] 1 Ch. 192; *Re Howard*, 1923, 54 O.L.R. 109, [1924] 1 D.L.R. 1062; *Re Teale*, 1923, 54 O.L.R. 130; *Re Colville Estate*, 1931, 44 B.C.R. 331, [1932] 1 D.L.R. 47 (with annotation). While the general rule as to succession to immovables is clear, some difficult problems may arise as to the heir's right of recourse against movable property and as to the doctrine of election: see Dicey, Conflict of Laws, Appendix, note 25, Questions where Deceased leaves Property in Different Countries.

owner. The generality of the proposition just stated must, however, be modified in two respects, by reason of Lord Kingsdown's Act. Firstly, under that statute even though a will of movables is not made in accordance with the law of the last domicile of the *de cujus*, it is valid in point of form, if it is made by a British subject, and (in the case of a will made either at home or abroad) is in accordance with the law of the place of making, or (in the case of a will made abroad) is in accordance with the law of the domicile of the testator at the time of the making of the will or the law then in force in that part of the British dominions in which the testator had his domicile of origin. Secondly, under the same statute, a will is not revoked or rendered invalid, and its construction is not altered, by reason of a change of domicile of the testator after the making of the will.[65]

The foregoing statement of the rules of conflict of laws relating to succession applies not only to Ontario, but also to Alberta, British Columbia and New Brunswick, in which the basis of the law is English law and in which Lord Kingsdown's Act has been re-enacted. It also applies to Manitoba, on the assumption that Lord Kingsdown's Act, though not expressly re-enacted, is part of the law of England which was adopted in Manitoba as of the 15th of July, 1870. In the case of Nova Scotia, however, the statement must be modified, because the Wills Act of that province contains no provision as to wills made within the province, corresponding with one section of Lord Kingsdown's Act; and as to wills made abroad, while it re-enacts another section of Lord Kingsdown's Act, it does so with two important modifications, that is to say, the statute is not limited to wills of British subjects, and if a will is made according to the forms required by the law of the place of the testator's domicile of origin, it is not necessary that the domicile should be within the British dominions. In the case of Prince Edward Island the foregoing statement of the law may, it would appear, be simplified by the omission of all reference to Lord Kingsdown's Act. Saskatchewan alone has adopted the logical course of enacting a revised version of Lord Kingsdown's Act,[66] retaining the permissive provisions under which a will of movables is valid in point of form if it is made in accordance with any one of certain laws, but limiting these provisions to wills of movables and thus avoiding the incongruous and illogical features of Lord Kingsdown's Act.[67]

[65] This provision is not limited to the will of a British subject. *In the Estate of Groos*, [1904] P. 269.

[66] Sask. Statutes, 1931, c. 34, ss. 34-36.

[67] The provisions substituted in Saskatchewan for Lord Kingsdown's Act are part of a Uniform Wills Act prepared by the Conference of Commission-

In Quebec, as in the other provinces, and as in France, succession to movables on intestacy is governed by the law of the domicile of the *de cujus* at the time of his death, and the succession to immovables is governed by the *lex situs* of the property.[68] As to movables at least, the law of Quebec relating to the formal validity of wills is strikingly different from that of the other provinces, the primary rule being that a will made in accordance with the forms of the law of the place of making is valid, but resort being permitted to the forms of the *lex domicilii* of the testator.[69] Inasmuch as status and capacity also are in Quebec governed by the *lex domicilii,* it is unnecessary there to make the distinction which must be made in France between the personal capacity of a testator, governed by his national law, and limitations imposed upon his disposing power, governed by the law of his domicil.[70]

In any province in which there has been enacted a Dependents' Relief Act or Family Protection Act or other similar statute, enabling a court to give to a testator's dependents a larger share of his estate than he has given them by his will, a nice question of characterization arises. The prevailing view would seem to be that a statute of this kind, in the absence of any clear indication of the legislature's intention, is to be characterized as being in effect a limitation on the testator's disposing power, and therefore as being testamentary law, applicable to immovable property situated within the territory of the enacting legislature and to movable property wherever situated of a testator domiciled in that territory.[71]

---

ers on Uniformity of Legislation in Canada published in the Conference Proceedings, 1929, 37, at pp. 46-47, and in the Canadian Bar Association Year Book, 1929, 323, at pp. 332-333, and subsequently adopted, so far, only in Saskatchewan. The provisions in question are quoted in the annotation to *Re Colville,* [1932] 1 D.L.R. 47, at pp. 56-57.

