# PRIVATE INTERNATIONAL LAW

BY

A JURIST

*Completely Revised & Brought up–to–date*

BY

C. VEENA, B. Com., LL.B.

Advocate, High Court, Bombay

C. JAMNADAS & CO.

EDUCATIONAL AND LAW PUBLISHERS

146–C, Shamaldas Gandhi Marg,

BOMBAY–400 002

*Published by*
**Parimal J. Shah, M. A.**
For C. Jamnadas & Co.,
146–C, Shamaldas Gandhi Marg,
Bombay–400 002



Thoroughly Revised & up-dated Fifth Edition

**Price : Rs. 75–00**

*Printed by*
**Surendra J. Shah**
At Parijat Printery
288/1, RANIP–382 480
Dist. Ahmedabad

## PREFACE TO THE FIFTH EDITION

We are very happy to present the fifth edition of Private International Law to the student community. This book written by A Jurist is primarily intended to help students grasp the principles of Private International Law. It deals with the subject in a simple and straightforward manner. The questions asked at the Bombay University examinations are incorporated in the margins for ready reference. We are confident that students will find this book to be of immense utility.

— PUBLISHERS

## CONTENTS


| Chapter | | Page |
|---|---|---|
| I. | Nature & Scope of Private International Law | 1 |
| II. | Domicile | 13 |
| III. | Status | 25 |
| IV. | Marriage | 29 |
| V. | Legitimation & Adoption | 41 |
| VI. | Contracts | 51 |
| VII. | Negotiable Instruments | 59 |
| VIII. | Theories of Classification | 62 |
| IX. | Renvoi | 68 |
| X. | Assignment of Movable Marriage | 73 |
| XI. | Assignment of Property on Marriage | 82 |
| XII. | Testamentary Succession (Wills) | 85 |
| XIII. | Trusts | 92 |
| XIV. | General Principles Relating to Jurisdiction | 94 |
| XV. | Matrimoniai Causes | 108 |
| XVI. | Tort | 123 |
| XVII. | The Recognition and Enforcements of Foreign Judgements | 127 |
| XVIII. | The Limits for Application of Foreign Law | 132 |
| | **Index of Cases** | 137 |

# BOOKS FOR FURTHER READING

| | |
|---|---|
| Graveson | Conflict of Laws |
| Dicey and Morris | Conflict of Laws |
| Cheshire | Private International Law |
| Paras Diwan | Private International Law |

# 1

# NATURE AND SCOPE OF PRIVATE INTERNATIONAL LAW

All transactions between human beings are governed by laws. Each modern State has its own set of laws which govern transactions between persons residing within the territorial jurisdiction of that particular State. However, it happens sometimes that transactions between two persons or bodies may not be confined or restricted to the territory of one particular State. Again, the two different persons or bodies may have their own laws and legal systems. In such cases, it becomes necessary to decide whether : (i) the Court before which they go, has jurisdiction to try the dispute; (ii) if such a court has jurisdiction, then which legal system governs the case; and lastly (iii) whether the judgement of a foreign court already rendered binds the parties equally before it or not ?

*B.U. = Bombay University.*

Private international Law or conflict of laws is that part of the law of a State which comes into operation whenever there is a dispute before a court which *contains a foreign element.* The laws in modern States are generally territorial in application but human transactions are not confined to the territory of one State. Therefore, whenever there is a transaction extending over the territories of different States the need for the application of rules of Private International Law or conflict of laws would arise. For example, if an English merchant were to enter into a contract with a French merchant for supply of certain goods in Germany and if the dispute is brought before an English Court it will be necessary to apply, not the domestic law of England, but the Private International Law of England. It would certainly not be proper to decide the dispute on the exclusive basis of domestic English law. In a case like this the court before which the dispute comes has to decide the following three questions : —

(1) Whether the court can exercise jurisdiction over such dispute connected with the legal systems of different countries. This is known as *choice of jurisdiction.*

(2) If the court decides to exercise jurisdiction, the law according to which the dispute is to be decided becomes another question of importance. This is known as *choice of law.*

(3) If there has been a judgment of a foreign court, would such judgment or decree of a foreign court be recognised or enforced by the court before which the dispute has arisen.

*Explain the meaning and nature of Conflict of Laws. How does Conflict of Laws arise ?*

B. U. 81

*Explain the "Conflict of Laws."*

B. U. 82

*Define 'Private International Law and examine critically how far the subject is based on justice, convenience and Comity.'*

B. U. May 83

*Discuss the need for Conflict of Laws and trace its development.*

B. U. Oct. 85

*Distinguish between Private International Law and Public International Law.*

Private International Law is not to be mistaken for Public International Law. Private International Law is not International Law in the sense that it is law accepted by the various States in the world. Private International Law is a part of the law of a State which will be invoked whenever there is a foreign element in a dispute. Private International Law of one country might differ from the Private International Law of another country. For example, it is right to speak of English Private International Law, French Private International Law or Indian Private International Law. On the other hand, Public International Law is in its very nature universal. It is common generally to all the members of the community of nations.

The term Private International Law may be misleading because it gives an impression that the law is international in its nature. Therefore, some writers call it *conflict of laws*. Even this term is not acceptable to writers like G. C. Cheshire. He points out that it is not a case of the laws of two countries struggling to govern a particular case. The name may suggest such a struggle. Other terms like 'International Private Law' and 'International Law' are also used when referring to Private International Law.

## THE CHARACTERISTICS OF PRIVATE INTERNATIONAL LAW

(1) As pointed out above, Private International Law is *a part of the domestic law* of a State.

In any branch of civil law, the problem of Private International Law might arise. For example, (a) a contract may have a foreign element; (b) a marriage may be between nationals of two States ; or (c) a negotiable instrument might have been duly accepted or endorsed in different countries. In such circumstances the rules of Private International Law are to be applied.

*What is the purpose of Private International Law ? Trace the development of Private International Law briefly and suggest any improvement to remove its inadequacies.*

B. U. Nov. 93

(2) Private International Law is essentially a *system of indicating choice*, choice of jurisdiction, choice of law and rules for recognition and enforcement of the judgement of a foreign court. Therefore, Private International Law does not lead to any final decision. It has been loosely compared by a famous writer to a railway enquiry room. By approaching the enquiry room you can only ascertain the platform from which a particular train leaves. It is the train that reaches you to your destination but not the enquiry room. In the same way, Private International Law would only decide the rule of choice and then indicate to you the law that is to be applied. Such law is to be ascertained with the help of an expert and applied.

## THE BASIS OF PRIVATE INTERNATIONAL LAW

### COMITY

*State the need and basis of the Private International Law. Discuss briefly any one of the theories of Private International Law*

B. U. May 93

There is difference of opinion amongst writers on the question of the basis of Private International Law. Some writers say that the basis of Private International Law is *Comity*. Comity is the regard or reciprocity that exists between the two sovereign friendly States. But it is difficult to accept that comity is the exclusive basis of Private International Law. It is no doubt true that there are certain aspects of Private International Law, like diplomatic immunity which are based on principles of comity but comity can never be the sole basis of Private International Law. For example, even when two States are at war and when there is no comity existing between them, the rules of Private International Law will be in operation.

### CONVENIENCE

*Write a short note on Justice as the basis of Private International Law.*

B. U. Apr. 91

Some writers contend that convenience is the basis of Private International Law. It may be in a very narrow field that principles of convenience might determine the rules of Private International Law. Some of the rules of procedure are based on convenience. But convenience alone cannot be the basis of Private International Law.

## JUSTICE

As *comity* and *convenience* are not the exclusive basis of Private International Law, what would be the basis ? According to Graveson, the main basis of Private International Law is the desire of the courts to do justice. He points out that an English Judge before taking office, takes an oath "to do Right to all Manner of the People, after the Laws and Usages of this Realm, without Fear or Favours, Affection or Ill-will". It is this prime concern to do Right to all Manner of the people that leads to the formulation of the rules of Private International Law. As Graveson points out *"With regard to English Conflict of Laws, the dominant motivating* principle is : the desire to do justice in cases involving a foreign element." He further explains that the basis of Private International Law or the need for the rules of Private International Law is: sociologically, in the international nature of human affairs; ethically, in the desire of English Courts to do justice; and legally, in the obligation of their oath of office.

*Examine critically "Justice, convenience and comity form the basis of the English conflict of Laws."*

B. U. Apr. 85
Nov. 93

*Write a short note on : Justice as the basis of Private International Law.*

B. U. Oct. 85

This basis of justice *is at once the chief practical and theoretical justification* for the rules of Private International Law. It is quite obvious that no court can do justice if it totally refuses to recognise a foreign law or the rights acquired under such foreign law or refuses to recognise the validity of a foreign judgment.

*"The basis of the English Conflict of laws is the need to do justice involving a foreign element." Explain the statement.*

B. U. Apr. 82

Keeping in view this main justification of Private International Law, English Judges have gradually evolved the rules of Private International Law. Obviously, by justice, the English Courts would mean justice according to English Law. What exactly is justice according to English law is broadly a legal reflection of ethical or moral values conditioned by time, place and circumstance. The English Courts do not pretend to do justice in an abstract manner as the House of Lords observed in *Starkowaski* v. *Attorney General,* (1954) A.C. 155. "The circumstances are such that no decision can avoid creating some possible hard cases, but if a decision in one sense will on the whole lead to a much more just and reasonable result, that appears to me to be a strong argument in its favour."

*What is the need for the establishment and the development of a body of rules of conflict of laws in the English legal system ?*

B. U. Oct. 79

As observed by Graveson, anything lesser than the basis of justice will not be sufficient and anything greater than the basis of justice is not possible.

Therefore, to sum up we may say that : COMITY, CONVENIENCE and the desire of Courts to do JUSTICE broadly form the basis of Private International Law.

## THE THREE PRINCIPLE QUESTIONS OF PRIVATE INTERNATIONAL LAW

As observed before, the three important questions around which the rules of Private International Law are evolved, are —

*Discuss the nature and basis of Conflict of Laws.*

B. U. Oct. 73, 81

(i) *Choice of jurisdiction* : Has the Court jurisdiction to deal with this specific issue ?

(ii) *Choice of Law* : By what system of law should the specific issue be decided ? and

(iii) *Recognition and enforcement of foreign judgment* : By what tests will the English Courts decide whether the judgement of a foreign Court should be recognised or enforced in England or not ?

These three questions most frequently arise before a Court when deciding a dispute involving a foreign element.

## (i) CHOICE OF JURISDICTION

*Discuss briefly the three different questions around which, the English Conflict of Laws, has developed.*

B. U. June 74

Certain rules of Private International Law attempt to determine the rules by which jurisdictions of the English Courts are to be determined. Quite often, it is possible that a foreign Court may have exclusive jurisdiction in that particular matter but at the same time the matter may go before the English Court. The English Courts decide whether they have jurisdiction or not on the basis of the claim of the petitioner or the plaint of the plaintiff. The question of jurisdiction must be answered before any other questions in Private International Law are answered. In some cases the question of jurisdiction might be raised before the English Courts in an explicit manner. In certain other cases, it might have been decided by the court in a tacit and implied manner. Nevertheless, the question has to be answered.

## (ii) CHOICE OF LAW

*"The problem in Conflict of Laws is really the problem of jurisdiction and choice of Law." Discuss.*

B. U. Dec. 74

The problem of choice of law is the other important question which would arise before the court when there is a dispute involving a foreign element. As observed earlier, the function of the court is to determine which of the laws connected with the dispute must decide the particular issue before the court. The whole of the dispute may not be determined by a single rule of choice of law. It is possible that different aspects of the dispute are determined by different rules of choice of law. For example, the question in dispute before the court may be as to whether the marriage between two persons is valid. In this case there will be three aspects of the problem :

(a) Had the parties the capacity to marry ?

(b) Were there any prohibitions for solemnizing their marriage ?

(c) Was the marriage celebrated according to the prescribed formality ?

The first and the second questions may be determined by one law and the third question may be determined by the law of the place where the marriage was celebrated.

By foreign law, is meant the law prevailing in a territorial unit outside the area governed by the law of a particular court. It may not necessarily mean the law of a foreign State alone. For example, the Law of Scotland is foreign law before the English Courts though England and Scotland happen to be units of the same State.

The relation between the question of choice of jurisdiction and the question of choice of law needs to be examined. As a rule, these appear to be two independent questions but it is possible that in some cases the choice of jurisdiction might influence the choice of law. It is also possible that in some cases choice of law influences the choice of jurisdiction. The truth of this statement will become clear later as the rules of choice of law and choice of jurisdiction are discussed by us.

## (iii) RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

The question of choice of jurisdiction and the question of recognition or enforcement of foreign judgment correspond to each other. While answering the question of choice of jurisdiction, the English Court would answer the question as to whether it is competent to exercise jurisdiction over the dispute. On the other hand, while determining the question of the validity of a foreign judgment, the English Court tries to determine whether the foreign Court was a competent court or not. In effect, this means whether the Foreign Court had jurisdiction over the dispute or not ? It is true that other questions may also arise while determining the validity of a foreign judgment. These questions are discussed later by us in the Chapter on recognition and enforcement of foreign judgments.

## AVOIDING CONFLICT OF LAWS AND UNIFICATION OF CONFLICT OF LAWS

*Discuss : Conflict of Conflict of Laws.*

As observed earlier, the necessity of Private International Law or conflict of laws would arise because the legal systems of different countries differ a human transactions are quite often connected with or take place in more than one STATE. It is also pointed out that Private International Law of each STATE may be different and there is nothing like an universal set of rules of conflict of laws. Rules of conflict of laws might themselves conflict. Let us take the case of a person having British nationality but domiciled in Germany dying and leaving some movable property in England. Let us say, according to English Law this property will devolve by succession upon one relative and according to German Law upon the other relative. Then, the question is 'according to which law should the question of devolution be decided'. According to English Private International Law it should be decided by the law of the country in which the deceased was domiciled at the time of his death. But according to German Law, succession to such movable property should be determined according to the law of his nationality at the time of his death. In this case, there is not only conflict of laws but also conflict of conflict of laws. Having realised the difficulties that would arise out of such conflicts, several attempts are made to remove them :

(1) by unification of Internal Laws,

(2) by unification of Private International Laws.

### Unification of internal laws

*Write a short note on : Attempts at unification of Private International Law.*

B. U. Oct. 64, 84

Several attempts are made to unify internal laws of the various countries by adopting international conventions. Though, this form of unification cannot be extensive due to intrinsic differences in the legal systems, yet, in certain spheres where such unification has become imperative conventions are adopted. Reference can be made to the Warsaw Convention of 1929, which prescribed uniform rules regarding international carriage of persons or goods by aircraft. Similarly, the international conferences on Maritime Law held in Brussels in 1922 and 1923 led to the unification of international laws regarding the carriage of goods by sea. Very recently an international convention on international sale of goods has been adopted which would also lead to certain unification of laws. There is also similar effort being made to unify the Laws relating to Arbitration.

### Unification of Private International Law

The question of unification of Private International Law has presented some difficulties in view of the fact that the Anglo-Saxon countries adopt *'domicile'* as the connecting factor for the purpose of personal status while continental countries have adopted *'nationality'* as the basis. Inspite of this difficulty, several attempts are made to unify Private International Law.

*(a) INTERNATIONAL LEGISLATION*

By International Legislation, is meant adoption of International Conventions in international conferences which would be subsequently given effect to by legislation passed by the States which are parties to such convention. Therefore international legislation involves two states :

(i) The uniform rules are agreed and adopted in a multipartite document known as *'convention'*.

(ii) Each State participating in the convention subsequently gives legal effect to the convention by enacting proper laws and accepting or ratifying the uniform rules.

*(b) INTERNATIONAL LAW ASSOCIATION*

The International Law Association has paved the way towards the unification of Private International Law by its extensive research and propagation of information. Its work has been mostly educative and persuasive. It publishes the reports of various International conventions and gives prominence to work of thinkers and writers on the subject.

*(c) THE AMERICAN LAW INSTITUTE*

The U.S.A. is a Union of 50 States each having its own legal system.

The diversity of Private International Law was, therefore, felt in an acute form in the U.S.A. The American Law Institute, by codification of the rules of Private International Law in its re-statement of laws has made a very valuable attempt to bring uniformity into those rules. But this work of the Institute, being the work of a private body, is only of persuasive influence much like that of the International Law Association.

*(d)* In the United States of America attempts are also made to bring *uniformity in the internal law* of the States. For example, the Uniform Marriage Evasion Act made such an attempt to bring uniformity to a certain extent in the laws of marriage and divorce in the United States of America. Similar attempts are also made in Canada.

Though there have been many such attempts it would be wrong to think that Private International Law is a universal law common to all legal systems. These attempts at unification have touched only a limited aspect or the fringe of Private International Law. In the rest of the field, Private International Law of different countries continue to differ as widely as ever.)

## ORIGIN AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW

*Discuss the need for Conflict of Law and trace its development.*
B. U. Oct. 85

A greater portion of English Private International Law has developed as a system recently. Though it has mostly developed as a result of judicial decisions, it has been influenced by continental thought on the subject. Therefore it is necessary to have some knowledge of the origin and development of the rules of Private International Law in Continental Countries.

*Trace the origin and development of the Conflict of Laws.*
B. U. Apr. 82

**1. Origin and development of the Private International Law in the Continent**

Private International Law can be developed only when law has become territorial in application. In ancient communities when law was mostly personal there was very little need for the rules of Private International Law. Therefore, in ancient India we did not come across the problems necessitating the application of the rules of Private International Law.

## ROME

In ancient Rome, law was personal but after the fall of the Roman Empire law became territorial in operation. Even then, rules similar to those of modern Private International Law did not develop. The only contribution of the Roman legal system towards the evolution of the rules of Private International Law was in the development of the concept of Origo and Domicilium. A person had his Origo in the place to which his father, or if he was illegitimate, to which his mother belonged. Domicilium meant the relation between a man and the urban community which he had chosen for his permanent residence.

*Trace the origin and development of Conflict of Laws in the continent of Europe.*

B. U. Oct. 72

*Discuss the origin and development of Private International Law.*

B. U. May 83

*Discuss the origin and development of conflict of laws.*

B. U. May 92

*Define "Private International Law", and discuss the origin and development of Private International Law.*

B. U. Oct. 92

*Write a brief note on the origin and development of Private International Law.*

B. U. Apr. 91

## AFTER THE FALL OF THE ROMAN EMPIRE

After the fall of the Roman Empire, the law again became personal. Each tribe would have its own laws and there was nothing like a territorial system of law. In a situation like that the general principle was that the system of law to which the defendant was subject must prevail in every suit. Therefore rules of Private International Law could not develop.

## 11TH AND 12TH CENTURIES

A few centuries, after the fall of the Roman Empire, laws became territorial again. There were many reasons for this development. One of them; particularly, North of the Alps, was the gradual development of Feudalism. A feudal system was essentially territorial and therefore laws had to be territorial. South of Alps, the greater factor that led to the development of the territorial system of law was the growth of the Italian cities. A large number of prosperous cities like Florence, Bologna, Milan and Padua emerged. Each of these great cities was subject to a different system of laws and those laws were applicable to the residents therein.

## 13TH CENTURY TO 18TH CENTURY

In the commerically prosperous Southern cities of Italy there arose several factors which brought into focus the problem of the conflict of laws. As commerce increased, transactions between residents of different cities grew in number. Therefore, there arose the need for deciding disputes which would arise between residents of different cities.

*Discuss : Glossators, post-Glossators.*

The jurists of the 13th century made a serious attempt to evolve some reasonable principles upon which those disputes could be solved. This also happened to be a period of the revival of the learning of Roman Law. Scholars in Italian Universities had begun to take a keen interest in the rules of Roman law. Therefore, the earlier attempts were by way of putting glossae on the text of the Roman law, the Corpus Juris. Such attempts had already begun in the 11th century. Scholars who made such attempts in the 11th century were known as *Glossators*. But the attempts of the Glossators were not systematic. The credit of systematizing the method of solving disputes among residents of different cities goes to the scholars of the 13th century who are known as the *post-Glossators*. The jurists attached to the law schools of the important Italian cities developed a theory known as the Statute Theory. According to this theory, all laws could be classified into two categories :—

(a) Real Statute

or

(b) Personal Statute.

A *real statute* was one the principle object of which was to regulate things. A *personal statute* was one that concerned persons. *Real statutes* were considered to have been essentially territorial; while *personal statutes* were personal. The law of the person would be applicable unless such personal law was opposed to the *Public Order* of the City. The greatest amongst such scholars was Bartolus (1314-57).

This theory was not free from defects. The basis on which the laws could be classified was not always clear. It was also possible that different cities classified the laws in different ways. What might have been classified as real law by one city might have been classified as personal law by another city. When there was such conflict of classification, the system would not work. Similarly what exactly was meant by *Public Order* was also not clear.

## FRANCE

In the 16th century, the *statute theory* was carried to France where it was developed and refined by several jurists. The famous among them are Dumoulin and D'Argentre. Both of them accepted the Italian division of the statutes into *'real'* and *'personal'*. D'Argentre emphasised the *'territorial theory'* of law while Dumoulin emphasised the *'personal theory'*. By the end of the 16th century, there arose the concept of *'national statute'* in Europe. With the destruction of feudalism and the rise of the sovereign national State, the territorial nature of law came to be widely accepted.

## HOLLAND–HUBER

In the 17th century the Dutch Jurists were mainly responsible for further development, and refinement of the statute theory. The most famous of them is Huber. He formulated the theory of Private International Law into the following three maxims : –

(a) The laws of a state have force only within the territorial limits of the sovereignty of the State.

(b) All persons within such territory are bound by the laws of the sovereign.

(c) By reason of comity, every Sovereign admits that the consequences of the operation of a law in a foreign country shall be recognised by the courts of the country unless such consequences will not prejudice the subjects of the sovereign by whom its recognition is sought.

A detailed examination of the principles laid down by Huber shall be made by us later. The formulations of Huber have been acknowledged as the theory of acquired rights and these formulations have practical influence on the development of conflict of laws in England even today to a limited extent.

## 19TH CENTURY-SAVIGNY

The great German Jurist, Savigny made a definite break from the previous approaches to the subject and formulated a new theory of Private International Law. Savigny rejected both the statute theory and the territorial theory of Private International Law. Savigny's formulations can be briefly stated as follows :–

(a) Each legal relation has its natural seat in a particular local law and it is that law which must be applied when it differs from the law of the Court. Savigny's concept of *'natural law'* is similar to the concept of connecting factor in modern Private International Law.

(b) There are rules of Private International Law which are universal and common to all the legal systems.

The second formulation of Savigny, according to some writers, is not true. It would be impossible to find that the Private International Law of different countries have common and universal characteristics. Notwithstanding this criticism, it has to be accepted that Savigny's formulation of the natural seat of each legal relation made the rules of Private International Law more scientific and accurate.

On the continent of Europe, the development of Private International Law has been mostly the work of jurists. Therefore, naturally the development has been around certain theories. These theories shall be examined by us later.

### 2. Origin and development of Private International Law in England

The comparative geographic isolation of England from the rest of the Continent did not necessitate the development of Private International Law for a long time. It is true that in England there were two sets of courts : Courts of Chancery and Common law Courts, administering two separate systems of law — *'equity'* and *'common law'* respectively. But the conflict that would arise between equity and common law would have no resemblance to the conflict that would arise in the field of Private International Law. The conflict between *'equity'* and *'common law'* was a conflict between two sets of legal rules applied in the same State.

With the union of Scotland with England, a new situation arose. England was governed by the Anglo-Saxon law while Scotland was governed by a system of law that was more influenced by Roman law. Thus on the union of Scotland with England, several problems of conflict of laws arose. It was perhaps in *Calvin's* case, for the first time, that this problem had to be solved. The English Courts had to recognise the laws of Scotland and apply them. Thereafter, Private International Law in England has been developed by judicial decisions in a pragmatic manner from case to case and from decision to decision. Therefore, naturally, the theoretical works of jurists have very limited influence on the development of rules of Private International Law in England.

The credit of having written a first treatise on English conflict of laws goes to an American. It was the great American jurist Joseph Story (1779-1845) who first wrote a coherent treatise on the subject of conflict of laws. Thereafter, several English authorities like Westlake and Dicey have written treatises on the subject.

On the whole, as observed before, the rules of English Conflict of Laws have evolved around judicial decisions. The main concern of the English Courts is to do justice in a dispute involving a foreign element. To be able to do justice in a case they have formulated the Rules of Conflict of Laws.

## MODERN DOCTRINES OF PRIVATE INTERNATIONAL LAW

The theories of conflict of laws generally try to explain the jurisdiction of Private International Law and also the technic of Private International Law. The various theories can broadly be classified under three ideas : *'statutory theory'*, *'international theory'* and *'territorial theory'*. There have been many variations of these three theories.

### 1. Statutory Theory

The *'statutory theory'*, though resembling the old *'statute theory'*, is different from that theory. According to this theory legal transactions or relations can be classified into personal and real. Transactions or relations which are classified as personal are governed by the personal law of the parties provided they are not in conflict with public policy or the concept of public order of the local system administered by the court. On the other hand, transactions which are classified as real are governed by the territorial law.

*"The English Conflict of Laws has developed around three principal questions" (Graveson). Elucidate*

B. U. Oct. 85

*Write a short note on : Statutory Theory.*

B. U. Oct. 85
May 92

As pointed out above, this doctrine is different from the *'statutory theory'* of the post-Glossators. The post-Glossators and their immediate followers attempted to classify laws into *'real'* and *'personal'* while the modern *'statutory theory'* attempts classification of transactions into real and personal. The modern theory is an improvement and refinement of the old theory as it does not face the difficulty of classifying a law which has composite characteristics. Nevertheless, the 'statutory theory' is not free from difficulties. The first problem which this theory does not satisfactorily solve is the problem of classification. If there is more than one legal system involved and if those legal systems classify the transaction in more than one way, by what law should the nature of the transaction be determined ? This theory does not answer this question. Further, the concept of public policy or public order which imposes a limit on the application of the personal law is vague and therefore fails to give precision to this theory.

## 2. The International Theory

*State and briefly explain the modern doctrines or theories which profess to provide, from a theoretical angle, solution to cases involving conflict of Laws.*

B. U. Dec. 75

*Critically examine :*

*The 'territory theory' of Private International Law.*

B. U. May 83

This theory which was very vigorously advocated by Savigny starts on the presumption that there are rules of conflict of laws which are universal and common to various legal systems prevailing in the world. Therefore, this theory would advocate that such universal rules of conflict of laws could be ascertained and applied. But as pointed out by many writers the basic assumption of the theory is not correct. It has already been pointed out that there is not only conflict of laws but also conflict of conflict of laws. It is also pointed out that notwithstanding many attempts, unification of Private International Law is not an achievement. Therefore, the very basic assumption of the *'international theory'* is false. It may be that in some narrow spheres there are such uniform rules but those uniform rules are more an exception than the rule.

## 3. The Territorial Theory–Acquired or Vested Rights Theory

*Discuss the various modern theories/doctrines of the conflict of laws.*

B. U. Apr. 82
May 92

This theory which was first advocated by Huber has been elaborated upon by writers like Dicey and Beale. As observed before, the Central principle of this theory is, that courts of a sovereign State do not apply foreign law nor do they directly enforce foreign judgments but they recognise the consequences of the operation of a foreign law within its relevant limits. The merit of this theory is that it tries to reconcile the territoriality of law and also the need for Private International Law. But this theory has been very vehemently criticised, the most formidable critic being G. C. Cheshire. Dr. Cheshire's criticism can be summed up as follows :

*'THEORY UNNECESSARY'*

*Analyse the five modern doctrines of conflict of laws.*

B. U. Apr. 91

Dr. Cheshire points out that this theory is based on a misconception of the maintaining of the territorial law. This theory starts on the assumption that Private International Law is interrogation of the sovereignty principles. But Dr. Cheshire rightly points out that the choice of law, the choice of jurisdiction and the principles regarding recognition and enforcement of foreign judgment are all rules of the national law of a State. They are the dictates of the sovereign. Therefore, when a court applies a foreign law according to the rules of the conflict of law it applies the conflict of laws of the State and not the foreign law. Therefore, it is unnecessary to bring a fiction of acquired right to reconcile the territoriality of law and Private International Law.

*'THEORY UNTRUE'*

According to **Cheshire**, the theory is untrue in facts. He points out that the rules for the choice of law current in England and North America frequently require the enforcement of a right that it unrecognised or even refuted by the chosen law. He also points out that the incidents and consequences attached to a foreign right when enforced in England may differ from those recognised in its country of origin. In brief, the foreign rights may be varied or repudiated. Therefore, according to Dr. Cheshire the theory is not true.

*"In Conflict of Laws today there are five major themes with many variations."*

B. U. Apr. 85

*'THEORY UNHELPFUL'*

As a technique of Private International Law, this theory fails. If it is the purpose of Private International Law to indicate the fundamental principles guiding the rules of choice of law, this theory fails to perform such a function. When there is a dispute connected with more than one legal system, this theory fails to indicate the system of law that should be chosen to determine the acquired rights.

*"Write a short note on the local law doctine."*

B. U. May 83
Oct. 92

Thus, Dr. Cheshire points out that this theory advocated by the eminent jurists is unsatisfactory.

**4. Local Law Theory**

This theory is a slight variation of the territorial theory of Private International Law. This has been chiefly expounded by W.W. Cook, an American Jurist. This theory is based on the principle that each court applies its own laws.

No court ever applies any other law but its own, nor enforces any rights or obligation other than those created by its own law. According to Cook, the court never applies foreign law; neither does it enforce a right acquired under a foreign law. The court does not hand the case over to the law of the other State. According to Cook, law consists of rules which help one to predict what judges would do. Therefore, the rules of Private International Law would only consist of rules as to how a court would decide a dispute involving a foreign element. The gist of this theory is that the court recognises and enforces a local right that is one created by its own law. But as the dispute in question has a foreign element the court would necessarily apply the rule of the Forum that would be applied in the case of a purely domestic dispute; but for reasons of social expedience and practical convenience it takes into account the laws of a foreign country in question. It creates its own local right, but fashions it as nearly as possible upon the law of the country in which the decisive facts have occurred.

This theory gives singularly little help to a judge faced with the need of choosing one foreign law rather than another to the case before him. As Cheshire observes this theory is a sterile truism — sterile because it affords no basis for the development of a system of Private International Law.

*Examine briefly various limitations on applications of foreign laws in English Courts.*

B. U. May 83

**5. The Theory of Justice**

After a critical evaluation of the various theories, Gravesons comes to the conclusion that English Private International Law cannot be considered to have been based exclusively on any of the above theories. The approach of the English Courts to the problem of Private International Law is pragmatic and ethical. The main purpose of these rules is to do justice as seen by the English Judges in the environment of time and place. Graveson states that the premises of Private International Law in England are threefold : Sociological, ethical and legal.

Sociologically, it is based on the international need for fair treatment in the private transactions of individuals. Ethically, it is based on the needs of justice. Legally, it rests on the terms of the judge's oath. In essence, the rules of Private International Law in England are built from precedent to precedent with the ultimate view of doing justice.

2

# DOMICILE

Under the Anglo-Saxon system of law the factor that connects a person with his personal law is *'domicile'*. An absolute definition of *'domicile'*, it has been said, is impossible (*Doucet Geoghegan*, (1878) L.R. 9 Ch. D. 441, 456). Nevertheless, Lord Cranworth defines *'domicile'* as follows :

"By *'domicile'* we mean home, the permanent home, and if you do not understand your permanent home, I am afraid, that no illustrations drawn from foreign writers will very much help you to it." *'Domicile'* has also been defined as follows : "That place is properly domicile of a person in which he has voluntarily fixed a habitation of himself and his family, not for a special and temporary purpose, but with a present intention of making it his permanent home." *'Domicile'* is a conception of law employed for the purpose of establishing a connection between an individual and the legal system of a territory of certain legal purposes.

*State the importance of domicile in the Private International Law. What are the rules of law whereby the domicile of person is fixed ? Cite cases.*

B. U. Nov. 93

But why

*'Domicile'* is not accepted as the connecting factor between a person and a legal system under all legal systems. The Continental countries governed by the Civil Law consider 'nationality' as the connecting factor. *'Nationality'* denotes the political membership of a person in a particular country. A person has the nationality in that country to which he owes allegiance. Though *'domicile'* was the connecting factor for centuries in Europe, yet, in the 19th century *'nationality'* came to be accepted as the connecting factor in many Continental countries.

## DOMICILE AND NATIONALITY

A clear distinction must be made between *'nationality' and 'domicile'*. *'Nationality'* is the political status conferred by the State on an individual. It may depend on the place of birth, on parentage or on naturalisation. But *'domicile'* is generally the result of the choice and intention of an individual. One of the greatest obstacles in the way of unification of the rules of Private International Law is that the two main legal systems of the world adopt different connecting factors in the field of personal law. Both the legal systems claim certain merits for the connecting factor they adopt. The argument in favour of nationality is that it is as definite and certain as acquisition of loss of nationality and does not depend merely on the intention of a person. Domicile dependent on the intention of a person might not be, quite often, clearly ascertainable. On the other hand, the advantage of domicile is that generally, a person has a free choice to acquire it and therefore he might choose a system of law under which he is to live. Further, in the case of nationality, due to lack of uniformity in law of nationality or for other reasons, there may be cases of statelessness or cases of double nationality. In either of these cases there may not be a law or there may be more than one law to govern a person but in the case of *'domicile'* as there cannot be more than one operative domicile and as no person can be without a domicile such problems do not arise.

*Write short note :- Nationality and Domicile.*

B. U. Apr. 81

Therefore, we must always bear in mind that a person can never have his *'domicile'* in two or more places. Of necessity, his *'domicile'* is in the place where he has voluntarily fixed a habitation for himself and his family *and not* for a special or temporary purpose, but with the present intention of making it his permanent home.

## FUNDAMENTAL PRINCIPLES LYING AT THE BASIS OF THE ENGLISH THEORY OF DOMICILE

(1) Every person must possess a domicile at all times. (*Udny* v. *Udny* (1869) L.R. 1 Sc. and Div. 441, cases 81). Though it is true that a person has a certain amount of freedom to acquire or abandon a *'domicile'*, yet such a system is restricted by the rule that no person can be without a domicile at any particular time of his life. The need for this rule is very obvious. *'Domicile'* is the connecting factor between a person and a system of law for certain legal purposes. As no person can be without a system of law to govern his personal relations at any particular point of time, he cannot be without a *'domicile'*.

(2) No person can have at the same time more than one *operative 'domicile'*. As *'domicile'* is the determining factor in ascertaining a system of law that governs the life of a person, it is also obvious that he cannot be governed, at the same time, by more than one system of law. If a person is permitted to have more than one operative *'domicile'* at a time, he may be governed by conflicting rules of the two legal systems. This may cause confusion and uncertainty. It should be noted that there cannot be more than one *operative 'domicile'*. It is possible that a person may have a *'domicile of origin'* and a *'domicile of choice'*. But, under English law, the *'domicile of origin'* will be latent when a *'domicile of choice'* is in operation.

However, it has been pointed out by several writers that this principle may not be fully applicable in a Federal State. It is possible that the Federal Legislature and the State Legislatures can both enact personal laws and therefore it is possible that for certain purposes a person may be considered to be domiciled in the Federal State and for certain other purposes in the regional States. Due to the inherent need for reconciliation of the Federal and the state Laws, this kind of limited domicile in two territories may not present the problem of a person being governed by two conflicting legal systems at the same time in such a case.

(3) Whether certain facts do or do not constitute domicile is to be determined by the English Courts, according to English Law. (*Re. Martin*, (1800) p. 211). As there are different conceptions of *'domicile'* under different legal systems it is quite possible that an English Court might hold that a person is domiciled in one country while such country might hold that his domicile is in another country.

(4) The question as to which law would govern the capacity of a person to acquire a new domicile of choice has not been definitely answered by English Law. For example, if a person aged 19 and domiciled in India were to acquire his domicile in England, would Indian Law determine his capacity to acquire it or would English Law determine it ? In this case, according to Indian Law he has attained majority. Therefore he can acquire a new domicile; but, having not attained the age of 21 years he is a minor according to English Law and therefore he has no capacity to acquire a domicile of his own. This question has not been finally answered. However, Graveson suggests that a person's capacity to acquire or change his domicile should be governed by the law of his existing *operative* domicile.

## DOMICILE AND RESIDENCE

As *'domicile'* is different from nationality, it is also different from residence. It is true that *'domicile of choice'* may be dependent on residence in certain circumstances but, residence and domicile need not necessarily coincide.. *'Domicile'* is a much wider concept. It may be in certain cases a creation of law and in certain other cases, it may be the outcome of several factors although based on residence. Let as bear in mind that residence in habitual physical presence in a place during a period of either limited or unlimited duration. A person may be the national of one State, domiciled in another country and resident in a third. Residence may be relevant for certain legal purposes like the purpose of jurisdiction, taxation, etc. But *'domicile'* is the factor, which determines the civil status of a person and connects him to a system of law.

## DIFFERENT KINDS OF DOMICILE

Under English Law there are *three* kinds of domicile of natural persons :

(a) Domicile of origin.

(b) Domicile of choice.

(c) Domicile of dependent persons or domicile of dependence.

### (a) Domicile of Origin

As observed in *Udny* v. *Udny* a *'domicile'* is attributed to every person at the time of his birth. Such, *'domicile'* is known as *'domicile of origin'*. *'Domicile of origin'* differs from the other two kinds of *'domicile'*. According to English law, one important characteristic of *'domicile of origin'* is that it cannot be extinguished by any acts of its owner. When a new *'domicile of choice'* is acquired or when there is a new *'domicile'* of *dependence'* the *'domicile of origin'* is merely in abeyance but it is never completely extinguished. In this sense, *'domicile of origin'* resembles nationality. Both of them cannot be extinguished by act of parties. Further, *'domicile of origin'* like nationality is independent of the intention of the person on whom it is conferred. It is also independent of the residence of the person in any particular place. The very purpose of *'domicile of origin'* is that, as a person must have a *'domicile'* throughout his life, he shall have a *'domicile'* conferred by law at the time of his birth.

*Write notes on Domicile of origin.*

B. U. Dec. 74
Dec. 82

*Write a short note on : Discuss Udny v. Undy.*

B. U. Apr. 91
May 92

*Winano v. Attorney General.*

B. U. Oct. 92

There is another aspect in which *'domicile of origin'* differs from other kinds of *'domicile'* and particularly the *'domicile of choice'*. English Courts would require clear and unequivocal of the intention to change from *'domicile of origin'* to other domiciles. For example, in *Winans* v. *Attorney General*, (1869) L.R. 1 H. L. Sc. and Div. 441, the facts were as follows :

Winans, an American, was a member of his father's Engineering Firm and lived for a considerable period of time in Russia. For reasons of health, he was obliged to live in England from 1860 to 1897. He died in 1897. The question before the Court was as to whether Winans had lost his American domicile of origin and acquired a domicile of choice in England. After examination of the various events in his life the Court came to the conclusion that the interest of Winans remained almost entirely American and anti-British. Therefore he had not lost the *'domicile of origin'* in America.

*What is the domicile of origin and in what respects does it differ from domicile of choice ? What will be the domicile of origin of–*

*(a) A legitimate child.*

*(b) An illegitimate child.*

*(c) A foundling.*

B. U. May 92

In another case, *Ramsay* v. *Liverpool Royal Infirmary*, the facts were as follows :

One Bowie was a person with Scottish domicile of origin. He left Scotland in about 1891 and resided in England for about 36 years till his death. For the purpose of determining the validity of his will it was necessary to ascertain whether he was domiciled in England or he continued to have his Scottish domicile of origin. The

*Write a short note on – Discuss : Ramsay v. Liverpool Royal Infirmary.*

B. U. May 93

House of Lords held that he continued to have the Scottish domicile of origin on the ground — "change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct a change from the domicile of choice to another) has always been regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence."

*What is "domicile of origin"? What are the rules of Private International Law relating to its acquisition? How does it differ from 'domicile of choice'?*

B. U. Apr. 85

*The Purposes of Domicile of Origin.*

Domicile of origin exists for the following two purposes :—

(1) To make sure that every person possesses a domicile at the time of his birth.

(2) To prevent the occurrence of a gap in domicile in case the person has abandoned one domicile of choice and has not acquired another domicile of choice.

*Acquisition of Domicile of Origin*

The *'domicile of origin'* of a legitimate child is the same as the domicile of the father at the time of the child's birth provided the child was born during the lifetime of the father. If a legitimate child is born after the death of the father it takes the domicile of the mother at the time of its birth. It should be noted that the domicile of origin has nothing to do with the place of birth of the child, the residence of the father at the time of the birth of the child or the subsequent change of domicile by father.

*What is domicile of origin? Can it be changed? When does a person get back his domicil of origin? Refer to case laws.*

B. U. May 93

An illegitimate child takes the domicile of the mother at the time of its birth. In some cases, it may be necessary to determine the domicile of origin of a foundling whose parents are not known. As a rule, the domicile of origin of such a child will be that of the place where the child is found. Probably this general rule may be rebutted where contrary evidence exists.

The rule that the domicile of origin of a child depends on its status of legitimacy presents one problem. The domicile of origin would depend on the status of legitimacy and the status of legitimacy of a child might depend on the domicile of origin of the child. This appears to be a vicious circle. Graveson suggests, "A possible and a just solution of the problem would be to regard the child as legitimate if it is so treated by the law of the domicile of either parent."

It should be clearly noted that the 'domicile of origin' is that domicile which is acquired at birth. It is not the last domicile of dependence. For example, C, a legitimate child of A, was born when A was domiciled in England. During the infancy of C, A changed his domicile to Scotland and then to Burma. When the child attained the age of majority, A was domiciled in Burma and therefore C's *'domicile of dependence'* was in Burma. In this case the *'domicile of origin'* is the *'domicile'* acquired at the time of the birth of the child. Therefore the English domicile and not the last domicile of dependence, *viz.* Burmese is the *'domicile of origin' of* C.

**(b) Domicile of Choice**

*'Domicile of choice'* is a domicile voluntarily chosen by a person of full age and capacity. The question, as to which law should determine whether a person is one of full age and capacity, is already raised. It is also answered that it is probably the law of the existing domicile and not the law of the acquired domicile which should determine such capacity.

According to English law the following requirements are necessary for a person to acquire a *'domicile of choice'*.

(1) He or she must be a person of full age and capacity and if a woman, must not have been under a coverture of a marriage,

(2) Such person must have so resided in the country of choice, and

(3) Such person must have resided with the intention to remain permanently in that country.

*Define and explain 'domicile of choice'. Discuss in detail how such domicile is acquired or lost.*

B. U. May 93

*Who can acquire a domicile of choice and how ?*

B. U. Apr. 82

The last two conditions need to be analysed in some detail.

*Residence*

All that is necessary is that residence must have taken place in the country of choice. The length of residence is not material in acquisition of *'domicile of choice'* but the length of residence may be an important evidence of the intention. That is, whether there was an intention to remain *permanently or* not may be ascertained by the length of residence. As observed in *Ramsay* v. *The Liverpool Royal Infirmatory*, "Prolonged actual residence is an important item of evidence of such volition. But it must be supplemented by other facts and circumstances indicative of the intention. The residence must answer a qualitative as well as quantitative test." What constitutes such qualitative and quantitative test is a question of fact.

*How is domicile of choice acquired and how it is lost ?*

B. U. June 74

Oct. 76

A person acquires domicile as soon as he begins to reside in a country with the intention of remaining there permanently. Once these two elements have coincided, he acquires the domicile of choice, though after such acquisition one might change his intention or residence.

*Intention*

The intention required for acquisition of *'domicile of choice'* is an intention to reside permanently in the country of residence. Such intention need only exist at the time of actual residence in the country. Once such domicile is acquired, as observed before, he will continue to have the *'domicile of choice'* in that country even though he changes his intention subsequently. (*Donaldson* v. *Donaldson*, (1949) p. 363). The intention to reside *permanently* is also interpreted to mean an intention to reside *indefinitely* in the country of choice.

A person cannot acquire a domicile of choice in the chosen country merely by a long residence, where such residence is not accompanied by the requisite intention to reside these permanently. In *Louis De Readt* v. *Union of India* (AIR 1991 S.C. 1886), certain foreigners voluntarily stayed back in India after its independence on the basis of their passports issued by other countries after obtaining permission from Indian authorities from time to time to stay in India for specific periods. It was held that they did not acquire a domicile of choice in India. The Supreme Court reiterated the well established proposition of law that, by residence alone howsoever long when there is no intention to reside permanently a person cannot acquire domicile of choice.