[68] As to immovables, see Lafleur, Conflict of Laws (1898), p. 127, and Niboyet, Manuel de Droit International Privé (Paris, 1928), § 722, pp. 837-839. As to movables, the French law and the Quebec law relating to the whole paragraph in the text are more fully stated, and the authorities are cited, in *Renvoi* and Succession to Movables, 46 Law Quarterly Review 465, at pp. 468-472, [1932] 1 D.L.R. 1, at pp. 5-9. It would be a work of supererogation, if not of presumption, for me to pursue the matter further here in view of the fact that the learned author of Johnson on the Conflict of Laws with Special Reference to the Law of the Province of Quebec, has stated in the preface to the first volume, that he hopes in his forthcoming second volume to treat of the subject of succession. As to the French law, see also footnotes 76 and 88, *infra.*

[69] See *Ross* v. *Ross,* 1895, 25 Can. S.C.R. 307, and footnote 91, *infra.*

[70] Some authorities are referred to in the article cited in footnote 68, *supra.*

[71] A good discussion of the subject is to be found in *In re Butchart* (Deceased), *Butchart* v. *Butchart,* [1932] N.Z.L.R. 125 (in the Court of Appeal for New Zealand). See also *Re Ostrander Estate, Ostrander* v. *Houston,* 1915, 8 Sask. L.R. 132, 30 W.L.R. 890, 8 W.W.R. 367.

2. *Proof and Application of Foreign Law.*

In the immediately preceding discussion it has been assumed that if any question as to the succession to the property of a deceased person comes before the proper court of the country in which the property is situated, the logical process is for the court of the situs to characterize the question in accordance with the *lex fori* (*lex situs*) and, in accordance with its own rules of conflict of laws, to choose the connecting factor (*situs* in the case of succession to immovables, *domicile* in the case of succession to movables) which leads the court to select its own local law or the local law of some foreign country as the proper law to govern the decision of the question.

If, for example, in the case of succession to movables, the court chooses the last domicile of the deceased owner as the connecting factor, it must then ascertain in accordance with the *lex fori*[72] what was the last domicile of the *de cujus*. If the domicile is found to be in the country of the forum, *cadit quaestio:* the court applies the *lex fori*. If the domicile is found to be in some other country, the court consequently selects the law of that country as the proper law. If the provisions of that law are admitted or proved,[73] the court must then apply those provisions to the case before it and order distribution to be made in accordance with those provisions.

Just at this point confusion is likely to arise. Error in a crude form appeared when it was formerly said that the administration of movable property belonged to the court of the domicile and that the court of the domicile was the *forum concursus* to which beneficiaries were obliged to resort,[74] This error was subsequently authoritatively disapproved and corrected in the House of Lords, and it was pointed out that for the purpose of determining succession to movables recourse must be had, not always or necessarily to the court of the domicile, but always and necessarily to the law of the domicile.[75]

[72] *In re Annesley, Davidson* v. *Annesley,* [1926] Ch. 692.

[73] As to the competency of a witness to prove foreign law, see *Gold* v. *Reinblatt,* [1929] S.C.R. 74, 1 D.L.R. 959, and my note in 7 Canadian Bar Review 399 (June 1929); see also Johnson, Conflict of Laws, vol. 1, 1933, pp. 13 ff. for a full discussion of the proof of foreign law; *Re Low,* [1933] O.R. 393, 2 D.L.R. 608. It is provided by the Manitoba Evidence Act (1933, c. 11), s. 25 (1), that "Every court shall take judicial notice of the laws of any part of the British Empire, or of the United States of America, or any state, territory, possession or protectorate thereof, but foreign law shall nevertheless be pleaded where any rule or law so requires."

[74] *Enohin* v. *Wylie,* 1862, 10 H.L.C. 1, at p. 13, Lord Westbury. See also the dictum of Lord Cranworth in *Doglioni* v. *Crispin,* 1866, L.R. 1 H.L. 301, at p. 314. Both dicta are also inaccurate in their reference to "personal" property, when "movable" property must have been meant.

[75] *Ewing* v. *Orr Ewing,* 1885, 10 App. Cas. 453, at p. 502, Earl of Selborne. It is submitted that the error which was condemned in this case is in effect

While it is clear as a matter of jurisdiction that it belongs to the court of the situs of the property, and not that of the domicile of the *de cujus*, to determine who are beneficially entitled to the movable property, some English judges have shown a tendency to allow the court of the domicile in effect to do what the court of the situs ought to do for itself, namely, to define the scope and meaning of the English rule of conflict of laws which says that succession to movables is governed by the law of the domicile.