The very essence of acquisition of *'domicile of choice'* is that one must *'voluntarily choose and intend to reside permanently in such country of choice'*. Quite often, there may not be such freedom of choice. The problem would be as to whether the person acquired the domicile of choice in that country where he has intended to reside under some restrictions. For example, a person might have left one country and resided in another to evade his creditors or to obtain a divorce. It is also possible that due to certain political compulsions a person might have been a fugitive in another land. Or he may be undergoing imprisonment in another country for a protracted period of time. In *May* v. *May* (1943) 2 E.R. 146 a similar problem

*What is "domicile of choice ?" Write a short critique.*

B. U. Apr. 91

arose. M was a German national having his domicile of origin in Germany. He professed the Jewish faith. He was released from a German Concentration Camp. Thereafter he obtained a visa to emigrate to the U.S.A. Under a training scheme he came to England in 1939. This was a state on his way to America. Subsequently his wife and family joined him in England. He was interned in England from July 1940 to January 1941. After his release, he lived and worked in England. He presented a petition for divorce in 1942. It was necessary to decide whether he was domiciled in England. The Court taking a very liberal attitude in the granting of domicile held he was domiciled in England notwithstanding his staying in England without cancelling his visa to the U.S.A

It is obvious that mere transportation for life will not make the prisoner acquire the domicile of choice in the country to which he is transported. But, in the case of invalids this question may arise in an acute form. If a person has been advised for reasons of health to stay permanently in a country other than the home country, would he acquire *'domicile of choice'* in such country of residence ? It cannot be said that he has voluntarily chosen the country of residence. Yet, he is residing there with the intention of residing permanently. In such cases it has been suggested that the question has to be decided on the basis of the pressure on his mind. If the change of residence was absolutely necessary to prevent untimely death, then there may not be any change to domicile. On the other hand, if the change of domicile was necessary not to prevent death but to improve his health, in such cases mere residence in the country without the intention of giving up domicile in the home country would not result in change of domicile.

Similarly, if a person has left a country with the intention of evading the law, the question of change of domicile would depend on the seriousness of the change and the probability of conviction. It was held in *Re : Martin* that if the fugitive did not return to his home country after the period of limitation, if any, for prosecution for the crimes and when he was at liberty to return then it may result in change of domicile.

If residence in another country is necessary for the purpose of official duties, such residence will not automatically result in change of domicile.

## INDIAN LAW

Section 10 of the Indian Succession Act provides "A man acquires a new domicile by taking up a fixed habitation in a country which is not that of his domicile of origin". An explanation of the same section further provides that a man shall not be deemed to have been taken up his fixed habitation in India merely by reason of his residing there for Civil, Military, Naval or Air Force service of government or in the exercise of any profession or calling. Further Section 12 of the Act provides that a person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such first-mentioned person as part of his family, or as a servant.

*Evidence of domicile*

As observed before, to prove that a person has acquired the *'domicile of choice'* in another country, the fact of residence and the existence of requisite intention must be proved. Normally a person's residence in a country may be a *prima facie* evidence that he is domiciled there (*Bruce* v. *Bruce*, (1790) 2 B and P 229) and such presumption might grow stronger with the length of the residence but the length of residence is not the sole criterion of domicile as G.C. Cheshire observes, "Long residence does not constitute nor does it negative domicile." The residence, to be evidence of domicile must answer a qualitative as well as a quantitative test. Because it is out of that test that the intention of the person has to be ascertained. It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. Every conceivable event and incident in a man's life is a relative and admissible indication of his state of mind. The tendency of the English Courts is to investigate his actual state of mind.

*Loss of Domicile of Choice*

A *'domicile of choice'* is lost when both the factors which constitute *'domicile of choice'* are lost. The person should cease to reside in the country of domicile and he must have developed an intention never to return and to reside permanently in that country. Unless there is loss of both these factors, *'domicile of choice'* is not lost. An illustration of this principle is to be found in the case of *the Goods of Raffenel*. The facts of the case are as follows : —

*Discuss the nature and duration of a domicile of dependence with reference to infants, married women and lunatics.*

B. U. Dec. 75
Oct. 76

R was the widow of a French Naval Officer. Before marriage she was a British subject having a domicile of origin in England. After the death of her husband she decided to go back to England and settle there. She embarked a steamer at Calais with the intention of leaving France permanently; but before the ship sailed she was taken ill and was brought back to the shore. After spending some months in Calais, she died. In this case it was held that her domicile in France was not lost as her residence in France was not abandoned.

**(c) Domicile of dependent persons**

By operation of law the domicile of certain persons would depend on the domicile of others. The domicile of infants and lunatics would depend on the domicile of the others as they are incapable of choosing their own domicile. The domicile of a married woman will depend on that of her husband on the principle of unity of residence.

*Write a short note on : Domicile of infants.*

B. U. Oct. 76

*Comment on : Domicile of minor and mentally disordered person.*

B. U. May 92

*Domicile of infants*

The domicile of an infant will, as a rule, follow the domicile of the parents from whom he derives his domicile of origin. In the case of a legitimate child the domicile of the child would follow the domicile of the father and in the case of an illegitimate child it will follow that of the mother.

A person might acquire a new domicile as soon as he ceases to be an infant provided that he has the requisite intention and residence. In *Harrison* v. *Harrison*, the facts were as follows :

*"The domicile of dependence is based on the idea of preserving the unity of the family in all matters of the law governing their personal relations." Discuss this statement with reference to the domicile of infants.*

B. U. Apr. 81

A child had his domicile of origin in England and subsequently a domicile of dependence in South Australia. When he had attained the age of 20 he developed an intention to reside and settle in New Zealand and he married there. During a visit with his wife to England he attained majority. His wife presented a petition for divorce in England. The main question to be decided, for the purpose of jurisdiction, was, as to whether the husband could be deemed to be domiciled in England at the time of the presentation of the petition. It was held that he had lost the domicile of dependence in South Australia but had not acquired the domicile of choice in New Zealand as he had not resided there on attainment of majority. Therefore it was held that his domicile of origin was revived and he was domiciled in England at the time of the petition.

*Examine the law which governs the domicile of dependence with special reference to minors and mentally disordered persons.*
B. U. May 83

*Act of 1973*

The traditional law presented some difficulties regarding the domicile of infants when the parents were separated. The difficulty has been tide over by the Domicile and Matrimonial Proceedings Act, 1973. Where the parents are separated, if the child is living with his father, his domicile would continue to be the domicile of the father. This is consistent with the principles of common law we have discussed above. On the other hand, under the Act, even during the life time of the father, the domicile of a child may follow the domicile of the mother under the following circumstances :—

*Analyse domicile of dependence pertaining to minors and mentally retarded persons.*
B. U. Apr. 91

(1) if the infant is living in the home of the mother and not with his father (but if the infant is sharing the home of the mother as well as of the father, he will be deemed to be having the domicile of the father).

(2) if the infant has, at any time, had the domicile of the mother by virtue of the principle (1) mentioned above, he will continue to have the domicile of the mother even though he may not be sharing the home of the mother.

3.2. ⇒ *Domicile of married infants*

When an infant girl is married, there might appear to be a conflict between two rules. Firstly, the rule that the domicile of an infants is that of the parent and secondly, the domicile of a married woman is dependent on that of the husband. In such cases matrimonial domicile would prevail. On marriage she acquires the domicile of her husband. If the husband is himself a minor, then the domicile of the minor wife will be the domicile of that person on whose domicile the domicile of the husband depends.

The above discussed principles of law pertaining to the domicile of a married child has undergone considerable change after the Domicile and Matrimonial Proceedings Act, 1973. This Act confers capacity for the independent domicile at the age of 16 or marriage under that age to a married girl. It must also be noted that under the same Act, a married woman is also capable of a domicile independent from that of her husband.

*Domicile of the infant after the death of his father*

Generally the domicile of an infant will follow the domicile of his mother on the death of his father but this change is not invariable and automatic. It is settled that whether the domicile should follow that of the mother or not is to be decided bearing in view the welfare of the child. In *Re : Beaumont,* (1893) 3 C.H. 490, the facts were as follows :—

B was a daughter of parents domiciled in Scotland. After the death of the father the mother married a person domiciled in England and went to reside with him with her other children. But B remained with her aunt in Scotland. It was necessary to decide whether she had acquired the domicile of her mother at the time when B died as a minor. It was held in this case that in a case like this it was not an automatic rule that the minor's domicile will follow that of the mother. As the child remained in the custody of the aunt, it was held that the child could retain its Scottish domicile. When both the parents of an infant are dead, probably, the guardian may have power to change the domicile of the infant if such change were for the benefit of the infant. However, Dicey does not accept this view. 1.2.

*Domicile of adopted children* 1, 3.

Earlier, there were no specific provisions of law regarding the change of domicile of adopted children. However, it was believed that by analogy to the domicile of a natural child, the domicile of the adopted child would also follow depending on the domicile of the adopting parent. But now the position is made clear by the Domicile and Matrimonial Proceedings Act, 1973. The following positions may clearly be noted :-

(a) the domicile of an adopted child follows the domicile of the adopting parents ;

(b) but adoption in English Law is not retrospective. Therefore, the domicile of origin of the adopted child is not affected. It continues to be the same as at the birth of the child.

(c) however, if there has been a legitimation by subsequent marriage, such legitimation operates retrospectively and, therefore, the domicile of origin of the legitimated child will be that of the father.

INDIAN LAW

Section 14 of the Indian Succession Act provides that the domicile of a minor follows the domicile of the parents from whom he derived his domicile of origin. But there is an exception to this rule. The domicile of a minor does not change with that of his parents if the minor is married or holds an office or employment in the service of the Government or has set up with the consent of the parents, in any distinct business. Except in this way a person cannot, during minority acquire a new domicile.

*Domicile of a married woman*.

With marriage a woman takes the domicile of her husband. It continues to be that of her husband so long as the marriage lasts. This consequence would follow only if the marriage is valid or voidable. Her domicile of choice, before the marriage, is lost and domicile of origin ceases to operate during the period of marriage. The domicile of a married woman will be that of her husband even after the termination of the marriage by death or divorce *until the woman acquires a domicile of her own choice, In Re : Wallach,* the facts as follows : "A woman with her domicile of origin in France was married to a person domiciled in England. Five days after his death she committed suicide. An attempt was made to prove that she had no intention of being domiciled in England, and with the termination of the marriage, the matrimonial domicile came to an end. Therefore, the French domicile of origin revived. But it was held that the domicile of her husband was her domicile, as she did not acquire any new domicile, after the death of her husband. It was held that it was necessary that she should acquire a new domicile or change the old domicile by some positive act.

The decision in *Re : Wallach* is modified to some extent by the following two cases.

In *Re : Cook's Trust* [(1887) 56 L.T. 737] the facts were as follows :

A woman with a domicile of origin in England had married a person domiciled in France. Subsequently she separated from him. After sometime, believing that her husband was dead she went through a form of marriage and settled in New South Wales. Without her knowledge, her French husband died in 1877 and she died later in 1879. The question before the Court was regarding her domicile at the time of her death. It was held in this case that there was already the intention to reside separately and as in fact she had resided separately the matrimonial domicile came to an end with the death of the husband and the intention along with the separate residence conferred on her domicile in New South Wales.

In another case *Re : Scullard,* (1957) 1 C.H. 107, a woman married a person domiciled in England in 1893. The man died in 1955 being domiciled in England. The wife separated from her husband in 1908 and in 1946 settled in Guernsey with the expressed intention of remaining there for the rest of her life. Without being aware of the death of her husband she died in Guernsey shortly after her husbands's death. It was held that the intention and separate residence being already there she had acquired a domicile different from that of her husband at the time of her death. The decision in *Re : Wallach* and the other two cases can be distinguished on the ground that the rule in the former case is applicable *when the husband and the wife were living together whereas the rule in the latter cases would be applicable when they were not living together.*

One of the most irrational aspects of English law is this automatic dependence of the wife's domicile on that of her husband even when husband and wife are not living together. An extreme illustration of this rule could be seen in *Lord Advocate* v. *Jaffrey* (1921) 1 A.C. 146. The facts of the case are as follows :—

In this case the husband had deserted the wife and migrated to Australia. He settled in Australia and went through a form of marriage with another woman. The English wife filed a petition for the dissolution of the marriage on the ground of adultery. She died before the final decree could be passed. Even in such an extreme case it was held that she died with her husband's domicile.

The common law principle of unity of domicile of husband and wife during coverture was given the epithet "... The last barbarous relic of wife's servitude" by Lord Denning in *Gray* v. *Formosa* (1963) and it was called "a completing out-moded legal concept" by Simon, P. in *Adams* v. *Adams* (1971). This rule of unity of domicile of husband and wife now stands abolished by virtue of Domicile and Matrimonial Proceedings Act, 1973, which came into force on January, 1974.

*Act of 1973*

The above discussion on the question of the domicile of the married woman is of historic importance. The domicile of the married woman now is of historic importance in England in view of Section 1(2) of the Domicile and Matrimonial Proceedings Act, 1973 as follows :

"Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining the domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section."

This Act has made fundamental changes in the domicile of wife, by virtue of it, a married woman has acquired normal adult capacity for domicile and it is, no longer exclusively dependent on the domicile of her husband.

It should be noted that the principles of English Law, under this Act have gone beyond the principles of Indian Law regarding the domicile of married women.

The provisions of Sec. 1(2) of the 1973 Act came up for interpretation in *I RC* v. *Duchers of Portland* [(1982) 2 W.L.R. 367] : The taxpayer, Canadian domiciled woman married an Englishman before coming into force of that Act and lived with him in England thus acquiring an English domicile of dependency, which under the 1973 Act, is known as domicile of choice. Throughout her marriage she maintained close links with Canada. She retained her Canadian passport, kept a bank account in Quebec, owned a house in Quebec where she spent about ten to twelve weeks every summer. In 1975 her husband had agreed that after his retirement, they would leave England and permanently live in Quebec. She was assessed to Income Tax from 1973 to 1978 on the basis of being domiciled in England throughout those years. She claimed that her Canadian domicile of origin revived on the coming into force of the 1973 Act.

It was held that she did not require her Canadian domicile of origin, notwithstanding her continuing intention to return eventually to Canada since she had not after the coming into force of the 1973 Act, ceased to reside in England and had not therefore abandoned the English domicile of choice imposed on her by the Act.

## INDIAN LAW

Section 15 provides that by marriage a woman acquires the domicile of her husband and Section 16 provides that their domicile during her marriage follows the domicile of her husband. However, the wife's domicile no longer follows that of *her* husband if they are separated by the decree of a competent court if the husband is undergoing a sentence of transportation.

*Domicile of lunatics*

Lunatics cannot change by their own act their domicile. It is not, however, clear as to whether a person in charge of the lunatic might change the lunatic's domicile if such change is in the interest of the lunatic.

### Commercial Domicile

Commercial domicile is a legal concept relevant only in times of war. It is helpful in determining the enemy character of a person or a firm. Commercial domicile will attach to any person or firm voluntarily resident or carrying on business in enemy territory or even in enemy-occupied territory.

*Write short notes on Commeercial domicile.*

B. U. June 75
Apr. 76

*Write a short note on : Domicile and residence of associations.*

B. U. Oct. 85
Apr. 91

Commercial domicile must be distinguished from the civil domicile. The following are the differences :

(a) Commercial domicile is operative only in times of war.

(b) Commercial domicile depends on residence or (in the absence of residence) on carrying on of business in the enemy territory or in enemy-occupied territory. It does not depend on the length of residence or the intention of the person.

(c) A person may have any number of commercial domiciles whereas one person can never have more than one operative civil domicile.

(d) Commercial domicile may be more easily lost. For example, it may be lost by a person from the moment he puts himself in motion *bona fide* to quit the country without the intention of returning.

### Nationality, domicile and residence of companies and associations

The laws pertaining to the nationality, domicile and residence of companies or associations are evolved by treating those legal persons, as far as possible, like natural persons.

*Nationality*

According to English Private International Law the nationality of a corporation depends on the place of its incorporation. It does not depend either on the nationality of the director or on that of the shareholders But the enemy character of a nationality might depend on the persons in *de facto* control of the affairs of the corporation. The House of Lords laid down the following principles in *Daimler Co. Ltd.* v. *Continents Tyre and Rubber Co. of Great Britian*, (1960) 2 A.C. 307 :

(i) The enemy character may be assumed by a corporation if its agents or the persons in *de facto* control of its affairs are resident in an enemy country or wherever resident are adhering to the enemy or taking instructions from or acting under the control of the enemy.

(ii) A company registered in U. K. but carrying on business with those persons residing in enemy territory or enemy-held territory is to be regarded as enemies.

(iii) A company registered in U.K. but carrying on business in neutral country through agents properly authorised to reside there or in neutral country is *prima facie* to be regarded as a friend but may through its agents or persons in *de facto* control of its affairs assume an enemy character.

*Domicile*

Though artificial legal persons are treated as far as possible like human beings, yet, in the case of domicile there is one important restriction on such treatment. A company or an association is incapable of forming intention. Therefore, it *cannot have a domicile of choice.* It can have only one domicile which is attached to the company or association *at the time of the formation.* Such domicile cannot be subsequently changed. An incorporated company acquires its domicile by operation of law and its domicile will be *the law governing incorporation.* In the case of an incorporated association, the domicile will be in the place of its registration or creation. The domicile of a company may be relevant for the purpose of income-tax or for the purpose of determining the creation, continuance or dissolution of the corporation.

*Residence*

Residence of a corporation or an association may not be very relevant for the purpose of Private International Law. But for the purpose of taxation and for the purpose of determining the enemy character, residence may be relevant. A company is regarded by law as resident in the country where the centre of control exists, that is, where the seat and directing power of the affairs of the company are located. In a leading case *Cesena Sulphar Co.* v. *Nicholson*, (1876) 1 Ex. D. 428, the facts were as follows :—

The Cesena Co. was incorporated in England under English law for the purpose of taking over and working Sulphur Mines at Cesena in Italy. No products of the company were ever sent to England. The business of manufacturing and selling of Sulphur was done in Italy under the supervision of a delegation headed by Managing Director. It was also registered in Italy and two-thirds of the shareholders were resident Italians. But according to the Memorandum of Association of the company a Board of Directors was set up in London having the control and management of the company. The shareholders' meetings were held in London and dividends were declared there. It was held in this case that since almost every act of the company connected with its management was done in London, the company was resident in England. As a result of decisions in *Swedish Central Railway* v. *Thomson*, (1925) A.C. 495 and *Egyptian Delta Land and Investment* v. *Todd*, (1929) A.C. 1 it can be concluded that if the control is so evenly divided between two or more countries as to preclude the possibility of identifying one place of central control, then the company must be regarded as resident in each country in which substantial degree of control is in fact exercised.

# 3

# STATUS

## THE MEANING OF STATUS

Status is *the legal position of the individual* in or with regard to the *rest of the community*. Status is the person's legal condition in society in relation to others. It is as a result of status, that a set of rights, duties, capacities, powers and disabilities surround a person. For example, a person because he is a minor, suffers from certain disabilities and has certain protections in law.

*What is "status" ? What are its incidents ? What is the law that governs Domestic Status.*

B. U. May 93

In earlier societies, status played a very important role in determining the legal position of an individual. Though the importance of status today is not as great as in those societies; yet, in modern times, status does play a vital role in determining the legal condition of an individual.

*Write a short note :- Status, its meaning and its purpose.*

B. U. May 83
Apr. 85

## THE PURPOSE OF STATUS

*Write a short note on : "STATUS is a matter of public or social interest."*

B. U. Oct. 85

Certain personal conditions and relations cannot be left entirely to the free will of individuals. The needs of society require some regulation of such personal conditions and regulations. For that purpose, law classifies persons into certain groups, *e.g.* infants, lunatics, insolvents and criminals are such classifications. The *predominant purpose* behind classification of status groups is *social*. It is for the purpose of maintaining certain social institutions. Nevertheless, there are other purposes also. Quite often, the purpose of status is also to protect an individual.

The purpose of status can broadly be classified as follows :

*Define "Status" and distinguish it from the "incidents" of status. What is the law governing Domestic status ?*

B. U. Oct. 92

(1) to protect the *interest* of the *individual* on whom the status is conferred, *e.g.* the status of minority denies the minor the capacity to enter into contracts. This is with a view to protect the minor from incurring liabilities arising out of a contract; the nature of which he may not be able to judge or understand.

(2) to protect the *interests of society, e.g.*, the purpose of the status of marriage is to protect the morality of society. The purpose of imposing certain disabilities on a criminal is again to protect society.

(3) to protect the *interests of society as well as that of the individual, e.g.* the status of insanity is partly imposed to protect society from the insane person and the insane person from incurring liabilities, the nature of which he may not be in a position to understand.

Thus, though the predominant purpose of status is to maintain and protect social institutions, it is also meant to protect the individual in certain cases.

## THE NATURE OF STATUS AND ITS CHARACTERISTICS

The nature of the characteristics of status can be broadly stated as follows :—

(1) Status can be conferred on an individual by the *authority of the State only.* It is true that in certain cases status is dependent upon some voluntary acts of the individual concerned; yet, status is acquired because law has conferred it. For ex-

ample, the status of marriage is dependent on the contractual act of the parties; yet it has to be recongised by law as Viscount Haldane observed in *Salvesen* v. *Administrator of Austrian Property*, (1927) A.C. 641; 448, "A something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognises as having been superadded to it by the authority of the State. ..."

(2) The second characteristics of status, as observed before, is that *its predominant purpose is social*. The primary concern of status is to promote public or social interest.

(3) As the purpose of status is predominantly social and also because it determines the position of an individual before law *status cannot be acquired, varied or divested at the mere will of the parties* concerned.

(4) The most important characteristic of status is its *universality*. Scott. L.J. observed in *Re : Luck*, (1950) 1 Ch. 864 : "Perhaps the most far-reaching characteristic of status is its quality of universality — The general principle of status is that when it is created by the law of one country, it is or ought to be judicially recongised as being the same everywhere, all the world over ..." The character of universality of status means that once the relevant law has conferred the status on an individual, the English Court would recongise such status even though such status would not be acquired according to the domestic law of England.

*Exception*

To this general rule of Universality of Status there are certain exceptions. The *first exception* is when the foreign status is one which is *unknown to English Law*. Generally in all civilized communities certain common types of status are established. But it is possible that certain kind of status may be completely unknown to English Law and it is also possible that recognition of such status may be totally opposed to English *fundamental conceptions of public policy and social morality*. This principle is illustrated in *Metlies* v. *National Bank of Greece and Athens S.A.* (1957) 2 Q.B. 33. In this case it was observed that the Law of Incorporation for the status and powers of the foreign company will not be given an extra-territorial effect, if such law is prejudicial to the rights of other nationals, or to those of their subjects.

*Discuss : Worms v. De Valdor.*
B. U. May 83

This problem of recognition of a foreign status is often raised in connection with polygamous marriages valid under a foreign law. Though English Courts have not recongised polygamous marriages as valid marriages for certain purpose of English Law; yet, the present position is that the English Law will give effect only to certain incidents of the status, so far as the acts taking place in England are concerned. (*Ohochuku* v. *Ohochuku* (1960) 1 W.L.R. 183). Therefore, it can be concluded that in the case of alien status, the English Courts may not recognise all the incidents of the status in relation to transactions taking place in England.

The *second exception* is that English Courts will not recognise or enforce status if it is of *a penal nature*. *In Worms* v. *De Valdor* (1880) 49 L.J. Ch. 261, the facts were as follows :

A person, domiciled in France who had attained the age of majority but who was yet according to French Law, incapable of managing his own affairs by reason of his extravagance, sued a party in England for surrendering of the Promissory Notes. His status according to French Law as that of a prodigal. He was under the care of a curator and according to French Law, he could not maintain an action unless the curator concurred. In the instant action the curator objected, but the English Courts overruled the objection on the ground that the French rule was of a procedural nature and could not be applied in an English Court. The decision in this case was misunderstood in *Re* : *Selot's Trusts,* (1902) 1 Ch. 488. The facts in this case were as follows :

A French prodigal sued in England to recover English personality bequeathed to him. The curator objected, but the English Court overruled the objection. This overruling was on the assumption that the status of prodigality was not recognised in *Worms* v. *De Valdor,* on the ground that it was a disability of a penal nature. But that assumption is not correct. In fact in neither of the cases was the position of a prodigal regarded as a status.

In *Re* : *Langley's Settlement Trust,* (1962) Ch. 541, the facts were as follows : Langely, domiciled in England made a settlement. The proper law of the settlement was English. Subsequently, he was domiciled in California. A Californian Court declared him incompetent because of his physical disabilities and appointed his wife as his guardian. The wife alone was authorised to exercise the power. The husband had to withdraw funds from the settlement. The husband and wife jointly exercised the power. The Court of Appeal held that the exercise was valid according to English Law, the proper law of the settlement. The Court of Appeal did not consider the Californian order as penalty in view of the general beneficial nature of the order. But the whole question was answered with regard to commonsense and reasonable policy.

Lord Evershed, M. R. observed :

"Will the Courts of this country, in deciding upon the validity of this (exercise of a power under an English settlement) give effect to the status possessed by the respondent ? That question we have to decide with due regard to commonsense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter." Therefore, in conclusion it can be said that the doctrine of universality of status is limited by commonsense and reasonable policy.

*"The most important features of status, is its universality." Discuss.*
B. U. Oct. 85

*Write a short note on : Incidents of status and status.*
B. U. Dec. 74

*Write a short note on : Sottomoyor v. De Barros.*
B. U. Oct. 85

## INCIDENTS OF STATUS

It has been observed earlier that status determines the legal position of a person. These various powers, rights, duties, capacities and disabilities are called the Incidents of Status. These incidents superficially resemble the rights, and duties arising out of a contract. But they differ from those rights and duties in a substantial way.

| *Incidents of Status* | *Rights and duties arising out of a contract* |
|---|---|
| 1. The incidents of a Status may be *determinate in nature* but *not in content.* They are exerciseable or enforceable with no defined limit of frequency. | The rights and duties of a contract are determinate both in nature and in content. |

| | |
|---|---|
| 2. These incidents are imposed to a great extent in the *interests of a Society* and not merely in the interest of the parties. Therefore they *cannot be varied by* any act of parties without the intervention of the States. | The rights and duties of a contract being essentially the result of act of parties, can be varied by the act of parties. |
| 3. The incidents of Status also differ from those of a contract in the method of their enforcement. | |

## THE LAW THAT GOVERNS STATUS

Though, the law of domicile has an importance in the matters of domestic status under Common Law, yet, it cannot be said that a single system of Law governs all kinds of status. To ascertain the law that would govern a particular status, one has to be aware of the purpose for which the status is created. Different kinds of status may be governed by different laws. Again, status might not be the result of the operation of a particular law. It might be the result of the operation of more than one law. Several elements might constitute a status and each of the elements may be governed by different legal systems. For example, the status of marriage is the result of the following three factors :

(a) Capacity of the parties to marry,

(b) Essential validity, and

(c) Formal validity.

These three elements are not all governed by the same law. Whether a marriage is valid or not is to be determined by referring those elements to the relevant system of law. The formal validity of a marriage may depend on the law of the place where the marriage was celebrated, while capacity and essential validity may be determined by the law of the domicile of the parties to the marriage. Generally, domicile is important in determining the domestic status. But, in determining non-domestic status like lunacy or insolvency, the purpose of the status determines the law that would determine such status.

*Law governing the Incidents of Status*

The law that governs status need not necessarily determine all the incidents of status. Further, the various incidents of the same status may be governed by different laws. For example, the status of minority is governed by the law of minor's domicile. But the capacity of the minor to marry is governed by the *lex situs*, or the law of the place where the marriage is to be solemnised.

The rule that all incidents of status are not governed by the same law is illustrated in *Wood* v. *Wood*, (1957) P. 254. The facts of this case are as follows :

An English domiciled wife who was deserted by her husband had obtained an order for maintenance from an English Magistrate's Court. Subsequently, the husband acquired domicile in the State of Nevada and obtained a divorce. On the strength of this divorce, he asked the Magistrate's Court to discharge the maintenance order. The Court of Appeal held that the divorce, need not automatically discharge the maintenance order. The Court, of course, recognised the decree of Nevada for the purpose of extinguishing the marital status, though it held that it need not necessarily affect all the incidents of the marital status.

# 4

# MARRIAGE

## WHAT IS MARRIAGE ?

Marriage is a status but at the same time it is a status based on a contract. Therefore it is a status arising out of a contract to which each State is entitled to attach its own condition both as to its creation and duration (*Sotto-mayor* v. *De Barros* (No. 2) (1879) 5 P.M. 94).

*English matrimonial law is founded on the conception of the Christian marriage. Discuss with the aid of decided cases, if the concept has undergone a change.*

B. U. Oct. 81

For the purpose of English Matrimonial Law, a marriage is a Christian marriage. The definition of a Christian marriage has been given in *Hyde* v. *Hyde*. It is *the voluntary union for life of a man and one woman to the exclusion of all others.* In *Hyde* v. *Hyde*, the facts were as follows :—

A husband petitioned the English Court for dissolution of the marriage which he had contracted with his wife in Utah according to the rites and ceremonies of the Mormons. At the time of the marriage polygamy was a part of the Mormon doctrine and was the common custom in Utah. The English Court refused to exercise jurisdiction over the petition on the ground that it was not a Christian marriage.

*Write a short note on : Hyde v. Hyde.*

B. U. May 83
Oct. 92

A Christian marriage is a marriage which satisfies the test laid down in the above case. It is a voluntary union for life of one man and one woman to the exclusion of all others. The nature of the marriage does not depend on the religious beliefs of the parties but it depends on its having the characteristics mentioned above. For example, a monogamous marriage celebrated in Japan in Japanese form between a British subject and a Japanese woman was considered to be a Christian marriage (*Brinkley* v. *Att. Gen.* (1890) L.R. 15 P. & D. 76). Similarly, in *Maher* v. *Maher* (1951) P. 342, it was held that a marriage in England between a domiciled English woman and a domiciled Egyptian Muslim was a monogamous marriage.

*Write a short note on the Concept of a 'Christian' marriage.*

B. U. Apr. 85

Though Christian marriage has been defined as a union for life yet the question would be as to whether a marriage which has the possibility of dissolution could be considered as a Christian marriage. This problem arose in *Nachimson* v. *Nachimson* (1930) P. 217. The facts of the case were as follows :—

The marriage in question was in the form of monogamous union of two persons for life but under the law of the parties concerned, i.e. the Russian Law, the marriage was dissoluble at the wish of both the parties, or at the wish of either party, by judicial decree. The Court of Appeal held, in this case, that such a marriage was a Christian marriage. Being at its inception a marriage for life, it was not a marriage for a stipulated limited period.

## WHAT LAW DETERMINES THE NATURE OF THE MARRIAGE

If a woman domiciled in England marries a Muslim in London intending to live in Pakistan where he is domiciled, is the nature of the marriage determined by English law, the *lex loci celebrationis* or by the law of Pakistan, i.e., the law of matrimonial domicile ? Both Dicey and Westlake are of the opinion that it is the law of the place where the marriage is celebrated that determines the nature of the marriage. On the other hand, Cheshire is of the opinion that the law of the intended matrimonial domicile must determine the nature of the marriage.

On the whole it can be said that the weight of English authorities is in favour of determining the nature of the marriage according to the law of the country where the marriage is celebrated. (*Maher* v. *Maher, supra*)

## THE RECOGNITION OF POLYGAMOUS MARRIAGES

*"The recognition or non-recognition of the existence of a polygamous marriage depends on the purpose for which such recognition is invoked."— Groveson. Discuss with case law*

B. U. Oct. 85
Oct. 92

*Write a short note :- Hyde v. Hyde.*

B. U. May 83
Oct. 92

The statement in *Hyde* v. *Hyde* (*supra*) "Now it is obvious that the matrimonial law of this country is adopted to the Christian marriage, and is wholly inapplicable to polygamy" could be misunderstood. In several subsequent cases it was observed that polygamous marriages would be denied the status of marriage in all respects and for all purposes. It was observed in *Harvey* v. *Farnie* that "If one of the numerous wives of a Mohammedan was to come to the country, and married in this country she would not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country. This decision in fact went to the extent of denying the validity of the Mohammedan marriage itself. But all that was said in *Hyde* v. *Hyde* was that the parties of a polygamous marriage were not entitled to the remedies, the adjudication or the relief of the matrimonial law of England. Therefore, the present position under the English law is that the recognition or non-recognition of a polygamous marriage depends on the purpose for which such recognition is invoked. In fact, the correct position is that the attitude of the English Courts is not determined by the status of marriage itself but by certain of its incidents. The law on the question in its correct perspective is laid down in *Baindail* v. *Baindail*, (1946) P. 122. The facts of the case were as follows :

*Do English Courts ever recognise a polygamous marriage? Discuss with relevant case law.*

B. U. May 83

*Short note– Concept of marriage as decided in Hyde v. Hyde.*

B. U. Apr. 91

A domiciled Indian of Hindu faith being married to a Hindu woman in India went through the civil form of marriage in England with a domiciled English woman when his Hindu wife was alive. He informed the Registrar of Marriages that he was a bachelor. The Hindu marriage, as the law stood then, was potentially polygamous. The English wife petitioned for a decree of nullity on discovering the previous marriage. The question to be decided in the case was as to whether the polygamous marriage celebrated under the personal law of the appellant would be considered as a bar to the subsequent marriage in England. The Court examined the question along these lines. It thought that the problem before it was to decide the status of the person and that was determined according to his personal law. *That status of marriage though not recognised for all purposes had to be recognised for certain purposes.* The Court held that the second marriage was void on the ground of being a bigamous marriage because he was already a married man according to his personal law. On facts similar to those of *Baindail* v. *Baindail*, the Court came to the same conclusion in *Srinivasan* v. *Srinivasan*, (1945) 2. All. E.R. 21. The Court emphatically observed, "To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based."

Similar conclusions were arrived at in the Sinha Peerage Claim, 1939. The facts of the case were as follows :—

Lord Sinha, born in a orthodox Hindu community, was married when he was a member of the orthodox community. Subsequently he embraced a reformist section known as Brahmo Samaj. It was obligatory for the members of the Samaj to observe monogamy but the members of the Brahmo Samaj could revert to the orthodox section. Junior Sinha was born after senior Sinha had become a member of the Brahmo Samaj. The question before the Committee of the House of Lords was as to whether junior Sinha would be entitled to succeed to the hereditary peerage that was conferred on senior Sinha. On the facts of the case, the Committee of the House of Lords held that junior Sinha was an issue of a monogamous marriage and therefore a legitimate child for the purpose of succeeding to the title of Honour conferred under English law. But, at the same time the extent to which polygamous marriages would be or would not be recognised under English law was clearly stated in this case.

*When can the English courts recognise a polygamous marriage ?*

B. U. Nov. 93

*In what circumstances, and to what extent, will the courts recognise a polygamous marriage ?*

B. U. Oct. 79

However, there have been a series of recent decisions which reveal the liberalisation of the attitude of the English Courts towards polygamous marriages.

In *Coleman* v. *Shany*, (1961) A.C. 481 (P.C.), the facts were as follows :

A Ghanaian first entered into a monogamous marriage and after the death of the wife married in local customary fashion. Thereby, the marriage was potentially polygamous. After the death of that person, the children by the first marriage and the widow of second marriage claimed the right of succession of his property. It was held by the English Court that both of them could claim. To this extent, the status of the wife in the potential polygamous case was recognised.

*Write a short note on – Hyde v. Hyde.*

B. U. May 83

In *Alhaji Mohammed* v. *Knott*, (1968) 2 W.L.R. 1446, the facts were as follows :

The marriage was celebrated in Nigeria both the parties being domiciled there at that time. It was a potentially polygamous Muslim marriage, the wife being a child of about 12 at the time of the marriage. An English Court had made an order for care and protection of that girl. The husband appealed against that order. The Divisional Court recognised that status of the marriage and revoked the order. Again in *Mehta* v. *Mehta*, 1945, 2 All E.R. 690, the English Court exercised jurisdiction to grant a decree of nullity of a Hindu marriage performed in India between an Indian of a Hindu sect practising monogamy and a domiciled English woman.

*Cheni* v. *Cheni* (1965) P. 85-258 :—

In this case the husband and wife, who were Sephardic Jews domiciled in Egypt, and uncle and niece, married there in accordance with forms of their religious law. The marriage was potentially polygamous until the birth of a child, which took place within a few years of the ceremony. Later the parties became domiciled in England, where the wife petitioned for annulment on the ground that the parties were within the prohibited degrees of consanguinity, or, alternatively, for divorce on the ground of cruelty.

*Husband and wife, who were Jews domiciled in Egypt, and uncle and niece, married there in accordance with forms of their religious law. The marriage was potentially polygamous until the birth of a child, which took place within a few years of the ceremony. Later the parties became domiciled in England where the wife petitioned for annulment on the ground that the parties were within the prohibited degrees of consanguinity or alternatively, for divorce on the ground of cruelty. Will the court exercise jurisdiction ?*

B. U. Apr. 66
Apr. 71

As the marriage was potentially polygamous on the date of its solemnization, the question of jurisdiction came in as a preliminary issue. The main question here was as to what was the relevant time to determine the nature of the marriage. Was it the date of celebration or the date of proceedings ? The Court departing from the decision in *Hyde* v. *Hyde* held that the marriage had become monogamous at the time of the proceedings, and, therefore, it would exercise jurisdiction in the matter.

In another case *Ali* v. *Ali* (1966) 2 W.L.R. 620, the parties to the marriage were Muslims domiciled in India at the date of the marriage. Subsequently, they came to England and acquired English domicile of choice. Two years after such acquisition of the domicile, the husband petitioned for divorce on the ground of his wife's desertion and the wife cross-petitioned on the ground of the husband's cruelty and adultery. Consistent with the decision in *Cheni* v. *Cheni*, the English Court held that their marriage had become monogamous after they acquired domicile in England and, therefore, the Court could exercise jurisdiction in the divorce petition and the cross-petition.

A similar problem arose in *Parkasho* v. *Singh*, (1968) P. 233. The facts of this case were :—

The parties were married in India governed by Hindu Law. The marriage was potentially polygamous at the time of celebration. However, after the passing of the Hindu Marriage Act, 1955, all Hindu marriages including the pre-existing marriages became monogamous. The English Court could exercise jurisdiction as such Hindu marriage which was polygamous in inception had became monogamous subsequently.

As a result of these decisions, it appears that for *purpose of exercise of jurisdiction*, the English Courts would determine *the nature of the marriage at the date of the proceedings*.

As a result of the decisions in the above-mentioned cases, it can be concluded that polygamous marriages would be recognised by the English Courts for all purposes *excepting* the following :—

(a) For purpose of exercising matrimonial jurisdictions to give matrimonial reliefs and remedies. However, the nature of the marriage would be determined at the date of the proceedings and not at the date of the celebration of the marriage. Further, this bar on jurisdiction would not be applicable to proceedings for recovery of debts arising out of marriage. (*Shahnaz* v. *Rizwan*, (1964) 2 All E.R. 993) title

(b) For purpose of succession to a ~~litle~~ of Honour conferred under English Law.

(c) For purpose of succession to real property situated in England.

In conclusion it can be said that except for the above three purposes polygamous marriages are recognised by English Court.

*Act of 1972*

The gradual liberalisation shown towards polygamous marriages by English Courts culminated in the Matrimonial Proceedings (Polygamous Marriage) Act, 1972. Now it is provided that Courts at all level throughout the United Kingdom are not precluded from granting matrimonial relief or making declaration concerning the validity of a marriage (by reason only that the marriage was entered into under a law which permits polygamy). The term matrimonial relief here includes all kinds of matrimonial relief that would be discussed hereafter by us.

## THE VALIDITY OF MARRIAGE

It has been observed that though marriage is based on a contract, it is in fact a status-contract. Therefore, it is necessary that law should recognise the status. The validity of a marriage would depend, in modern law, on the following three factors :—

(a) The capacity of the parties to marry.

(b) The essential validity of the marriage.

(c) The formal validity of the marriage.

For a marriage to be valid, these three factors are absolutely necessary. The persons getting married must first of all have the capacity to marry. These should be no bar on the capacity of either party to the marriage. The status of marriage is primarily meant for the purpose of maintaining and preserving morality of a society. Therefore, naturally, the requirements of a marriage would be determined by the need of safeguarding such morality. The matters which are regarded as vital to the maintenance of an expected standard in the matrimonial and family relations of any given society would be considered as matters of essential validity. For example, whether a person already married once can marry again when the other spouse is living. Could he marry within a degree of relationship ? Could he marry a person belonging or not belonging to a certain religion ? These are all questions of essential validity. On the other hand, matters of less vital social interest but nevertheless necessary for evidencing the solemnisation of the marriage will be considered as matters of formal validity. For example, the length of the period of notice to be given before celebration of marriage, the number of witnesses necessary or the qualifications of the presiding officer. These are questions of formality. Nevertheless, it should be noted that a marriage is not valid unless these formalities are fulfilled. The distinction between formality and essential validity is not dependent on it being necessary or otherwise for the validity of a marriage but on the vital social interest involved in the particular requirement. Formalities are essential that is why it was observed in *Kenward* v. *Kenward*, (1951) P. 124 that the formalities ***were essential formalities.***

### Capacity and prohibition

Capacity and prohibition are treated as essential requirements and the rule of choice of law would be the same as in the case of the essential validity. The English Courts will not permit an exception to the law of domicile on the basis of religious law. In *Re De Wilton*, (1900), 2 Ch. 481 the facts were as follows :

> A Jew and his niece, British subjects domiciled in England, where they were prohibited from intermarrying on grounds of consanguinity, married in Germany according to German law and afterwards according to Jewish ceremonies. Both German and Jewish law permitted marriage of Uncle and Niece. The English Court held the marriage void.

There is also an absolute statutory prohibition in the Age of Marriage Act, 1929. Section 2 of the Act provides that "A marriage between person, either of whom is under the age of 16, shall be void." So a marriage where one of the parties is under the age of 16, shall be void, if celebrated in England. It would also be void even if performed outside England, provided either of the parties to the marriage is domiciled in England at the date of marriage.

***Write a short note on : Ogden v. Ogden.***
**B. U. May 83**

### What law determines the nature of requirements for marriage

It has been observed earlier that the validity of a marriage depends on essential requirements and formal requirements. It will be seen later that different rules of choice of law are applicable for determining the essential validity and the formal validity of a marriage. Therefore, whether a particular requirement could be classified as essential requirement or formal requirement would be very important. The important question is as to which law will determine whether a particular requirement is an essential requirement or a formal requirement. The classification of any requirement as an essential and purely formal matter is not a well settled question

*Answer the following :—*

*A domiciled Frenchman married in England a domiciled English-woman without first obtaining the necessary consent of his parents to the marriage. Consent of parents in English law is treated as a formality, to be governed by the law of the place of celebration, and the English rule as to consent did not apply in this case to the Frenchman who was over the English age of majority. According to French law, consent of parents under the circumstances of this case was regarded as an essential, and for lack of such consent a French Court annulled the marriage. Will the English Court give effect to the decree of the French Court ?*

*[Ans.—See Ogden v. Ogden]*

B. U. Dec. 74
Apr. 76

*Write a short note on the problem faced by the English Courts in Apt. v. Apt.*

B. U. May 83

*Write a short note on : Apt. v. Apt.*

B. U. Dec. 75
Oct. 85
Oct. 92

*Write a short note on— Lex loci celebrationis. Short note- Brook v. Brook.*

B. U. Oct. 92

in English law. One view is that it must be made according to the law of the domicile to each of the parties. The other view is that such classification must be according to the *lex fori*, i.e., the law of England. In *Ogden* v. *Ogden*, (1908) P. 46, this question arose before the Court. The facts of the case are as follows: A domiciled Frenchman married in England a domiciled English woman without obtaining the consent of his parents. According to English law the consent of the parents is a question of formality while according to French law the consent of the parents was a question of essential validity. Such consent was not necessary according to the English law but it was necessary according to French law. So the whole question here was if it was a question of an essential validity, French Law would be applied and the marriage, would be void. On the other hand, if it was a question of formal validity, English Law would be applied and the marriage would be valid. In this case, the Court classified the question according to English Law, and held the marriage valid. What is not clear, in this case, is whether the rule of classification was adopted because the marriage was celebrated in England ? Whether the same rule would be applied to classify the requirement of a marriage celebrated outside England is not well settled. In *Apt* v. *Apt*. (1947) P. 127, the facts were as follows :

Two persons professing Jewish faith and having German nationality but the husband being domiciled and resident in Argentine and the wife being domiciled in England married in Argentine. As the marriage took place during the time of war, the wife could not be present in Argentine at the time of marriage. She gave a Power of Attorney authorising one of her woman friends in Argentine to go through the form of marriage there on her behalf. This procedure was valid according to the law of Argentine where the marriage was solemnised. Subsequently the question of validity of the marriage arose before the English Court. It was contended in this case that the marriage by proxy was opposed to public policy. However, the Court decided that it offended in no way any head of public policy known to English law. The matter was purely of form and governed exclusively by the *lex loci celebrationis* and therefore it was held the marriage was valid. It should be noted that in this case the nature of the requirement was determined by English law. (B.U. Oct. 1969, Oct. 1970)

'*Lex loci celebrationis*' means the laws of the place where the marriage was solemnized. Where the question is merely of formal validity, then the same is governed exclusively by '*lex loci celebrationis*'.