The process by which some English judges have reached this strange conclusion is commonly known as the *renvoi*—the *lex domicilii* referring back to the *lex situs*,[76] with a possible further reference by the *lex situs* to the *lex domicilii*[77] or to some other law,[78] of the *lex domicilii* itself referring to some other law,[79] and the court of the situs in any of these events accepting the result actually reached by the court of the domicile or the result which the court of the domicile would reach if the question of the distribution of the movable property of the same estate came before it.

I have attempted elsewhere to state in some detail my reasons for thinking that the doctrine of the *renvoi* should not be admitted in any form with regard to succession to movables,[80] although something analogous to the *renvoi* may be admissible to a limited extent with

---

revived when it is said that the court of the situs must accept without question whatever the court of the domicile has decided with regard to the distribution of the estate, even if the application of foreign rules of conflict of laws is involved: see footnote 85, *infra*.

[76] *Renvoi, Rückverweisung.* The reference back is not necessarily or usually a reference back to the *lex situs* as such. It may be a reference to the *lex situs* as being the national law of the *de cujus*. *In re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377. It may be a reference to the *lex situs* as being what the court of the domicile in the English sense considers to be the *lex domicilii* of the *de cujus*. This was the case in *In re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692, it being a rule of French conflict of laws, that succession to movables and limitations on a testator's disposing power are governed by the *lex domicilii*, not by the national law of the *de cujus*, as is suggested in the report of the case: see Law Quarterly Review, vol. 46, pp. 471-472; vol. 47, pp. 280-281; [1932] 1 D.L.R. 8-9, 32; Affaire Mondet, Tribunal Civil de la Seine, 11 May 1933, Clunet, 1933, pp. 812, 970, Revue Critique de Droit International, vol. 29, 1934, p. 129.

[77] The double *renvoi*: *In re Annesley, supra*, reaching the same result as if the doctrine of the *renvoi* had not been invented; *cf. In re Askew, Marjoribanks* v. *Askew*, [1930] 2 Ch. 259.

[78] *In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821, one theory of the judgment.

[79] *Renvoi* in the second degree, *Weiterverweisung*: *In re Trufort, Trafford* v. *Blanc*, 1887, 36 Ch. D. 600.

[80] *Renvoi* and Succession to Movables, in Law Quarterly Review, vol. 46, pp. 465-485 (1930), vol. 47, pp. 271-293 (1931), republished, with additions and changes, in [1932] 1 D.L.R. 1-47, and, translated into French, *sub. tit. Renvoi et Succession Mobilière*, in Revue de Droit International Privé, vol. 27, pp. 254-278, 451-479 (Paris, 1932).

regard to marital status[81] and with regard to title to land and possibly with regard to conveyance of movables *inter vivos*.[82] Only some supplementary observations need to be made here concerning the application of the doctrine to the succession to movables.

Firstly, I venture to add some remarks about one peculiarly deceptive form in which the argument in favour of the *renvoi* is sometimes expressed. It is said that when the law of a given foreign country has to be applied by an English court, conclusive proof of the law of that country is afforded by a judgment of a court of that country with regard to the question which is before the English court. Thus, for example, if the distribution of the movable property of A (a British subject of English domicile of origin) comes before an English court and that court finds that A died intestate domiciled in Italy at the time of his death, and if proof is given of an Italian judgment by which it is decided that A's movable property is to be distributed in accordance with the local law of England, as being the national law of A, then it is said that the English court should distribute the movable property in accordance with local English law.

This argument is the one which is adopted in its extreme form in the Hailsham edition of Halsbury's Laws of England,[83] with the logical sequel that if no judgment has been given by a court of the domicile, the English court must nevertheless decide the case as if it were sitting in the country of domicile and therefore must decide it exactly as a court of the domicile would decide it if the question came before it. In an earlier article I reviewed, and attempted to demonstrate the illusory character of, the cases usually cited in favour of the somewhat naïve proposition that a judge appointed and paid to sit in England and apply English law, including English rules of conflict of laws, should feel justified in imagining himself sitting in a foreign country and therefore in applying foreign rules of conflict of laws.[84] I venture to submit that the supposed authorities are no stronger in favour of the proposition that an English judge, charged with the duty of distributing movables situated in England, should

[81] Report on conflict of laws relating to the formation and dissolution of marriage prepared by me for the International Congress of Comparative Law, The Hague, 1932, published in part *sub. tit.* Conflict of Laws as to Nullity and Divorce, [1932] 4 D.L.R. 1 (at pp. 44 ff. as to the *renvoi*).