## THE ESSENTIAL VALIDITY OF A MARRIAGE

English Courts did not adopt different rules of choice of law for determining essential validity and formal validity during the early years of the 19th century. Both the questions were determined according to the law of the place where the marriage was performed. This is fully illustrated by the decision in *Dalrymple* v. *Dalrymple*, (1811) 2 Hagg. Cons. 54. But by the end of the 19th century the matter assumed a different nature. In *Brook* v. *Brook* (1861) 9 H.L.C. 193, the facts were as follows :

A marriage was celebrated in Denmark between a domiciled Englishman and his deceased wife's sister also domiciled in England. Such marriage was valid according to Danish Law but illegal according to English Law as it was then. The House of Lords held that the marriage was void. The reasoning adopted by the Court was as follows :

"But while the forms of entering into the marriage are to be regulated by the *lex loci contractus*, the laws of the country in which it is celebrated, the essentials of the marriage depend upon the *lex domicilli*, the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated.

*Critically examine:— "the law which governs the formalities of a marriage."*

B. U. May 83
May 93

This decision made it clear that the essential validity of a marriage would not be governed by the law of the place where the marriage was celebrated. But as to the questions whether it would be governed by the laws of the domicile of the parties at the time of the marriage or by the law of the intended matrimonial domicile, the decision does not give an unequivocal answer. This has resulted in some controversy. Dicey and other writers expound the view that the essential validity of a marriage is governed by the law of the country in which the parties are domiciled at the time of the marriage. According to this view, the essential validity is governed by the law of domicile of both the parties. This theory is known as the *dual domicile theory*. On the other hand, Dr. Cheshire contends that the essential validity of the marriage is governed by the law of the country in which the matrimonial residence is contemplated. This theory is known as the *intended matrimonial domicile theory*. It can be seen that the observation made in *Brook* v. *Brook* seems to support both the theories.

*Discuss the law that determines the essential validity of a marriage.*

B. U. Oct. 92

*What are the principles governing the essential validity of a marriage ?*

B. U. May 93

Dr. Cheshire criticises the dual domicile theory and supports his intended matrimonial domicile theory on the following grounds :

**(1) Sociological grounds**

Marriage is an institution which closely concerns public policy and the social morality of the State. Therefore the validity of the marriage must be determined with reference to the law of the State in which the parties set up their home. The dual domicile doctrine commands little respect from this point of view, because the countries of their domicile before the marriage may have very little to do with the married life of the couple after their marriage once they set up their matrimonial residence elsewhere.

**(2) Principle**

The intended matrimonial doctrine will be closely analogous to the general principle regarding the validity of contracts in general. The essential validity of the contracts in general will be governed by the proper law of the contract which is mostly the law with which the contract has the most substantial connection. On the basis of that principle, the status-contract of marriage must be governed by the intended matrimonial domicile because it is with that domicile that the marriage has the most substantial connection.

**(3) Grounds of effectiveness**

Dr. Cheshire argues that the dual domicile doctrine can be evaded by the parties to the marriage by changing their domicile. On the other hand, the intended matrimonial domicile cannot be evaded. Therefore, from the point of view of effectiveness the intended matrimonial domicile doctrine has greater merits.

Critics of Dr. Cheshire have attempted to meet all these arguments. They have pointed out that the social argument cannot be pressed to its logical conclusion because if the parties immediately after the marriage, change their domicile and begin to permanently reside in another country, the marriage which was valid under earlier law cannot be invalidated on the ground that the marriage is not valid under the new domiciliary law.

On the argument regarding principle, they point out that the very fact that marriage is not a commercial contract, analogy with commercial contract is not meaningful. Meeting the argument of effectiveness they point out that the law of the intended matrimonial domicile could be evaded more easily than the dual domicile doctrine. Because, under the dual domicile doctrine it may be necessary for both the parties to change the domicile, whereas in the case of intended matrimonial domicile doctrine, it is sufficient if the husband alone changes the domicile.

Apart from these theoretical arguments, it is necessary to go through the decisions of Courts to ascertain the rule of choice of law regarding the essential validity of a marriage. As pointed above, the decision in *Brook* v. *Brook* while establishing that the essential validity of a marriage was not governed by the law of the place where the marriage was celebrated, did not categorically decide as to whether the law of the dual domicile or the law of the intended domicile will govern such validity.

In *Warrender* v. *Warrender* [(1835) 2 C.L. & F. 488] the Court held that the marriage of a domiciled Scotsman was to be governed by the law of Scotland.

In *Mette* v. *Mette* [(1859) 1 S.W. & T.R. 416] the facts were as follows :

A domiciled Englishman contracted a marriage in Frankfurt with his deceased wife's half-sister, a domiciled German woman. This marriage was prohibited by English law but valid by German law. The Court held that the marriage was void on the ground that "There could be no valid contract unless each was competent to contract with the other". These words necessarily suggest a preference for dual domicile doctrine. But Dr. Cheshire points out that as the intended matrimonial domicile in this case was English, which coincides with the domicile of the husband, this decision is not against the doctrine.

In *Re Paine,* (1940) C.H. 46, the facts were as follows :—

The wife was a British subject domiciled in England. She travelled to Germany and married her deceased sister's husband, a German subject. The husband had lived in England for some time shortly before the marriage and he and his wife continued to live there until their respective deaths. It was held in this case that the marriage was not valid. The reasoning adopted was the dual domicile doctrine. But Dr. Cheshire comments : "The result was exactly what could have been had he (Judge) applied the doctrine of the Matrimonial home."

In *Sottomayor* v. *De Barros* [(1877) 3 P.D. 1] the facts were as follows :—

*Write a short note on : Sottomayor v. De Barros.*

B. U. Oct. 85 May 92

Two first cousins supposed to have been domiciled in Portugal, married in England. According to English law, the marriage was valid but according to the law of Portugal the marriage was prohibited in the absence of a Papal dispensation. The Court held that the marriage was void. The reasoning adopted was the dual domicile doctrine. But shortly after the decision, it was discovered that the husband was domiciled in England at the time of the marriage. Therefore the case was re-opened at the instance of the Queen's Proctor. It was held in this case that the marriage was valid on the following grounds :—

"The validity of a marriage celebrated in England between persons of whom one is English, and the other a foreign domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England."

In *De Reneville* v. *De Reneville* the facts of the case were as follows :

A woman domiciled in England and a man domiciled in France were married and spent their married lives in French territory. The wife petitioned the English Court for a decree of nullity. The English Court would have no jurisdiction if the marriage was void and it would have no jurisdiction if the marriage was voidable. Therefore the question before the Court was to ascertain the effect of the marriage either according to English law or according to French law. Lord Green observed in this case as follows :

"In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows : The validity of a marriage so far as regards the observance of formalities is a matter of the *lex loci celebtrationis*. But this is not a case of forms, it is a case of essential validity. By what law is that to be decided ? In my opinion, by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that time it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage." Relying on this observation, Dr. Cheshire maintains that the essential validity of the marriage is governed by the law of the intended matrimonial domicile. Other writers do not accept this view. Firstly, the question of choice of law arose in the case as an incidental question and not as a main question. Further, if the Court of appeal intended to overrule a series of cases, the Court would have referred to them and overruled. As the judgment does not refer to prior decisions, the prior cases cannot be deemed to have been overruled. The only conclusion that would be proper is that in this case a new rule of choice of law was laid down for distinguishing between a void and a voidable marriage. The rule in this case is not applicable to determine the validity of a marriage. The Marriage (Enabling) Act, 1960 also further supports the dual domicile theory. In conclusion it can be said that the English decisions favour the dual domicile theory. The essential validity of marriage is governed by the law of the domicile of each of the parties to the marriage. But this rule is subject to two exceptions :

*Exception (1)*—The validity of a marriage celebrated in England between persons of whom one is English and the other a foreign domicile is not affected by any incapacity which though existing under the law of such foreign domicile does not exist under the law of England. *Sottomayor* v. *De Barros*.

*Exception (2)*— If there is any prohibition for marriage under a foreign domicile law and if such prohibition is of a penal nature such disability will not be recognised by the English Court. The Second exception is supported by the decision in *Scott* v. *Att. Gen.*, (1886) L.R. 11 P.D. 128. The facts of the case were as follows :

A woman domiciled in Natal was guilty of adultery in Cape Colony. The husband obtained a decree of divorce. A week after the decree, the wife married the Correspondent in Cape Town. Subsequently they went through a second ceremony in England after acquiring English domicile. According to the law of Natal, the wife could not remarry so long as the other party remained unmarried. The question before the Court was as to whether this marriage could be recognised. The English Court held that the restriction under the law of Natal was of a penal nature and therefore the restriction could not be recognised by the English Court. The marriage was held valid.

## FORMAL VALIDITY OF A MARRIAGE

It is an established rule of English law that, subject to certain exceptions, the formal validity of a marriage is governed by the law of the country in which the marriage is celebrated. Whether any particular ceremony constitutes marriage depends solely upon their law of the country where the ceremony takes place. It has been held that the law of the place where the marriage was celebrated would also include a subsequently enacted law having retrospective effect. This principle was approved by the House of Lords in *Starkowaski* v. *Att. Gen.* (1954) A.C. 155. The facts of the case were as follows :

*Discuss the rules of choice of law regarding the formal validity of a marriage.*

B. U. Apr. 85

Two Polish nationals professing Roman Catholic faith married in Australia in 1945. The form was of a religious ceremony of a marriage. The Australian law, as it stood at the time of the marriage, recognised civil marriages only. But a month after the marriage a law of the Australian Government validated religious marriages retrospectively provided the marriages were subsequently registered. The husband and wife came to England and separated in 1947. In 1949 the husband got the marriage registered without the knowledge of the wife. In 1950, the wife, describing herself to be unmarried, went through a civil ceremony of a marriage in England. By both the marriages she had a child each. The question before the House of Lords was as to whether the first or the second marriage was valid. The House of Lords giving effect to the retrospective Australian legislation upheld the first marriage as against the second. However, the House of Lords did not express any opinion on a position that would arise if the second marriage had taken place before the registration of the first marriage.

In *Pilinski* v. *Pilinska* (1955) 1 All E.R. 631, where the facts of the case were similar to the facts of Starkowaski excepting that the first marriage was not registered the Court held that the first marriage was void.

The law of the country where the marriage is celebrated would also include the conflict of laws of that country. For example, in *Hooper* v. *Hooper* the facts were as follows :

Two British subjects domiciled in England married in Iraq according to the rites of Church of England but no *'banns'* were called. The law of Iraq referred the validity of the marriage to the national law of the parties. In this case the validity of the marriage was examined according to English law and the marriage held void as the formality of calling the *'banns'* was not complied with.

('BANNS' means notice of marriage.)

Law of the country where the marriage is celebrated would govern the formal validity of the marriage even though the place of marriage is chosen deliberately to evade English law. Under English law there is no doctrine of evasion of laws.

Though it is a well established rule that the formal validity of a marriage would be governed by the law of the country where the marriage is celebrated, yet some modification of the rule has been answered in view of some recent decisions. In *Taczanowksa* v. *Taczanowski*, (1957) 3 W.L.R. 141, the facts were as follows :—

Two Polish nationals domiciled in Poland married in Italy according to a religious form which was valid according to Polish law, but not valid according to law of Italy; the law of the place where the marriage was celebrated. The husband was a member of an Army belligerent occupation of Italy. The wife was in a convent there. The Court of Appeal held that the marriage was valid as it satisfied the formalities of common law form of marriage. The reasoning of the Court was as follows :—

(a) The principle of international law that the Armies in belligerent occupation of a territory are not governed by the law of the territory overrides the principle that the formality of a marriage is governed by the law of the place where the marriage is celebrated.

(b) The rule that the *lex loci celebrationis* governs the formal validity of a marriage is based on the presumption of intention of the parties to subject themselves to the *lex loci*. In this case the Court observed, "Any presumption that the recently liberated members of this community have, at the material time, subjected themselves to the laws of a country which they hated fervently and at whose violent hands they had suffered severely is, to my mind, clearly rebutted." Though the first principle is a familiar principle of international law, the second principle seems to modify the general principle of Private International Law. It appears that after this decision the rule that the formal validity of a marriage is governed by the law of the country where the marriage is celebrated is subject to a proviso. The proviso being that the parties had the intention of voluntarily submitting themselves to the law of the country where the marriage was celebrated. However, this case has been criticised by several writers on the ground that there was no need to apply the common law to the marriage in question. The decision in *Taczanowska* v. *Taczanowski* has been approved and extended in *Kochanski* v. *Kochanska*. (1958) P. 147.

*Discuss Taczanowska v. Taczanowski.*

B. U. May 83

The facts in this case were as follows :

Two liberated Polish displaced persons married in a religious form recognised by Polish law, in Germany in 1945. This marriage was not according to the form prescribed by German law. The marriage was solemnised by a Polish Roman Catholic Chaplain of the displaced camp. Their refusal to avail themselves of the form prescribed by the local law as based upon the policy of non-fraternisation with the Germans. The Court of Appeal held that the marriage was valid "as it satisfies the formal requirement of common law marriages, and they were not bound to observe the local forms, as they were not, placed have voluntarily."

The decision in *Kochanski* v. *Kochanska* to the extent it extends the rule to civilians who were not members of the occupying forces, has not been approved by the Court of Appeal in *Pretson* v. *Pretson*, (1963) P. 411. In *Pretson* v. *Pretson*, the facts were as follows :—

The Polish Army Chaplin had celebrated the marriage in 1945 in a Polish military camp in Germany between two Polish nationals. The husband was a member of the Polish armed force and the wife a civilian resident in the camp. Though the Court of Appeal followed the rule laid down in *Taczanowska* v. *Taczanowski*, and *Kochanski* v. *Kochanska*, yet it made it clear that the principle would not be extended beyond members of the occupying forces.

**Exceptions to the rule of lex loci celebrationis**

The general rule that the formal validity of a marriage is governed by the law of the place where the marriage is celebrated is subject to the following exceptions :—

(1) *Where the local form is inappropriate.*— Where the existing local form is inappropriate, the marriage will be valid if it is solemnised according to the common law form. In *Re Bethell*, (1887) 38 Ch. D. 220, the facts were as follows :—

A domiciled Englishman contracted a native marriage with a member of a local African tribe. He desired to be treated as a member of the tribe and refused that his marriage be solemnized by a Church of England Priest. This marriage was held void on various grounds — one of them being that the marriage was not solemnised according to the common law form. Taczanowska and Kochanski cases cited above are also authorities in favour of this exception.

*Discuss :— Wolfenden v. Wolfenden.* B. U. Apr. 85

(2) *Where no local form or facility exists.*— If in the place where the marriage is celebrated there is no form or facility for solemnizing a marriage, the marriage will be deemed to have been valid if it has been solemnized according to the common law form. In the earlier days of colonisation, this rule was based on the principle that the English settlor took the common law with him wherever he went. In *Wolfenden* v. *Wolfenden*, (1945) 2 All E.R. 539, the facts were as follows :—

The husband was a domiciled Englishman and the wife was domiciled in Canada before her marriage. The marriage took place in a remote part of China where the only clergyman available was the Minister of the Church of Scotland. No banns were published; no notice was given and no licence was obtained. The Minister was not authorised to perform a marriage ceremony under the Foreign Marriages Act, 1892. The Court upheld the validity of the marriage on the ground that it was a common law form of marriage. (B.U. Oct. 1971)

(3) *Marriage in a foreign territory "within the lines".*— According to common law, a marriage would be valid if performed "within the lines" of an army camp provided it was solemnized by a person such as a Chaplain appointed for that purpose by the Commanding Officer. Under the Foreign Marriages Act, 1947 certain Army Officers are also Marriage Officers.

(4) *Marriage on board the ship or on high seas.*— A marriage on board the merchant ship would be governed by the law of the Flag. When the law of the Flag covers a number of legal systems as in the case of the Flag of the U.K. or that of the U.S.A. reference must be made to the law of the port of registration of the ship.

(5) *Foreign Marriages Act, 1892 and 1947.*— There have been several preliminary enactments regulating the marriage of British subjects in non-British territories. The latest among them is the Foreign Marriages Act, 1892 as amended by the Act of 1947. According to this Act, marriages between parties of whom one at least is a British subject shall be valid in law as if the same had been solemnized in the U.K. with a due observation of all forms required by law, if solemnized in the manner provided by this Act in any foreign country or before the Marriage Officer.

Section 11 of the Act enumerates the persons who are considered as Marriage Officers for the purpose of the Act. It must be noted that one important pre-condition for the application of the Act is that *at least one* of the parties to the marriage must be a British subject. The Act *is not applicable* if neither of the parties is a British subject.

(6) *Marriages solemnized in foreign embassies.*— It is an established rule of international law that the principle of extra-territoriality is applied to foreign embassies. Therefore, a marriage solemnized within an embassy, according to the form prescribed by the law of the country represented by the embassy would be a valid marriage even though the form of the marriage is in disregard of the one prescribed by the local law.

# LEGITIMATION AND ADOPTION

## PARTICULAR FORMS OF STATUS

*Distinguish between legitimacy and legitimation.*

B. U. Apr. 85

Legitimacy is ordinarily the status acquired by a person who is born or conceived in a lawful wedlock. This question of legitimacy is important for various purposes. Firstly, whenever we speak in law of son, daughters, grandchildren and issue, we speak only of legitimate persons. Secondly, if an English Will contains a gift to children of a specified person, the established rule of English Law is that the gift is meant for legitimate children only, except in certain circumstances. Thirdly, legitimacy affects the domicile of origin of a child. It also determines the right of guardianship possessed by the parents of the children. Further, quite often, the question of nationality of a child might depend on its legitimacy.

This problem of legitimacy in Private International Law raises the question as to what system of law will decide, whether a person is born legitimate. Under Common Law a child born of a legitimate marriage, or conceived before, but born during the marriage; or conceived during the marriage but born after the dissolution of the marriage by death or divorce alone, would be considered legitimate. A legitimate child in this sense, will be treated by English Courts as legitimate for all purposes. This strict rule of Common Law has been now mitigated by the Legitimacy Act, 1959. According to Section 2 of this Act, the child of a void marriage irrespective of the date of its birth, shall be treated as the legitimate child of its parents, if when the child was conceived or at the date of marriage, if later, either or both parents reasonably believed that the marriage was valid. This rule will be applicable only if the child's father had an English domicile at the date of child's birth or at the date of his death, if he died before the child was born.

*Examine the principles of conflict of laws relating of the status of legitimacy.*

B. U. May 92

According to English Conflict of Laws, the question of legitimacy must be determined by the Law of the domicile, at the time of the birth. This domicile is the domicile of origin. It has been noted before that the domicile of origin of a child depends on its status of legitimacy. The legitimate child will have the domicile of its father at the time of its birth, while an illegitimate child will have the domicile of the mother at the time of its birth. This inter-dependence of domicile and legitimacy lands us in a vicious circle.

The question is as to whether the legitimate status of a child should be invariably determined by the validity of the marriage of the parents or by the law of the domicile at the time of the birth. The House of Lords took the first view in *Shaw* v. *Gould.* (1868) L.R. 3 H.L. 55. The facts of the case are as follows :

*Explain the rules of the conflict of laws relating to the status of legitimacy.*

B. U. Nov. 93

B, a domiciled Englishman, married E, a girl of 16, domiciled in England. Before the marriage could be consummated, the parties separated. A few years later E wished to marry another person, S. To facilitiate the marriage it was agreed that B should reside in Scotland for a minimum of 40 days to give jurisdiction to the Scottish Courts and obtain the divorce. B resided in Scotland for more than 40 days. Such residence gave him the domicile of Scotland according to Scottish Law. Thereafter, he obtained a Scottish Decree dissolving their marriage. Subsequently E married S, and had children, while B was still alive. For the purpose of construction of a Will, it was necessary to decide, whether the children of E by marriage with S, were legitimate. The House of Lords decided this question by determining the nature of the marriage between E and S. The House of Lords held that B was not domiciled in Scotland according to English Law. Therefore the Scottish Court had no jurisdiction to dissolve the marriage. As the Scottish Decree could not be recognised in England, the marriage between B and E was never dissolved. Consequently, the marriage of E with S was bigamous and void. Therefore, the children were illegitimate. The House of Lords did not take into consideration the question that S was domiciled in Scotland and the matrimonial residence of E and S was also Scotland. If they had taken this fact into consideration and if they had ascertained the legitimacy of the children by the law of their domicile at the time of their birth, the children could be held to have been legitimate.

*Distinguish between legitimacy and legitimation. By what law is the question of legitimacy determined?*
B. U. Apr. 91

The ruthless logic of this decision has been criticised by many writers. It has also been considered that the decision in this case must be restricted for the purpose of ascertaining legitimacy to succeed to real property situated in England.

Fortunately, there is another trend of judicial decision according to which legitimacy of a child is to be determined by the law of the domicile of the child at the time of its birth and not by deciding the validity of the marriage of the parents. *In Re : Bischoffsheim,* (1948) Ch. 79 Case 206, the facts of the case were as follows :

N on the death of her first husband, married his brother in New York at a time when both parties were domiciled in England. English Law prohibited such marriage. Subsequently they acquired domicile in the State of New York. A child was born when they had their domicile in New York. According to the law of New York, the child was legitimate. The question of legitimacy of the child arose for the purpose of administering a Will. It was held in this case that the status of a child depended on the law of domicile of the parents at the date of birth of the child. Therefore, as the child was legitimate according to the law of New York that status was recognised even for the purposes of administering an English will.

In another case *Bomgbose* v. *Daniel,* (1955) A.C. 107, the facts were as follows :

*Critically examine :– Legitimation.*
B. U. May 83

H & W being domiciled in Nigeria had married under Nigerian Law. According to this law, the intestate succession of the property of the persons married under the Law or to the property of their issues would be governed by English Law. H & W had two sons A & B. A being married monogamously had one son. B entered into nine polygamous marriages and had a number of children. The polygamous marriage was valid according to the customary law of Nigeria. B died intestate. The question to be decided was as to whether the child of B could claim B's property as the legitimate child under English Law. The Privy Council upheld the legitimacy of the child. The reasoning adopted by the judicial committee was that — "In deciding upon a case where the customs and the laws are so different from British ideas, a Court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married."

The principle adopted in *Re Bischoffsheim* and *Bomgbose* v. *Daniel* was that if the child was considered legitimate by the law of domicile of the father at the time of the birth of the child, then the English Courts would consider the child legitimate without going into the question of the validity of the marriage of the parents. The decision in these cases differ from the decision in *Shaw* v. *Gould*. As observed before, the decision in *Shaw* v. *Gould* must be considered to be confined to the cases of Succession to Rule being situated in England. It appears that the decisions in the other two cases is the law on the question.

A reference has been made earlier to the vicious circle involved in the problem. Legitimacy depends upon the domicile of origin and the domicile of origin depends upon legitimacy. To solve this problem the English Courts have referred the question of legitimacy to the law of domicile of the father. The reasoning behind such an attitude seems to be twofold : (a) Legitimacy is essentially a legal relation between the child and the father; and (b) That if the status of a person is doubtful, it is equitable to infer in favour of the existence of the status.

On these grounds the English Courts have determined the status of legitimacy of a child according to the law of domicile of the father at the time of birth of the child.

## LEGITIMATION

Legitimation is a legal process by means of which a child born illegitimate is made legitimate. The child in question was conceived and born when the mother was not married to the father. The main distinction between legitimacy and legitimation is that legitimacy is the status of a child conferred on the child at the time of its birth; while legitimation is a process by means of which a child who does not enjoy the status of legitimacy at the time of its birth, will be made legitimate.

### Legitimation and English Law

Before the passing of the Legitimacy Act, 1926, the status of legitimation was generally unknown to English Law. It could only take place by a private Act of Parliament. Nevertheless English Courts would recognise for certain purposes foreign acts of legitimation. To recognise such foreign acts of legitimation the following conditions were to be fulfilled :

*Critically examine :– Legitimation.* B. U. Oct. 85

(a) The law of domicile of the father at the time of the birth of the child must have permitted the legitimation by subsequent marriage of the parents.

(b) The law of domicile of the father at the time of the marriage of the parents must have also permitted the legitimation of the children by such marriage.

In *Re Goodman's Trust*, (1881), 17 Ch. D. 266 cases 218, the Court of Appeal recognised the legitimation of a person as the law of Holland which was the law of domicile of the father at the time of the birth of the person and also at the time of his subsequent marriage with the mother of the child permitted legitimation. On the other hand, in *Re Grove*, (1888) 40 Ch. D. 216 cases 225, the Court refused to recognise a child as illegitimate when the father of the child of an English mother had acquired domicile in England at the time of the birth of the child, even though he had domicile of origin in Switzerland.

### Legitimation and the Legitimacy Act, 1926-59

The Legitimacy Act, 1926-59 as introduced into English Law is the principle of legitimation by subsequent marriage of the parents of an illegitimate child. Under the Act, a child will be deemed to have been legitimated by the marriage of the father with the mother of the child provided the father was domiciled in England at the date of the marriage. Such legitimacy would commence from the date of the marriage or from the commencement of the Act whichever is the later. Under this Act, a child could not be legitimated, if at the time of the child's birth either parent was married to a third person. However the Act of 1959 removes this restriction.

The Act also provides that a child born before the marriage of its parents could be legitimated if the father at the time of the marriage is domiciled, outside England and Wales, in a country which recognised legitimation by subsequent marriage. Legitimation would commence from the date of the marriage or of the commencement of the Act whichever is later. The peculiarity of the provisions regarding commencement of legitimacy would be that a child senior in age might be junior to a child born later.

*Difference between Legitimation under Common Law and under the Legitimacy Act.*

The one advantage under the Legitimacy Act as against the rules of Common Law regarding legitimation is that a child could be legitimated provided the father of the child was domiciled in a country which permitted legitimation by the subsequent marriage, at the time of the marriage of the parents. Under the Legitimacy Acts, the laws of domicile of the father at the time of the birth of the child would be irrelevant. But under the Common Law, a child could only be legitimated if the laws of the domicile of the father both at the time of the birth of the child and at the time of the marriage of the parties, permitted legitimation. However, there was one advantage under Common Law and that is that the legitimacy of the child would commence from the date of the birth of the child. But a child legitimated under Common Law would not be entitled to succeed to titles of honour or real property, whereas, a child legitimated under the Act could succeed to such property and has wider rights. Further, under the Legitimacy Act of 1926 a child born in adultery could not be legitimated. Under Common Law this was possible provided the relevant domiciliary laws permitted such legitimation. As observed before, this restriction is removed by the Legitimacy Act, 1959. Another restriction under the Legitimacy Acts, 1926 and 1959 is that these Acts recognised legitimacy only by the subsequent marriage of the child's parents. Many of the legal systems based on Civil Law permit legitimation by means other than the marriage of the parents, e.g., under those Civil Law Systems legitimation by adoption or by recognition may be possible. Such legitimation can be recognised under Common Law, but not under these Legitimacy Acts.

*Write a short note on : Legitimation.*
B. U. Nov. 93

recognition

**Recognition of Legitimation by ~~Adoption~~ or Acknowledgement**

Under Common Law, the legitimation of the child by Acknowledgement or Adoption would be recognised provided such a legitimation was possible according to the Law of Domicile of the father at the time of the birth of the child and at the time of the Adoption or Acknowledgement. This view is supported by the decision of the Court of Appeal in *Re. Luck's Settlement Trusts*, (1940) Ch. 864. The facts of the case are as follows :

One Fredrick Luck, while domiciled in England left his wife and lived in California with Martha Croft. David Luck was the child of this relation. Subsequently Fredrick Luck acquired a domicile in California, divorced his first wife in England and married a woman other than Martha Croft. Thereafter he recognised and adopted

David as his son. According to the Law of California, by this adoption and recognition David was a legitimate son of his father from the date of his birth. But the Court of Appeal held that the legitimation could not be recongised in England as on the date of the birth of David Fredrick, his father was domiciled in England.

The Decisions in *Re Luck's* case was founded on the analogy of Recognition of Legitimation by subsequent marriage under Common Law.

The other question is as to whether a legitimation would confer the nationality of the father on the legitimated child. *In Abraham* v. *Att. Gen.* (1934) P. 17, this question was raised. The facts of the case were as follows :

The father of the child was a British subject domiciled in England, living in Japan. After the birth of the child, he married the mother who was a domiciled Japanese woman. The child, subsequently petitioned for a declaration of legitimation and that he had acquired the nationality of his father by virtue of such legitimation. The Court refused to grant nationality though the declaration as to legitimation was granted. However, this position has been altered by the British Nationality Act, 1948. Under this Act a legitimated child can acquire the nationality of the father.

## ADOPTION

The concept of Adoption was not known to Common Law. It was only introduced into English Law, by Adoption of Child Act, 1926. This Act has been often amended and now consolidated in the Adoption Act, 1958.

It has been further amended by the Adoption Acts of 1964 and 1968. Adoption has been defined as *"the creation of relation of parent and child between person who are strangers in blood"*. However, it may be noted that in certain circumstances, a parent can adopt his own child.

*Write a short note on— Status of adoption.*
B. U. Oct. 92

The question of Adoption might present itself in two ways :

(1) How could a valid adoption be made in England or in the United Kingdom ?

(2) Under what circumstances would an English Court recognise Foreign Acts of Adoption ?

**Adoption under English Law**

By virtue of the Adoption Act, 1958, a valid adoption could be made in England, Wales or in Scotland, only by an order of the Court. The English or Scottish Courts can exercise jurisdiction to make an adoption order, if the following conditions are fulfilled :

(a) The applicant is domiciled in England or Scotland, and

(b) If the proceedings are before an English Court, the applicant and the infant must be both resident in England or if the proceedings are before a Scottish Court, both of them must be resident in Scotland.

In an exceptional case, the English or Scottish Courts may make an adoption order on the application of a person not ordinarily resident in Great Britain. Formerly the Adoption of Child Act was applicable only to British subjects. But now it is extended to infants of any nationality.

Another question that would arise is as to the Law which should be applied in granting such adoption. It is suggested by some writers that reference should be made to the *lex dmoicilii* of the child as well as that of the adoptor.

**Provisional Adoption Order**

*What are the conditions under which an English Court can make an adoption order ? What law would govern the adopted child after such an order ? Why ?*

B. U. 81

*Discuss the rules of conflict of laws regarding the recognition of foreign acts of adoption.*

B. U. Apr. 85
Apr. 91

Section 53 of the Adoption Act of 1958 provides that an applicant who is not domiciled in England or Scotland and who intends to adopt an infant under the law of or within the country in which he is domiciled and who for that purpose desires to remove the infant from Great Britain may obtain a provisional order from the High Court or a Country Court authorising him to remove the infant for that purpose and giving him the custody of the infant pending his adoption.

**Recognition of Foreign Acts of Adoption**

When the question of the validity of a foreign act of adoption comes before the English Court, the following two circumstances are possible :

(a) The adoptor and the child are domiciled in the same country, or

(b) The adoptor and the child have different domiciles. In the first case there will be no difficulty as the law of domicile of both the parties is the same and it will decide the validity of the Adoption.

In the second case, reference must be made to the *lex domicilii* of both the Adoptor and the child. Further if there has been an Adoption Order of a Foreign Court, the English Courts would recognise such adoption provided the Foreign Court has exercised jurisdiction under circumstances similar to those which would justify the English Courts from exercising jurisdiction. (*Re Dulles' settlement No. 2*) [(1951) Ch. 482].

It has been noted that in *Re Luck's Settlement*, the Court had to examine the validity of the Adoption for the purpose of determining the legitimacy or illegitimacy of the child.

The child was held illegitimate as the law of domicile of the father at the time of birth of the child did not permit such legitimation. In another case *Re Wilson* (1954) Ch. 733, the facts of the case were as follows :

Two British subjects domiciled in England were married but had no child. When they had been to Canada they adopted a child domiciled in Canada by an order of the appropriate Court in Canada. After the death of the father the question of the validity of the adoption arose before the Court. It was held that the adoption was not valid as the parents at the time of the Adoption Order by the Canadian Court, were domiciled in England. They should have obtained an Adoption Order of an English Court. However the fact that the child was domiciled in Canada was not seriously noticed in this case.

In another case *Re Wilby* (1956) P. 174, the English Court went a step further. In this case the adoptive parents and the child were domiciled in Burma, and the valid adoption according to the Law of Burmese had taken place. Subsequently the parties were domiciled in England. The question before the English Court was as to whether the adoptive mother could succeed to the property of the adopted person after his death. It was held that she could not. However the decision in this case has been questioned in *Re Marshall* (1957) 1 Ch. 263. The facts of the case were as follows :

A person domiciled in England had created several interests in his will including an interest to an issue to CSJ in certain circumstances CSJ adopted a child domiciled in British Columbia when CSJ himself had acquired the domicile there. According to Law of British Columbia which came into effect after the death of the testator, an adopted child would have the right to inheritance. The Court held that the question as to whether the adopted child was the child of CSJ, was to be decided by the Law of Domicile of the child. However in this case, as the Law of Domicile of the child on the date of death of the testator, did not confer and right of inheritance on an adopted child the plea of the adopted child was refused.

**Adoption Act, 1964**

Further it may be noted that the Adoption Act of 1964 provides for the recognition in England and Scotland of Adoption Orders made not only in Northern Ireland but also in the Channel Islands and in the Isle of Man as if they had been made in Great Britain.

**The Adoption Act of 1968**

This Act gives effect to a draft Convention on the international adoption of children which was approved by the Hague Conference on Private International Law in 1964. The Convention does not apply to internal or local adoptions. But only to "intercountry" adoptions. The Act of 1968 classifies the countries into *three* categories :—

(a) Great Britain and United Kingdom ;

(b) Convention country, i.e., a country which is party to the Convention of 1964 ;

(c) a specified country i.e., a country though not a party to the Convention which has been notified and specified by order in Council.

This Act gives additional jurisdiction to the High Court to recognise foreign acts of adoption. The provisions of this Act have been summarised by the Editors of Dicey and Morris on 'Conflict of Laws', as follows :—

(1) The applicant must be either (a) habitually resident in Great Britain and a United Kingdom national or a national of a convention country or (b) habitually resident in a convention country or a specified country and a United Kingdom national. If the applicant is ordinarily resident in Great Britain, it seems that he must also be resident in England.

(2) If the applicants are two married persons, (a) both must be habitually resident in Great Britain and each must be a United Kingdom national or a national of a convention country, or (b) both must be United Kingdom nationals and each must be habitually resident in Great Britain, a specified country or a convention country. Moreover, for reasons stated above in paragraph (1), if the applicants are ordinarily resident in Great Britain, both of them must also be resident in England.

(3) These jurisdictional criteria must be satisfied not only at the time of application but also immediately before the order is made.

(4) The infant must be (a) a person under the age of eighteen who has not been married and (b) a United Kingdom national or a national of a convention country and habitually resident in Great Britain, a specified country or a convention country. Moreover, for reasons stated above in paragraph (1), if the applicant is or both applicants are ordinarily resident in Great Britain the infant must also be resident in England.

(5) The jurisdiction conferred by the Act can not be exercised if the applicant or applicants and the infants are United Kingdom nationals and habitually reside in Great Britain or a specified country. In such a case the jurisdictional requirements

of the Adoption Act, 1958 (i.e. Rule 74 and Exception must be complied with.

(6) If the applicant or applicants are not United Kingdom nationals, no adoption order may be made contrary to a prohibition on adoption which is contained in the internal law of his or their nationality and has been notified to the United Kingdom Government and specified by Order in Council. Such prohibitions may relate, e.g., to the existence of issue of the applicant, or to the respective ages of the applicant and the infant; these are very common in the laws of some continental European countries.

(7) If the infant is not a United Kingdom national, no adoption order may be made except in accordance with the provisions of the internal law of his nationality relating to consents and consultations other than those of the applicant, his or her spouse, or members of his or her family. Any other requirement of consent (e.g. that of the applicant's spouse) is that imposed by English domestic law.

(8) The Act contains provisions designed to assist the court to determine the nationality of a person, e.g., in case of double nationality or statelessness, and also to determine the internal law of the nationality if the persons concerned is a national of a composite State comprising many countries. If there is a rule in force throughout that State indicating which system of internal law is relevant, that system is applicable; if there is no such rule, the applicable system is that "appearing to the court to be most closely connected with the case".

**Guardian and Ward**

*Critically examine :— The status of guardian and ward.*

When a child loses its parents, it will be necessary to appoint a person of full age to stand in the position of the father and to safeguard the interests of the child. Such appointed person is called the guardian and the child is called the ward.

B. U. Oct. 85
Apr. 91
Oct. 92

*The English Courts and Appointment of Guardians*

Though, generally, personal status is governed by the law, of domicile, yet, for the purpose of appointment of a guardian the English Courts abandon domicile in favour of the law of nationality. The theoretical basis for adopting the law of nationality is that it is the prerogative of the Crown to act as *parens patriae* of the children of British nationality or of children resident in England. In *Nugent* v. *Vetsara*, (1866) L.R. 2 Eq. 704, the facts were as follows :

*Explain fully the concept of status. What are the legal incidents of the status of guardian and ward ?*

B. U. Nov. 93

Two children of Austrian Nationality were sent to England for the purpose of going to an English school. They had a guardian appointed by the Courts of Austria. English guardians were also appointed by the English Court. The Austrian guardian wanted to take away the children from the English school so that they might complete their education in Austria. The English Court held :

(1) that the appointment of the English guardians on the basis of the residence of the children in England was valid.

(2) The Austrian guardian could exercise all such power and control as he might have exercised over these children in their own country, if they were there and had not been sent to this country for a temporary purpose.

This decision seems to have been based on the principle that the Court of nationality could appoint guardians and their powers would prevail over the powers of guardians appointed by other Courts. In *Di Savini* v. *Losada*, (1870) 18 W.R. 425, also the authority of the guardian appointed by the Court of nationality was recognised. In this case the Judge observed : "I think that I am bound without exercising any judgment of my own to recognise their authority." But the present position has considerably changed. Now the English Courts do not feel as helpless as they felt in the above-mentioned two cases. Section 1 of the Guardians of Infants Act, 1925 provides that in any proceedings, before any Court relating to the custody or administration of the property of an infant, the Court shall regard *the welfare and care of the infant*, as the first and paramount consideration. This new attitude is fully reflected in *Re B's Settlement* (1940) Ch. 64. The facts of the case are as follows :

There was a dispute between two Belgians, father and mother over the custody of a boy of eleven. Divorce proceedings were pending in Belgium, and the Belgian Court had ordered that the custody of the boy was to be with the father. The mother who was a British national before marriage had brought the boy to England. The boy was made a ward of the English Court. It was held in this case that the welfare of the boy was the paramount consideration of the court and on that principle he was to remain with his mother. In this case, it was conceded that the Court of nationality could appoint a guardian, but nevertheless the interest of the Crown as *parens patriae* in the welfare of all children resident in England was real and the English Courts could interfere to protect the interest of the children in England.

**Lunatic and Curator**

It has been noted before that the status of lunancy is created by law, having partly in view the interest of *lunatic himself* and also the interest of the *society in which he resides*. Therefore, the principle that jurisdiction in matters of status is governed by the law of domicile is abandoned. Residence is accepted on the basis of jurisdiction both in the interest of lunatic and in the interest of the society in which he resides.

**Jurisdiction of English Courts**

The English Court has jurisdiction over a lunatic under the following circumstances :

(a) If such person is personally present in England. In *Re Burbidge* (1902) Ch. 426, the English Court made an order under Lunacy Act even though the lunatic was an American citizen and had no property in England. This order was made on the ground that such person was present in England.

(b) If such lunatic has property of any kind in England, even though he may not be present. In such circumstances, the English Court will appoint a committee to manage the property of the lunatic.

**The powers of the Foreign Curator**

If a curator has been appointed by a Foreign Court the question as to his powers in England may be raised often. This question might arise in two ways :

(a) What are the powers of the foreign curator over the person of the lunatic present in England ?

(b) What are the powers of the foreign curator over the lunatic's property in England ?

*The powers of Foreign Curator over the Person of the Lunatic*

A Foreign Curator cannot exercise any authority over a lunatic found in

*Write short note on : The power of a foreign curator over the person and property of a lunatic.*
B. U. Oct. 92
May 93
Nov. 93

England merely by virtue of his foreign appointment. He must obtain an order of the English Court to be able to do so, or he may apply to the Court for the custody of the lunatic so that he may remove him outside the jurisdiction of the Court.

*The Power of the Foreign Curator over the Lunatic's property*

The Foreign Curator has no powers to manage and deal with the immovable property of a foreign lunatic, if such property is situated in England. He can only exercise any power by order of the English Court. He can neither exercise power over movable property of the lunatic situated in England, if the lunatic is domiciled in England, or if a committee had been appointed by the English Court. Subject to these limitations, a Foreign Curator may take possession of and administer the lunatic's movable property in England. In *Didisheim* v. *London & Westminster Bank*, (1900) 2 Ch. 15, Cases 263 the facts were as follows :

A German national domiciled and resident in Belgium was found of unsound mind and a Curator had been appointed by the Belgian Courts. She was entitled to a large sum of money deposited by her late husband at the London Bank. The London Bank refused to pay the money to the Belgian Curator unless an order of an English Court was obtained. In this case, though the Court held that the bank was justified, it was also held that it was not proper to extend the same principle. In a later case under similar circumstances, the Court refused costs to a bank. (*Pelegrim* v. *Courts*,) (1915) 1 Ch. 696.)

# 6

# CONTRACTS

*"The essential validity of a contract is governed by the proper law of contract."*

*Elucidate Discuss.*

B. U. May 83
May 92

For purpose of application of the rules of Conflict of Laws relating to contract, English Courts must first ascertain as to whether the transaction in question could be classified as a contract. To be classified as a contract, it is not necessary that the transaction must have all the characteristics an English contract would have. The essential factor for determining that a particular transaction is a contract is that there must be intention on the part of the parties to the transaction to create legal relations by an agreement.

## THE LAW THAT GOVERNS THE CONTRACT

A Contract can be of two kinds :

(a) Commercial or mercantile contract; or

(b) Contract relating to status.

The rules of Conflict of laws relating to status-contracts have been discussed before. So far as commercial contracts are concerned, their validity has to be determined keeping in view the following aspects of the contract :

(a) Capacity of the parties ;

(b) Essential validity ;

(c) Formal validity and

(d) Whether the contract is prohibited by law or other considerations like morality or public policy.

## (A) CAPACITY

*Write a short note on : Sottomayor v. De Barros.*

B. U. Oct. 85
May 92

There is no clear decision under English law as to what law governs capacity to make a commercial contract. There are conflicting decisions and judicial statements on the point. Broadly speaking there are two views on the question. One view is that the capacity to make a commercial contract is to be determined by *lex domicilii*. This view is held by Cotton L.J. in *Baindail* v. *Baindail*, (1946) P. 122. It is also held by the Court of appeal in *Sottomayor* v. *De Barros*, (1877) L.R. 3 P.D. 1., at P. 5 cases 139, that the personal capacity to enter into any contract is to be decided by the *law of domicile*. These decisions were regarding contracts affecting status. Therefore it is doubtful as to the extent to which they would be applicable to commercial contracts. Writers, like Dr. Cheshire, further point out that in modern conditions of trade, domicile is not a satisfactory test. It is incompatible with justice.

As against the above view the dicta of Lord Eldon in *Male* v. *Roberts*, (1799) III Esp. 163 cases 269, and an observation by Lord Green in *Baindall* v. *Baindail*, would support the view that the capacity to enter into a commercial contract must be determined by the *lex loci actus*. But Dr. Cheshire thinks that even the test of *lex loci actus* is also not satisfactory. He argues that the test of *lex loci actus* might enable a party to evade incapacity imposed upon him by the law that governs the contract in other respects. It might also be that the place where the contract is entered into may be accidental and transient. Dr. Cheshire suggests that the capacity to enter into commercial contracts must be governed by the *proper law in the objective sense*. However, writers like Graveson, suggest that English Courts will probably adhere to the general principle of the law of the place of contract in matters of capacity, except in cases of non commercial contracts and transfer of immovable property. In the case of contracts to transfer an interest in immovables, capacity is governed by the *lex situs* of the immovables.

## (B) ESSENTIAL VALIDITY

A contract by persons with full capacity may be invalid in form or may be bad either because of its contents or on account of the purpose for which it is made. Such problems relate to the essential validity of the contract. The essential validity of a contract is said to be governed by the proper law of the contract. As observed by Lord Wright in *Mount Albert Borough Council* v. *Australasian Temperance, etc., Society*, (1938) A.C. 224 at 240—

*Analyse the theory of "Proper Law of Contract."*
B. U. Apr. 91

"The proper law of contract means that law which the English Court to apply in determining the obligations under the contract." But as to the question of determining a proper law of contract, there has been a controversy. There are two theories regarding the proper law of contract. Dicey upholds what may be called the *subjective theory* of the proper law of a contract. According to him the proper law of a contract is the law which the parties have intended or presumed to have intended. The other view upheld by Westlake may be called the *objective theory* of the proper law. According to this theory the proper law of a contract is that law with which the contract has the most real connection.