[82] Law of Mortgages, 2nd ed. 1931, pp. 740-741; Contract and Conveyance in the Conflict of Laws, 81 University of Pennsylvania Law Review 661, at pp. 682-683 (April. 1933), [1934] 2 D.L.R. 1.

[83] Vol. 6 (1932), p. 244; to the same effect, the original edition, vol. 6 (1909), pp. 221-222.

[84] See footnote 80, *supra*.

blindly follow a judgment of the court of the domicile even to the extent of adopting the rules of conflict of laws of the domicile.[85]

A judgment of the Italian court is of course excellent proof of Italian law if it relates to that part of Italian law upon which the English court desires to be informed. The defect in the proof in the example given is that the Italian judgment may prove the Italian rule of conflict of laws applicable to the case before the Italian court (whereas what the English court has to apply to the case before it is English rules of conflict of laws), and the Italian judgment may give no information as to the Italian local law of intestate succession (which is what ought to be proved before the English court). If the Italian law, instead of being proved by an Italian judgment, were proved by the evidence of an Italian lawyer, he could be asked to distinguish between Italian rules of conflict of laws and Italian local law, and to tell the court how the movable property of an Italian subject domiciled in Italy would be distributed by an Italian court, without regard to Italian rules of conflict of laws applicable to the case of a British subject. Similarly if Italian law is proved by an Italian judgment, it ought to be a judgment in a case similar to the case before the English court except that it contains no element which would cause the Italian court to apply anything but local Italian law. In that event it might be truly said that the Italian judgment is conclusive proof of the Italian law.[86]

It should be remarked that an Italian judgment with regard to the distribution of the movable property of the same estate as is before the English court is in no sense a judgment *in rem* except as to the movables situated in Italy. As to the title to those movables it is of course a judgment *in rem* and entitled to recognition in England and elsewhere. The *res* in question before the English court is a different *res* altogether, namely, the movable property situated in England, and as to it the English court alone can pronounce a judgment *in rem*

[85] Stirling, J. did adopt this course in *In re Trufort, Trafford* v. *Blanc*, 1887, 36 Ch. D. 600, after quoting from the judgments in *Enohin* v. *Wylie*, 1862, 10 H.L.C. 1, and *Doglioni* v. *Crispin*, 1866, L.R. 1 H.L. 301. He noted the fact that Lord Westbury's language in *Enohin* v. *Wylie* had been disapproved in *Ewing* v. *Orr Ewing*, 1885, 10 App. Cas. 453, at p. 502 (see footnote 75, *supra*), but he chose for quotation a passage from Lord Cranworth's judgment in *Doglioni* v. *Crispin* containing the very error which was corrected in *Ewing* v. *Orr Ewing*. Neither *Enohin* v. *Wylie* nor *Doglioni* v. *Crispin* is authority for the proposition that an English judge must accept the rules of conflict of laws of the court of the domicile; in each case the House of Lords merely accepted the domiciliary court's exposition of the local law of the domicile. So, in *Jones* v. *Smith*, 1925, 56 O.L.R. 550, [1925] 2 D.L.R. 790, in which *In re Trufort* was nominally followed, there was no question of any reference by the rules of conflict of laws of the *lex domicilii* to any other law.

[86] The case would then be within the authority of *Enohin* v. *Wylie* and *Doglioni* v. *Crispin, supra.*

which will be binding elsewhere. As to the movables situated in Italy the Italian court must apply Italian rules of conflict of laws and as to the movables situated in England the English court must apply English rules of conflict of laws. It is of course unfortunate if different modes of succession are adopted in the two countries. It is also true that sometimes it happens that uniformity of succession in two countries is secured by the application of some form of the *renvoi* by an English court. Thus, as between England and Italy, local English law might be applied in both countries, the Italian court applying English law without admitting any reference back to Italian law and the English court applying Italian law and admitting a reference back to English law.[87] So, as between England and France, an English court and a French court might reach the same result in the same estate and apply local French law, on the supposition that the French court would apply English law, and admit a reference back to French law, and that the English court should therefore apply French law in the sense that the French law would refer to English law but accept a reference back to French law.[88] Thus uniformity of succession is achieved, but only by the accidental circumstance that the court of one country is one step ahead or one step behind the court of the other country in its understanding of the refinements of the doctrine of the *renvoi* or in its acceptance or rejection of the doctrine. If the court of one country is no more or no less enlightened than the court of the other country, the application by both courts of an identical doctrine of the *renvoi* does not secure uniformity of succession and serves only to obscure the rules of conflict of laws of both countries.[89]

It should also be remarked that the problem of the *renvoi* arises only if the appropriate rule of conflict of laws of each of two countries refers the matter in question to the law of the other country or of another country. If A dies intestate, domiciled in the English sense in England and in the French sense in France[90] an English court

[87] *Cf. In re Ross*, [1930] 1 Ch. 377.