*Short note— Critically examine Dicey's theory of "Proper Law."*
B. U. Apr. 91

**English decisions on the proper law of the contract**

Several decisions in the 19th century, generally supported the subjective theory of proper law, provided such law was connected with one of the relevant countries. A direct authority on the objective theory of the proper law is to be found in the decision of the Court of Appeal in *The Torni*, (1932) p. 48. The facts of the case can be summed up as follows :

*Explain critically "Proper Law" theory of contract.*
B. U. May 93

There was a contract for carriage by sea of certain cargo from Palestine to England under a bill of lading. The bill of lading contained a clause to the effect — "This bill of lading wherever signed is to be construed in accordance with English Law." The question before the Court was the assessment of liability for short delivery. According to the law of Palestine which incorporated the Hague Rules, any contract for carriage of goods by sea entered into in Palestine could not exclude the operation of the law of Palestine, English law, as it existed, had not incorporated the Hauge Rules. The Court applied the law of Palestine notwithstanding the above-mentioned clause in the bill of lading. However, the Palestine law was applied by construing English Law in the wider sense. As the law of Palestine, where the contract was entered into, was applied in preference to English Law, this decision is considered to be in support of objective theory of the proper law of the contract.

*Short note— Discuss Vita Food Products v. Unus Shipping Co.*
B. U. May 92
May 93

The next decision of importance was by the Privy Council in *Vita Food Products* v. *Unus Shipping Co.* (1939) A.C. 227. The facts of the case were very similar to those in *The Torni*. There was a contract for carriage by sea under a bill of lading having clause similar to the one in *The Torni* case. The contract was for carriage of goods from New Foundland to New York, and it was signed in New Foundland. The law of New Foundland had incorporated the provisions of the Hague Rules, while the law of England had not incorporated those rules.

In this case, it was held that the contract was governed by English Law. Lord Wright observed that "It is now well settled that by English Law ( and the law of Nova Scotia is the same) the proper law of the contract 'is the law which the parties intended to apply'. The intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances.

*What is proper law of contract ? Cite decided cases.*

B. U. Nov. 93

The decision of the Court of Appeal in *The Torni* case was distinguished on the ground that the provisions of the law of Palestine were mandatory. Any contract which was entered into in Palestine, but did not incorporate the Hague Rules, would be illegal. On the other hand, incorporation of the Hague Rules was recommendatory according to the law of New Foundland.

It was further held in Vita Food Products, that the proper law of a contract would be the law intended by the parties provided such intention was *bona fide* and *legal*. Here the term *bona fide* would probably mean that it should be consistent with the established mercantile practice. Further, it should not be illegal according to one of the relevant laws to be discussed later.

The decision of the Court of Appeal in the *Assunizione* case seems to close the gap between the decision in *The Torni* and in the *Vita Food Products* case.

The facts of the Assunzione case are as follows :—

A ship owned by Italians was chartered by French Shippers to carry a cargo from France to Italy. Payment of freight was to be made in Italian currency in Italy. Italian owners were sued for short delivery and damage to the cargo. The question before the Court was as to whether the contract would be governed by the French or Italian law ? It was held in this case that if parties had not expressly intended that a particular law was the proper law of the contract, such law would be the law with which the contract has the most real connection. The Court applied the Italian law on the ground that the contract was more closely connected with that law.

*"The doctrine of proper law is an application of the free will of the parties to the essence of the contractual relationship." Graveson. Examine the statement with reference to decided cases.*

B. U. Oct. 92

It appears that the principle, that when the parties have not expressly intended, the proper law of the contract will be that law with which the contract has the most real connection, is well established now. This view is also supported by a decision of the House of Lord in *Tomkinson* v. *The First Pennsylvania Banking and Trust Co.*, (1960) 2 W.L.R. 969.

Graveson summarises the present position regarding the proper law of a contract as follows :—

It would seem a fair synthesis of English decisions to say that proper law depends on the intention of the parties ascertained objectively and judicially, where the parties expressly state in a turn of their contract. What law shall govern the fullest effect will be given to their expressed intention, subject only to overriding consideration of public policy, international comity and legality by the proper law itself, *by lex fori* or (as to performance) by *lex loci solutions*. Where the intention is *not* expressed possibly because it never existed on the specific point, the Court will deduce from the terms of the contract and relevant surrounding circumstances, which will vary according to the type of contract in

*Discuss the thories of Westlake and Dicey regarding the proper law of a contract.*

B. U. Oct. 85

question, what must have been (or should be assumed to have been) the intention of the parties, regarded not simply as the parties themselves, but as reasonable men of business making the particular contract that was in fact made.

In *Forsikringsakticselskapet Vesta* v. *Butelur* [(1989) 3 W.L.R. 290], the House of Lords has held that lest difficulties may arise, it is possible that in a given case a contract may be governed partly by one proper law and party by another.

Two decisions of the House of Lords in *Tames Miller & Partners* v. *Whitworth Street Estates (Manchester) Ltd.* (1970 A.C. 583) and *Compagnie de Armement Maritime S.A.* v. *Compagnie Tunisienne de Navigation S.A.* (1971 A.C. 572) approved 'the closest and substantial' theory of the Proper Law of the Contract.

In *Armer Shipping Co. Ltd.* v. *Caisse Algerienne D'assurance* [(1981) I All E.R. 498, WLR 207], it was held that the proper law of contract is to be ascertained at the time of making of the contract and not by subsequent events. There was nothing in the facts and circumstances of the case to make the English system of law that with which the contract had its closest and most real connection, or to make English law the governing law of the contract. Therefore English law could not be applied.

**Presumptions indicating the proper law**

Dr. Cheshire is of the opinion that in view of accepting, that the proper law of a contract, in the absence of intention to the contrary, would be the law with which the contract has the most real connection, there is no place of presumption indicating the proper law of the contract. According to him, the proper law of the contract, in the absence of intention to the contrary, is to be objectively ascertained by examining the association of the various legal systems with the contract. Therefore, there is no room for subjective presumptions. But there are other writers, like Graveson, who would still insist that there is place for presumptions.

The following rules regarding presumptions have been briefly summarised here :

(1) *The Lex Loci Contractus* :— To start with, the presumption is in favour of the Lex Loci Contractus. Here the presumption is that the proper law of the contract is the law of the place where the contract is made and not where action is brought. This presumption is supported by the decision of the Court of Appeal in *Jacobs* v. *Credit Lyonnais*, (1884) 12 Q.B.D. 589. The facts in this case were as follows :

> Two London merchants had contracted in London for the carriage of a cargo of esparto from Algeria. In consequence of the outbreak of rebellion in Algeria certain deliveries could not be made. By French Law in force there, the rising constituted *force majuere* which would have been a defence to an action for non-delivery, if French Law applied to the contract. The Court held that the defendants were liable in damages for non-delivery as English Law was the proper law of the contract.

This presumption in favour of the Lex Loci Contractus can be rebutted by proving facts to the contrary. But this is a presumption of high legal order.

(2) *The Lex Loci Solutionis* :— The second presumption is in favour of law of the place where the contract is to be performed. It is said that this

presumption is as strong as the presumption in favour of the Lex Loci Contractus However, if in a contract, each party is to perform his part of contract under different legal systems, the Courts may have some difficulty in solving it. In such circumstances, the Courts may assess the various facts connected with the contract and thus choose one of the place of performance for purpose of the proper law or it may reject both the legal systems.

(3) *The Lex Situs of Immovable* :— When an immovable property happens to be the subject of the contract, the presumption is in favour of the law of the place where the property is situated. But this presumption is also rebuttable.

(4) *The Law of the Flag* :— In the case of all maritime contracts the presumption is that proper law of contract is the law of the flag. But when a maritime contract is made on land, the presumption in favour of the law of the flag could be displaced. In *the Industrie*, (1894) P 58, the contract was made in England in the form of English law. One of the parties was an English firm, the ship being registered under German law. The presumption in favour of the law of flag was displaced, in this case, by the presumption in favour of the Lex Loci Contractus.

**The functions of the Proper Law**

The following are the functions of the proper law :

(1) To determine whether a contract has come into existence or not.

It is the function of the proper law to determine whether there was valid offer and acceptance or if there was consent. Whether such consent was free or not.

(2) To determine the effect of the terms of the contract.

(3) To determine as to whether damages claimed for breach of contract are too remote or not [*D'Almeida Araujo Ida* v. *Sir Fredrick Becker & Co. Ltd.*, (1953) 2 Q.B. 329].

(4) *DISCHARGE OF CONTRACT*— Whether the contract is discharged by performance or due to operation of other facts, has also to be determined according to the proper law of the contract.

(5) *INTERPRETATION OF THE CONTRACT.*— The meaning of the terms of the contract will be determined by the rules of construction laid down by the proper law.

**Legality of Contracts**

It is no doubt true that the legality of the contract is governed by the proper law. However the proper law is not exclusively decisive on the question of the legality of a contract. In *Kahler* v. *Midland Bank Ltd.*, (1950) A.C. 29 and *Zivrostenska Banka National Corporation* v. *Frankman*, (1950) A.C. 57, the House of Lords determined the legality of the contract according to the proper law of the contract. In both the cases the proper law of the contract was the law of Czechoslovakia. Certain securities belonging to a customer were deposited by a Czech Bank in the custody of a bank in England. Under Czech Exchange Control Regulations the securities could be delivered to the plaintiff only with the prior consent of the Czech National Bank, which had been refused. The House of Lords held that the English Bank was justified in not delivering the securities to the plaintiff.

As observed before, the legality of a contract is determined not only by the proper law of the contract, but also by other relevant laws. If the contract is illegal according to the law prevailing in the place when the contract is made such contract cannot be generally enforced by English Law. However, the distinction made by Lord Wright in the Vita Food Products case has to be noted. If the prohibition under the law of place of making the contract is mandatory, the English Court will refuse to enforce the contract. On the other hand, if the prohibition is merely directory, such prohibition will not tender the contract unenforceable.

Further, if the law of the place of performance, prohibits the performance of the contract on the ground that it is illegal, English Courts will not enforce such a contract, though such contract may be legal and valid according to the proper law of the contract and the law of place of making the contract. This view is supported by the decision of Court of Appeal in *Ralli Bros.* v. *Compania Naviera Sota Y. Aznar,* (1920) 2 K.B. 287. The facts of the case were as follows :

> It was a contract for carrying cargo from Calcutta to Barcelona under a charter. The freight being £ 50 a ton, it was argued in the contract that half of the freight was to be paid on discharge of the cargo in Spain. But according to Spanish Law the maximum payment of freight was 875 pesetas a ton. Payment in excess of the above rate was prohibited. The shipowners sued in England for the unpaid balance of freight. It was held that the English Court could not enforce a contract which is illegal according to the law of the country of performance.

It is also a rule of English Law that the English Courts will not assist the breach of laws of other independent States concerned in a contract. This principle is supported by the decision in Vita Food Products case. The view is further illustrated in the decision of the House of Lords in *Regazzoni* v. *K.C. Sethia* (1944) *Ltd.*, (1958) A.C. 301. The facts of the case were the following :

It was a contract for the sale of Indian Jute bags to be delivered in Italy, but destined indirectly for South Africa. Indian Law prohibited exports to South Africa. The proper law of the contract was English Law. The House of Lords refused to enforce it on the ground of public policy and principles of international comity.

## (C) FORMAL VALIDITY OF A CONTRACT

It is a well recognised rule of English Private International Law that the form of a contract is determined by the law of the place where the contract was entered into. When a contract is entered into by correspondence, the formal validity of the contract would be determined by the law of the place from which the acceptance of an offer is sent. (*Cowan* v. *O'Connor*, (1888) 20 Q.B.D. 640). However, the formal validity of a contract is not exclusively determined by the law of the place of making the contract, if such law is different from the proper law of the contract.

Though it is said that the formal validity of a contract is governed by the law of place of making yet there is some difficulty in ascertaining as to whether a particular requirement is a matter of form or a matter of evidence. If it is just a question of evidence, it would be governed by the law of the Court in which the action is brought. But if the particular requirement is not in the nature of evidence and if it prevents the formation of the contract, it is the law of the place of making the contract which would determine the validity or the invalidity of the contract.

In the same way there may be some difficulty in determining the exact effect of the foreign laws relating to stamps. In such cases the test is to see whether the absence of adherence to the foreign stamps laws would prevent the formation of the contract or would only affect the production of the documents as evidence. In the first case, the English Courts would not enforce the contract. In the second case, as it is a general principle of English Law that English Courts do not collect foreign revenue, the objection regarding failure to adequately stamp the document according to foreign law, would not affect the validity of the contract.

## MONETARY PROVISIONS

In an international contract, where payment of money is the part of the contract, two questions may arise :— the currency in which the money to be paid, is to be calculated and currency in which it is to be actually paid. The first is called the *money of account* and the second is called the *money of payment. Money of account* is ascertained by the *proper law* of contract, if the parties have not specifically mentioned the currency in which the monetary obligation is to be calculated. Similarly, the *money of payment* may be specifically mentioned by the parties to the contract. In the absence of such specific provision in the contract, *money of payment* is the currency of the *place of payment.*

### (D) OVER-RIDING CONSIDERATIONS

The above rules of choice of law regarding the validity of a contract are subject to a number of over-riding considerations which constitute certain established principles of English Law. The parties may have capacity according to the relevant law, the contract may have essential and formal validity and also it may be legal according to the principles of rules of choice of law, discussed above, yet English Courts may not enforce such contracts, if such contracts offend certain well established principles of English Law. Such overriding considerations could be briefly enumerated as follows :

*Write a short note on : Money of account and money of payment.*

B. U. June 74
Apr. 76

(1) Matters which are classified as procedural by English Courts are exclusively governed in English Law, irrespective of their nature or character under the relevant foreign laws.

(2) A contract transferring an interest in immovable property is exclusively governed by the *lex situs. [Bank of Africa* v. *Cohen,* (1909) 2. Ch. 129].

(3) English Courts will not enforce a contract if it is contradictory to well established English principles in the following matters :—

(i) **Morality—**

A contract, otherwise valid, may not be enforced on the ground that the contract is contrary to the principles of morality as understood by English Courts. For e.g. in *Hope* v. *Hope,* (1857) 8 DEGM and G 731, a collusive agreement, made in France between husband and wife for procuring divorce, was not recognised on the ground that it was opposed to morality in England.

(ii) **Public Policy—**

A contract, which is otherwise valid, will not be enforced by English Courts if such contract is opposed to English principles of public policy.

**(iii) English Laws having Extra-territorial Operations**

If a particular Act of the British Parliament has specifically provided that in certain cases a foreign contract would be governed by English Law, to that extent the rules of choice of law discussed above will not be applicable.

**(iv) International Comity—**

English Courts will not enforce a contract, otherwise valid, if such contract violates the principles of public international law and comity. As seen above in *Regazzoni* v. *K.C. Shethia* (1944) *Ltd.*, (1958) A.C. 301, a contract, the object of which was to commit a breach of the law of a foreign friendly State, was held unenforceable.

# 7

# NEGOTIABLE INSTRUMENTS

Negotiable Instruments being the medium of modern trade, present several problems in private international law. In this field, several attempts have been made to unify the law of negotiable instruments. Yet such attempts have not borne fruit.

A *'Negotiable Instrument'* is a document embodying a contract to pay money to a person named, or his order (which is signified by an endorsement on the instrument), or to the bearer of the document. The characteristics of the negotiable instruments can be briefly stated as follows :

(1) A transferee in good faith and for value derives the better title than the one had by his transferor.

(2) He may sue in his own name on the instrument without making his transferor a party to the suit.

(3) There are, generally, three kinds of negotiable instruments :

 (a) Bills of Exchange,

 (b) Promissory Notes and

 (c) Cheques.

(4) The law relating to bills of exchange is laid down, in England, in the Bills of Exchange Act, 1882, and in India in the Negotiable Instruments Act.

 A bill of exchange has been defined in the English Act as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer."

The act classifies bills into *inland* and *foreign*. An *inland* bill is one which is, or on the face of it purports to be (i) both drawn and payable within the British Islands, or (ii) drawn within the British Islands upon some person resident therein. Other bills are *foreign* bills.

## THE LAW THAT GOVERNS THE VALIDITY OF A BILL OF EXCHANGE

The various acts pertaining to a bill of exchange are essentially contractual acts. Therefore the validity of those acts has to be examined under the following three heads :

(1) Capacity; (2) Formal Validity; and (3) Essential Validity and Interpretation.

### (1) Capacity

The Bills of Exchange Act is silent on this question. Therefore, the general principles of the law of contract relating to capacity must be applied here also. Graveson states the law on the question as follows :

"Capacity for entering into different transactions relating to a bill of exchange must depend on the *lex loci actus*, subject to the qualification that effect will probably be given to any more liberal standard of capacity granted by the parties' personal law."

**(2) Formal Validity**

As a rule, the formal validity of all acts in relation to a bill of exchange is governed by *the law of the place where the act takes place*. But this rule is subject to certain *exceptions* prescribed in Section 72(1) of the Bills of Exchange Act. Those exceptions are briefly stated below :

(a) The validity of a bill as regards requisites in form is determined by the law of the place of issue and not by the law of the place where it was drawn, if such places are different.

This is illustrated in *Koechlin* v. *Kestenbaum*, (1927) 1 K.B. 616, 889. The facts of the case were as follows :

A bill was drawn in Paris, to the order of X. It was signed and endorsed by X's son with his authority, but on the face of the bill such authority was not indicated. This kind of signature satisfied the French law, but not the English law. The Court held that the bill was valid in form as it satisfied the law of the place where it was issued.

(b) A foreign bill will not be held invalid merely because it has not been stamped in accordance with the foreign law of the place of issue. This is in accordance with the general principles of English law, that the English Courts will not enforce a foreign revenue law. However, if the foreign law renders a bill absolutely void and not merely unenforceable by action on the ground of it being not stamped, then the English Courts will recognise such foreign law.

(c) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, *for the purpose of enforcing payment* thereof, be treated as valid as between *all persons who negotiate*, hold, or become parties to it *in the United Kingdom*.

**(3) Essential Validity and Interpretation**

Section 72 of the Bills of Exchange Act provides that the essential validity, the interpretation and the effects of any contract comprised in a bill of exchange are governed by the law of the place where such contract is made. Some writers are of the view that the term "the law of the place where such contract is made" should include the rules of conflict of law of such place. But this view is not accepted by the English Courts. In *Alcock* v. *Smith* (1892) 1 Ch. 238 cases 322, the facts of the case were as follows :

A bill which was already overdue was transferred by means of a judicial sale by action in Norway under Norwegian law. Such transfer gave complete title to a purchaser in good faith. The Court of Appeal upheld the validity of such transfer though it would not be valid under English domestic law.

In another case *Embiricos* v. *Anglo-Austrian Bank*, (1905) 1 K.B. 677 cases 318, the facts were as follows :

A Roumanian bank drew a cheque at Braila in favour of the plaintiffs, payable at a London bank. The plaintiffs at Braila endorsed the cheque to a London firm, but in course of transit it was stolen by the plaintiff's clerk. The clerk endorsed it with the name of the London endorsee and sold it to a stranger, who in turn sold it to a bank in Vienna. The Viennese bank then endorsed the cheque to the defendants in London, who cashed it at the bank on which it was drawn.

According to the Austrian Law, the bank in Vienna had acquired a good title, as it had bought the cheque in good faith for value without negligence. The English Court held that the *lex loci contractus* determined the validity of the title.

However, the provisions of the Bills of Exchange Act are affected to a certain extent by the Exchange Control Act, 1947. In some cases, the consent of the Treasury is necessary for payment in the United Kingdom to any person outside the scheduled territories.

**Presentment, Protest, Dishonour**

The acts of the Presentment, Protest and Dishonour are governed by the law of place where the act is done or the bill is dishonoured.

**The Place where an Act is done**

When an act consists of several partial acts done in different places, there may be some difficulty in determining as to where that particular act is done. For example, if endorsement of a bill is made in one place, and the physical delivery of the bill in another place, there may be some difficulty in ascertaining as to where exactly the act of endorsement was done. The Bills of Exchange Act does not answer this question. However, the English Courts have held that *'an act is not done until it is completely done.'* In *Chapman* v. *Cottrell*, (1865) H. & C. 865, the facts were as follows :

> A had signed two promissory notes in Florence, and sent them to England to be countersigned by his brother. His brother delivered them to the payee. It was held in this case that the cause of action arose, when delivery was made to the payee in England.

Where an act is completed by a physical delivery through an uncontrollable mistake it will be considered as still incomplete. This principle was laid down by the Court of appeal in *Re Deveze*, (1873) L.R. 9 Ch. App. 27.

**Ascertainment of Maturity**

Though the general principle is that the *lex loci actus* determines the interpretation of bills, yet there is an exception to this. According to Section 72(5) of the Bills of Exchange Act, the due date of maturity of a bill drawn in one country, but payable in another is determined by the law of place of payment.

**Damage for Dishonour of a Bill**

The measure of damages for dishonour of a bill will be determined by English law, if the bill is dishonoured within the British Isles.

# 8

# THEORIES OF CLASSIFICATION

*Critically examine the approach of English Courts to the problem of classification. Cite case law.*

B. U. Apr. 85
May 93

It must have been clear by now that whenever there is a foreign element in a dispute, the Court would first ascertain whether it has jurisdiction. When it finds that it has jurisdiction, the next problem is the ascertainment of the law, that has to be applied. This is known as choice of law. But the choice of law depends on the connecting factors. You can determine the connecting factor only after determining the juridicial nature of the question that has to be decided by the Court. For example, when two persons domiciled in France, marry in England after attaining majority, but without obtaining the consent of the parents, the question of the validity of the marriage may have to be determined, if the parties of the marriage are below a particular age. The consent of parents is necessary according to French Law. A marriage without such a consent would be void under French law. But on the other hand, such consent is not necessary according to English Law. In the instant case, the problem is as to what law would govern this aspect of the marriage. We have discussed before, that the *essential validity* of a marriage is governed by the law of domicile and the *'formal validity* by the law of place, where the marriage was celebrated. Now in this case, whether English Law is to be applied or French Law is to be applied would depend on the juridical nature of the requirement of the consent of the parents. If this rule that the consent of parents is necessary, is a question of formal validity, English Law would be applicable and therefore the marriage would be valid. On the other hand, if this rule pertains to essential validity of the marriage, the French Law, the law of the domicile would be applicable and therefore the marriage would be void. This ascertainment of the juridical nature is known as *'classification or characterisation'*. In a case like this, it is possible that French Law might consider the rule of parental consent as the rule of *'essential validity'*, while English Law might consider it as the *'rule of formal validity'*. Then the question would be according to which law the rule is to be classified. This raises the problem of classification.