[88] *Cf. In re Annesley*, [1926] Ch. 692. In this case, and in Halbury's Laws of England, Hailsham edition, vol. 6, 1932, p. 245, note (*h*), it is inaccurately stated that in France the national law of the *de cujus* governs succession to movables and limitations on a testator's disposing power, whereas these questions are in France, as in England, governed by the *lex domicilii*: see footnote 76, *supra*.

[89] See 46 Law Quarterly Review 465, at p. 479; 47 Law Quarterly Review 271, at pp. 282-283, 286-287; [1932] 1 D.L.R. 1, at pp. 16, 34, 39.

[90] A case which is not improbable if we suppose that A's domicile of origin was English and that he had resided in France for some years prior to his death. It might easily happen that an English court would hold that he had not lost his domicile of origin (*Winans* v. *Attorney-General*, [1904] A.C. 287) and a French court hold that he had acquired a domicile of choice in France.

would apply English law, and a French court would apply French law, to the distribution of his movable property. In this situation even the illusory solution supposed to be afforded by the doctrine of the *renvoi* is unavailable.

In conclusion, I take advantage of the opportunity to make some supplementary observations on one case in the Supreme Court of Canada and three cases in the Privy Council, so far as they have any bearing on the doctrine of the *renvoi*.

In *Ross* v. *Ross*[91] the Court of Queen's Bench for Lower Canada had unanimously held (*a*) that article 7 of the Civil Code of Lower Canada ("Acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made") is imperative, not permissive, and therefore that a will of movables made in New York by a person domiciled in Quebec was governed as to formalities solely by New York law, but (*b*) that as New York law recognized the will as valid because made in accordance with the forms of the *lex domicilii*, the will was valid as to movables situated in Quebec. The Supreme Court of Canada affirmed the judgment, (*a*) three judges out of five being of opinion that article 7 is permissive,[92] and (*b*) four out of five being of opinion that the will was valid because it was recognized as valid by New York law. The reasons for judgment of the majority were chiefly directed to the first point and disposed of the second point quite casually, whereas Taschereau, J., delivered a vigorous and elaborately reasoned dissenting judgment on the second point. If the judgment of the Supreme Court on the second point is to be regarded as a binding authority in Quebec, we must be driven to the conclusion that the doctrine of *stare decisis* in one of its extreme

[91] 1894, 25 Can. S.C.R. 307, affirming, by a majority, the unanimous judgment of the Court of Queen's Bench for Lower Canada, 1893, Q.R. 2 Q.B. 413; *cf.* 47 Law Quarterly Review 271, at pp. 287-288; [1932] 1 D.L.R. 1, at pp. 40-41.

[92] In *Berthiaume* v. *Dastous*, [1930] A.C. 79, 1 D.L.R. 849, the Privy Council, reversing the Court of King's Bench, Quebec, 1928, Q.R. 45 K.B. 391, held that article 135 of the Civil Code of Lower Canada ("A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnized according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law") is imperative, not permissive; *cf.* [1932] 4 D.L.R. 1, at p. 7; Johnson, Conflict of Laws, vol. 1 (1933), pp. 290-296. It is not obvious, on a comparison of articles 7 and 135, why the former should be construed as permissive and the latter as imperative; and if the respective social interests in question are compared, it would seem that it is not less important that a marriage celebrated in accordance with the forms of the domiciliary law of the parties should be upheld than that a will of movables should be upheld.

and least defensible forms has entrenched itself in Quebec.[93] It is fairly obvious that the decision, on the construction of an article of the Civil Code of Lower Canada, is of little or no authority as to the law of the other provinces. In fact, no will has ever been held, in any reported English or Canadian case, to be *invalid* in point of form on the ground that although it complies with the form prescribed by the local law of the domicile, it does not comply with the rules of conflict of laws of the domicile. It is highly improbable that there will ever be such a case, and, until it arises, it is premature to state any general rule that the law of the domicile means the rules of conflict of laws of the domicile, on the basis merely of cases in which wills have been upheld as regards form on various and sometimes alternative grounds.[94]

The judgment of the Privy Council in *Bremer* v. *Freeman*[95] is so intricate in its reasoning that both the partisans and the adversaries of the *renvoi* have cited it in support of their views. Probably, though not certainly, the Privy Council applied what it believed to be the local law of France.[96] In particular, Lord Wensleydale said,[97] "Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law, nor any that the statute of 7 Will. 4 and 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law."

The editor of the fifth edition of Dicey's Conflict of Laws would seem to be labouring under a misapprehension when he cites *Bartlett* v. *Bartlett*[98] as being a decision of the Privy Council in favour of the *renvoi*. "It seems a pity that cases on extra-territorial jurisdiction should be classed together with those on the so-called *circulus inextricabilis* under the general head of *renvoi*. . . . The rule which [Keith] quotes from the judgment in *Bartlett* v. *Bartlett* was common ground of both parties, only recited in the judgment as introducing

[93] To the contrary is the dictum of Rivard, J., in *The King* v. *National Trust Co.*, 1933, Q.R. 54 K.B. 351, at p. 369, [1933] 2 D.L.R. 474, at p. 496: "Autrement, on tomberait dans la fausse doctrine connue sous le nom de théorie du renvoi et universellement condamnée."

[94] See Law Quarterly Review, vol. 46, p. 465, at p. 483, vol. 47, p. 271, at p. 290; [1932] 1 D.L.R. 1, at pp. 20, 46.

[95] (1857), 10 Moore P.C. 306, on appeal from the Prerogative Court of Canterbury.

[96] *Cf.* 46 Law Quarterly Review 465, at pp. 480-482; [1932] 1 D.L.R. 1, at pp. 16-19.

[97] 10 Moore P.C. 306, at p. 359. The passage is quoted in *In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, at p. 451.

[98] [1925] A.C. 377. See Keith's preface to Dicey, 5th ed. 1932, p. iv; and Appendix, note 1 (Meaning of "Law of a Country," and the Doctrine of the Renvoi), at p. 876, and note 26 (The Case of *Bartlett* v. *Bartlett*), pp. 981 ff.

the real issue between them."[99] The case turned upon the construction of a certain Ottoman order in council in force in Egypt, and it tells us nothing about the doctrine of the *renvoi.*

The case of *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*[100] is the strange choice made by Hibbert[101] as the leading case on the doctrine of the *renvoi*—a case which does not mention the doctrine and does not involve its consideration.

In the *Charlesworth* case the Privy Council heard an appeal from Her Britannic Majesty's Court for Zanzibar, and in the *Bartlett* case it heard an appeal from His Britannic Majesty's Supreme Court for Egypt. In each case the Privy Council had of course to apply the law of the forum, that is, the law of the country from which the appeal came. That law would be the whole law of that country, including it rules of conflict of laws, and the Privy Council had of course to decide the case as if it were sitting in that country. Whether the law in fact applied in either case was the local law or the rules of conflict of laws of the country makes no difference for the present purpose, since there was no suggestion in either case that the court under the rules of conflict of laws of the forum selected the law of a given country as the proper law and that the law of that country referred the question back to the law of the forum, or on to the law of any other country. There was, in other words, no question of the *renvoi.* On the other hand, in *Bremer* v. *Freeman* the Privy Council heard an appeal from the Prerogative Court of Canterbury; the forum was England, and the law to be applied was the law of England, including its rules of conflict of laws; and it is only the obscurity of the judgment in its discussion of the French law which prevents the case from being used as an unequivocal authority either for or against the doctrine of the *renvoi.*

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.

[99] S. G. Vesey Fitzgerald, in a review of the 5th edition of Dicey, in the Journal of the Society of Public Teachers of the Law, 1932, p. 54. The quotation from *Bartlett* v. *Bartlett* occurs on p. 983 of Dicey, and Vesey Fitzgerald suggests that Keith there supplies the answer to his own criticism on p. 876 of my view, stated in 47 Law Quarterly Review 271, at p. 285, [1932] 1 D.L.R. 1, at pp. 37-38.

[100] [1901] A.C. 373.

[101] Leading Cases in Conflict of Laws (1931), p. 1. The case is also cited by Johnson, Conflict of Laws, vol. 1, p. 12.