*Discuss the problems of classification in the English Courts.*

B. U. May 92

*Examine citing cases the approach of English Courts towards the problem of classification.*

B. U. Oct. 92

## PROBLEM OF CLASSIFICATION

The problem of classification arises because legal systems may differ in the following ways :

(a) Their substantive rules may be different.

(b) Under different legal systems the same word may be defined in different ways.

(c) There may be certain concepts peculiar to a legal system and unknown to other legal systems.

*How does the problems of classification arise ? Discuss how far the doctrine of "Lex fori" meets the Problems.*

B. U. June 75

The need of conflict of laws would arise only because the different legal systems have different rules of law. Different definitions and different concepts would present the problems of classifications. The problem of classification, in brief, contains the following :

(i) By what law are the words to be defined ?

(ii) By what law are the issues to be classified or characterised ?

(iii) By what law are the connecting factors to be classified and determined ?

**Theories of Classification**

The problem of classification may arise even in a purely domestic case. It would also arise in disputes involving a foreign element. In the latter case it would be necessary to know according to which law the words are to be defined and issues are to be classified. On this question there are several theories, these are discussed, in brief below :—

**The lex fori theory**

The theory was first advocated by Franz Kahn and subsequently supported by Bartin and Niboyet.

According to the theory, any particular rule or institution is to be classified by the law administered by the Court in purely internal affairs of its own legal system. According to this theory classification is a part of the municipal law of the country. This is based on the ground of simplicity and certainty. It leads to simplicity because the Courts are familiar with their own rules of classification and they apply such rules without any special proof by foreign experts. It brings certainty, because the lititgant would know beforehand exactly, how any particular legal rule or institution would classify. This theory is also supported on the ground that judges are under an oath to administer their own legal system and no other.

The obvious objection to this theory would be that when the Courts classify a particular legal rule or institution according to their law and arrive at a connecting factor, if according to such connecting factor, a foreign law would be applied there would be an anomalous position.

It is possible that the relevant foreign law might classify the legal rule or the institution in a different way. Then the Court would be applying the foreign law belonging to a category other than the law which the foreign Court would itself have applied. This may lead to injustice as a Court would not be deciding in the manner the relevant foreign Court would have decided if it had classified the legal rule or institution in its own way.

**Universal analytical theory**

This theory is advocated by Beckett and Rabel. According to this theory all legal elements are to be classified on a basis of general, comparative, analytical jurisprudence. By this method, it is expected, there would be uniformity of classification whatever Court may classify. Graveson observes, "Theoretically the solution is as ideal as uniformity would be in conflict of law itself. The single and fatal objection to the present application of the theory in practice is the impossibility of finding common principles throughout the whole field of modern legal systems." Particularly, the wide difference between the Common Law system and Civil Law system would not permit application of this theory to a considerable extent.

**The dual theory of lex fori and lex causae**

According to this theory which is advocated by Robertson, classification has to be done at two levels. There would be primary and secondary classification of the legal issue. The primary classification will be according to the law of the Court. After this primary classification, the Court ascertains the connecting factor according to its Private International Law. That connecting factor indicates the foreign law to be applied which

*Discuss :— Ogden v. Ogden.*
B. U. May 83 Nov. 93

is known as *lex causae*. Then, before applying the *lex causae*, there will be secondary classification according to the *lex causae*. For example, if the question before the Court is as to whether a particular transaction could be classified as a contract or as a tort, the Court would classify it according to its law. Say, if it is classified as a contract, it would be ascertaining the proper law of contract. That the proper law is the *lex causae*. Then the Court would examine as to how the *lex causae* would classify it. If the *lex causae* would classify it as a tort, the law of the torts of the *lex causae* would be applied. Cheshire, also earlier advocated this theory, though in later editions he has slightly modified his views. Graveson thinks that this theory "could perhaps be more effective in achieving justice in a particular case". However, some writers are critical of this theory on the ground that the distinction between primary and secondary classifications may not always be very clear. The Court of appeal in England did not approve of this theory in *Ogden* v. *Ogden*. But some judicial support was given to this theory in *Re Cohn*, (1945) Ch. 5 : cases 34 Ante. pp. 45, 46 and *Re Maldonado*, (1953) 2 All E.R. 300.

**The autonomous theory**

This theory is advocated by Martin Wolff. According to this theory a foreign rule has to be classified with reference to the whole foreign legal system.

As the *lex causae*, is to be applied, the classification must also be done according to *lex causae*. The main objection against this theory is that quite often classification is necessary before the connecting factor is ascertained and the *lex causae* is determined. In such a case, classification by *lex causae* will be impossible. This theory does not enjoy much judicial support.

## CLASSIFICATION IN THE ENGLISH COURTS

*Dsicuss the approach of the English Court towards the problems of classification.*
B. U. Nov. 93

Graveson observes, "The English practice in matters of classification is not an absolute doctrine based solely on a *priori* concept as are some of the theories mentioned below. It is an emphirical doctrine based on concepts outside the narrow field with which it deals, concepts of justice, convenience and common sense which may be found behind most English rules on conflict of laws." The truth of the above statement can be seen in the practice of the English Courts. As observed before, classification may comprise the following :—

(1) Definition of legal elements,

(2) Classification of issues involved, and

(3) Definition of the connecting factor.

**(1) Definition of Legal Elements**

The rule of English Law is that the English Court defines any element of law relevant to a case according to concepts of English Private International Law. But, if what is to be defined is a foreign concept of which there is no exact English counterpart, the English Court will examine the nature of the foreign concept and define it in terms of that English rule of institution which may nearly approximate to it.

However, as Cook has maintained, definitions must be relative and functional. The same word or the concept may be defined in different ways in different contexts. Such a definition may be just in view of the surrounding circumstances. For example, the Court of appeal adopted a similar attitude in *Re Bonacina*, (1912) 2 Ch. 304. In this case, a contract was governed by the law of Italy. It was valid according to Italian Law though there was no consideration in the English sense. Yet the transaction had the general character of the contract. As the validity of the contract depended on the Italian Law, the Court recognised such a contract as valid. The same kind of elastic attitude in definition can be found in *Re Berchtold,* (1920) Ch. 192, cases 20. The facts of the case are as follows :

> A person of Hungarian nationality and domicile died intestate. He was entitled to a share in English free-hold land held on Trust for a Sale. According to the English equitable doctrine of conversion such land was to be considered as money. If this English concept of the domestic or internal law was to be adopted, the succession to such movable property would be governed by the law of domicile of the intestate at the date of his death. But the Court adopted the definition of the English rule of conflict of laws under which intestate succession to immovables is governed by *lex senus* and movables by the *Lex domicilii* and held that the succession was governed by the *lex situs,* that is, the English law.

Another qualification of the rule that legal elements are defined according to English Law, is in connection with the other rule that all matters of procedures are governed exclusively by English Law. The English Court will not enforce a contract valid and enforceable under its foreign proper law, unless it also satisfies the requirement of the English rules of procedures. Further the English Court will examine the nature of a foreign rule of limitation or prescription and if such a foreign rule corresponds to the English rule of limitation, it will be considered as a matter of procedure, and such rule will not be given effect to by the English Courts on the principle that the law of the Court will decide all procedural questions. In *Huber* v. *Steiner,* (1835) 2 Bing N.C. 203, cases 30. The question in this case was as to a foreign rule of limitation. In this case, was the rule of French Law to be recognised by the English Court or not ? The Court looked into the French law, to ascertain whether the French Law extinguished the rights or merely extinguished the right of action. In the former case, it would have been considered as a rule of substantive law and in the latter case it would be considered as a rule of procedural law. Having come to the view that the French rule of limitation extinguished only the right of action, which was not applied by the English Court, the peculiarity of this case is that the English Court considered the nature of the rule under a foreign law also.

There are some qualifications to this rule that words are generally defined according to the law of the Court. The one qualification is that the nature of a property is determined by the law of the place where the property is situated. However where the situation of the property is in doubt, such situation is always determined according to English law. Similarly a problem may be raised in the case of title deeds to immovable property. By a fiction of English law, a problem would arise under the following circumstances. If a land is situated in the country 'X' and the title deeds in the country Y, how to determine the situation of the title of deeds ? Graveson suggests one of the three solutions —

(a) By the law of their actual *situs.*

(b) By the *lex situs* of the land to which they relate, or

(c) By the *lex fori* where the action arises.

The law that would determine the nature of immovable property would depend on the purpose for which it is to be so determined.

**(2) The Classification of the Issue**

The general rule regarding the classification of the issue is that it will be classified according to English Law. This rule is illustrated in *Re Korvine's Trusts* (1921) 1 Ch. 343. The facts of this case are as follows :

> A person domiciled in Russia died intestate. He has made a gift of movable property in England, which was in the nature of English *donatio mortis causa*. The Court had to decide whether the gift was in the nature of a transfer of movable property *inter vivos* or in the nature of a legacy. If it were a gift *inter vivos*, the validity of the gift would be determined by the *lex situs* or *lex actus*. On the other hand, if it were in the nature of legacy, the validity would be governed by the law of the domicile of the deceased. The Court classified it as a transfer *inter vivos* by applying the English rules of classification. A similar approach was adopted in *Ogden* v. *Ogden*, the facts of which have been discussed earlier.

But, this is not an invariable rule. The English Courts have, quite often, departed from the theory of classification by *lex fori*. For example, in *Re Cohn*, (1945) Ch. 5 cases 34, the facts were as follows :

> A mother and daugther of German nationality and domicile were killed in London in circumstances which made it impossible to determine, who died first and who died subsequently. The daughter would be entitled to succed under her mother's will, if she survived the mother. The English rule in such cases is that the junior in age will be deemed to have survived the senior. But under German Law they would be deemed to have died simultaneously. The Court had to examine first the nature of the rule under English Law. If it were a rule of evidence, the English Law alone would be applicable, as it would be a part of English procedural law. On the other hand, if it were a substantive rule, the law of the domicile of the deceased would be applicable. The Court classified it under the English Law, as a substantive rule. But further they examined the nature of the rule under German Law also. As German Law also treated it as a substantive rule that law which was the law of domicile of the deceased was applied.
>
> Similar approach was adopted in *Re Maldonado*, (1953) W.L.R. 204. The facts of this case were as follows :
>
> A person of Spanish domicile and nationality died intestate leaving some movable property in England. He had no heirs. If the English rule of *bona vacantia* was applied, the property would go by escheat to the British Crown. On the other hand, if Spanish Law, the law of the domicile, of the deceased was to be applied, the Spanish Government would be the last heir and property would vest in the Spanish Government. The English Court first classified the problem as the problem of succession to movable property. Therefore, it was to be governed by Spanish Law. Further, Spanish Law also classified it as a rule of succession. Consequently the Spanish Law was applied.

The above two cases show a probability of secondary classification by the English Courts. In conclusion it can be said that the English Courts do not adhere to a narrow theory in the matters of classifications. It can be said that English Courts classify in a pragmatic and empirical manner to meet the ends of justice.

**(3) Definition of the Connecting Factor**

Generally a connecting factor is defined according to the law of the Court. But the problem of the definition of a connecting factor might raise the question of Renovi. It shall be discussed in the next Chapter.

## INCIDENTAL QUESTIONS

Generally definition in a classification precedes the ascertainment of the law to be applied. But in some circumstances ascertainment of the *lex causae* may be necessary to define the legal elements or to classify the issue. For example, in *Nachimson* v. *Nachimson*, the Court was called upon to dissolve a marriage celebrated in Russia between persons domiciled there at the time of their marriage as the Russian marriage, according to Russian Law, could be dissolved at the wish of the parties. It was necessary for the English Court to see whether there was a marriage before it exercised its jurisdiction over it. Starting with the assumption that there was a marriage, they examined the marriage under Russian Law and satisfied themselves that it was a Christian marriage, over which the matrimonial Courts in England could exercise jurisdiction.

Quite often, even after classification of a particular issue as contract, tort, etc., all the legal incidents of such transaction may not be clear. Therefore, the English Court refers to an appropriate law to determine—

(i) whether any right, liability, interest or status has come into existence and remains in existence under the law which created it and that which governs it at the date of the action ;

(ii) what are the incidents attached to any right, liability, interest or status by the law which governs it at the date of the action; and

(iii) whether any situation has been created under the relevant foreign law to which the English Court is asked to attach legal consequences.

# 9

# RENVOI

V, V, \

*Write a short note on different meanings of "Renvoi".*

B. U. Apr. 85

It has been observed that the choice of law depends on the ascertainment of a connecting factor. The connecting factor is a factor which indicates which legal system or systems, shall or may, govern certain elements or a transaction before a Court. Domicile, it has been said, is a connecting factor in problems of personal status. Similarly, *situs* would be the connecting factor in matters pertaining to an immovable property. However, when a connecting factor indicates that the law of a foreign country is to be applied, the meaning of the term "the law of a country" can be interpreted in the following three ways :

*Discuss fully the doctrine of Renvoi.*

B. U. Nov. 93

(1) That part of the law of the country which would be applicable to a purely domestic situation. For example, if a person of Indian nationality is domiciled in Italy and dies leaving certain movable property in India, succession to this movable property is governed by the law of the country where he is domiciled (that is, by the law of Italy). Law of Italy would mean that part of the law of succession in Italy, which would be applied by the Italian Courts, if an Italian had died leaving property in Italy. But this interpretation of the term "the law of the country" might not result in uniformity of justice, because if a similar problem had arisen before the Italian Court, it could have applied the law of nationality, that is, the law of India. Therefore, this narrow interpretation of the term "the law of the country" might result in varying results, depending on the choice of the Court by the litigant.

(2) The other interpretation of the term "the law of the country" would mean the law of a country, including its rules of Private International Law. Hence, it has been pointed out that it would result in a sort of a logical cabinet of mirrors, because according to the rules of Private International Law of the foreign country, the matter may be referred back to Indian law and Indian Law would refer it back to Italian law. Thus it might continue *ad infinitum.*

(3) To solve the above problem, the doctrine of Renvoi is applied by some legal systems. Renvoi means remission or referring back.

*Write a short note on "Renvoi".*

B. U. May. 85

May 92

## THEORIES OF RENVOI

There are two theories of Renvoi :

(i) Partial Renvoi and

(ii) Foreign Court Theory, or Total Renvoi.

### (i) PARTIAL RENVOI

The legal system which adopts the theory of '*partial renvoi*' refers the matter to a foreign law determined by the connecting factor. If such foreign law remits it back to their law, accepts such remission, and applies its internal law. This is illustrated by a decision of the French Court, in *Forgo's Case*, [*Dalloz* (1879)]. Facts : Forgo, a Bavarian national domiciled in France, died in France intestate leaving certain movables there. He was illegitimate. Under French Law the State could claim all his movables. But according to French Law, the succession to his movables was governed by Bavarian Law, the law of his nationality. Reference was made to that law. By Bavarian Law, succession to movables was governed by the law of the domicile. The French Court accepted the remission and applied French Law as the law of domicile, which had the effect of firmly establishing partial renvoi as part of French Law.

### (ii) FOREIGN COURT THEORY

According to this theory the term, "law of the country" would be interpreted as the relevant foreign Court would interpret it. Under this theory deciding a dispute is resolved into the following stages :

*Whether Foreign Court Theory solves the problems of Renvoi. Explain with reference to decided cases.*

B. U. Apr. 91

(i) Ascertaining the appropriate law with the help of connecting factor.

(ii) Then ascertaining the law to be applicable as the foreign Court of the appropriate law would have ascertained.

The foreign Court might either accept partial renvoi or it may not recognise renvoi. In the first case, if the matter arose before that Court, it would refer the dispute to one system of law, and if that system of law referred it back, the foreign Court would apply its own internal law. In such cases, the Court exercising jurisdiction would apply *the internal law* of the relevant foreign country. On the other hand, if the foreign Court in question *did not recognise renvoi*, it would always apply *the law* (excluding its private international law), as *indicated by the connecting factor*. Therefore, the Court exercising jurisdiction would apply either its own law or the law of the third country depending on whether it is a case of remission or transmission. For example, the English Court adopts the Foreign Court theory. The English Courts have evolved a theory almost identical to the Foreign Court theory. It is claimed, that it is based on the decision in *Collier* v. *Rewaz*, (1841) 2 Cart. 855. The facts were as follows :

*Write a short note on— Foreign Court theory.*

B. U. May 93

> A British subject, who according to English law was domiciled in Belgium at the time of his death, had executed seven testamentary instruments, a Will and six codicils. The Will and two of the codicils had been executed in accordance with the formalities required by Belgian internal law. The remaining four codicils, though formally valid according to the Wills Act, 1837, were not made in the form required by Belgian internal law. According to the law of Belgium the testator had never acquired a domicile in that country, since he had not obtained the necessary authorization from the government. The question was whether the instruments could be admitted to probate in England.

The presiding judge observed that the Will and two of the codicils were held valid in form as they satisfied the law of the domicile of the testator at the time of his death. Regarding other codicils Sir Herbert Jenner observed, "The Court sitting here decides as it would if sitting in Belgium." He decided that Belgian law only applied to Wills made by Belgian citizens. The Will of foreigners must under that law be determined by the law of their nationality. Other codicils were, therefore, tested by English Law and held valid.

*Critically examine the Foreign Court Theory of "Renvoi". Refer to case law.*

B. U. Oct. 92

But the decision in *Collier* v. *Riwaz* cannot be an illustration of the Foreign Court theory, as the Court in that case, partly applied English Law and partly applied the Belgian Law. However, there have been several decisions which support the view that the English Court, at least in some disputes, adopts the Foreign Court theory.

In *Re Annesley,* (1626) Ch. 692, the facts were as follows :

The Will, in question, was in English form. It was of an English woman who was domiciled and died in France. The testatrix though domiciled in France, according to French Law, had never acquired French domicile. The question was by which law the validity of her Will could be determined ? The English Court tried to ascertain what view the French Court as *forum domicilii* would take.

As French Law would have adopted French Law by remission from English Law (which was accepted in Forgo's case) so the English Court also adopted French Law to decide the Will.

*Re Ross,* (1930) 1 Ch. 377. Here the question of succession to the movable property of a British subject who died and was domiciled in Italy arose.

The legal situation involved resembled that in *Re Annesley,* except that Italian Courts do not accept the doctrine of renvoi and no conflict of views arose, as to where the deceased had been domiciled. The English Courts decided that, "The issue must be determined as an Italian Court would decided it on the specific facts of the case before that Court. As Italian Courts would apply English Law on the basis of nationality, the Court adjudicating the dispute also applied that (English) law in this case to decide the matter".

This same theory was applied in *Re Askew,* (1930) S. Ch. 259. In this case the facts were as follows :

A person of British nationality acquired German domicile. He separated from his wife, 'W'. He had an illegitimate child 'C' cohabiting with 'A'. Subsequently he divorced his wife 'W' and then married 'A' — the mother of the illegitimate child. According to German Law, the child was legtimate by the subsequent marriage of the parents. The legitmacy of 'C' had to be determined by the English Court for the purpose of deciding a dispute under the marriage settlement.

The English Court found that a German Court would refer to English Law and on finding that English Law remitted the question to the law of the domicile, would treat the remission as one to German Municipal Law. So the English Court would also adopt German Municipal Law — by which the legitimacy was valid.

The foreign Court theory of renvoi or total renvoi was applied by WYM—PARRY J. in — *Re Duke of Wellington Deceased,* (1947) Ch. 506. The facts in the case were as follows :

> In 1942, the sixth Duke of Wellington died a bachelor leaving two Wills. In the first Will, which he had executed in Spanish form, all his property in Spain was bequeathed to a person who would become on his death, both Duke of Wellington and Duke of Ciudad Rodrigo. In the second Will which was executed in English form he disposed of all his property which did not fall under the Spanish Will. After his death, the Dukedom of Wellington passed to the uncle of the deceased and that of Cuidad Rodrigo passed to his sister according to the Spanish Law. The Spanish Will failed as no one individual became Duke of both Dukedoms. The English Will provided that all property not falling under Spanish Will would fall under English Will. As the Spanish Will failed, all the property fell under the English Will. The question was, as to whether the English Will was valid with respect to immovable property situated in Spain.

If the case arose before Spanish Court, the Spanish Law would determine the validity of the Will according to the law of nationality, namely, English Law. But

English Law would remit it to Spanish Law as it was *lex situs*. The Spanish Court would not accept such remission but would determine the matter according to internal law of England. Therefore, the English Court would apply law of England. According to English domestic (internal) law, the testator had of course, full disposing power and English domestic law governed the construction of his Will, since he was domiciled in England. The result was that the gift in the Spanish Will failed for uncertainty and the Spanish land fell into the residue disposed of by the English Will.

***Write a short note on : Armitage v. Att. General***

B. U. Oct. 85
Apr. 91
May 92
May 93
Nov. 93

*Armitage* v. *Att. Gen.*, (1906) P. 135, illustrates an extension of the principle of renovi to a third law. The process is conveniently termed 'TRANSMISSION' as distinct from 'REMISSION' or 'RENVOI' to the original law.

In *Amritage* v. *Att. Gen.* (1906) P. 135, the facts were as follows :—

The English Court had to deal with the validity of a divorce decree of South Dakota, obtained by a wife at a time when her husband was domiciled in New York State. According to English Law, the Courts of domicile of the parties has jurisdiction in divorce, and the wife always had her husband's domicile.

The English Court accordingly looked to New York as the domicile the New York Court regarded the South Dakota decree as valid, accepted this onward transmission and itself recognised the validity of the divorce decree.

## CRITICISM OF THE FOREIGN COURT THEORY

The foreign Court theory of *'renvoi'* is not free from criticism. Dr. Cheshire points out several defects in this theory.

(1) He points out that it *is arbitary to completely surrender* English rules to Private International Law to foreign Private International Law, in the interest of so called uniformity of justice.

(2) He points out that if the English Court were to exercise jurisdiction according to English Law and were to classify and obtain the connecting factor, it *would not result in uniformity of justice*, if they just interpreted the term "the law of the country as a foreign Court would".

(3) He points out that the foreign Court theory is *difficult to apply* particularly when one is concerned with multi-legal system in a national territory.

(4) He points out that the foreign Court theory presupposes that every legal system except the English legal system has solved the problems of *'renvoi'*. But if a foreign Court also has adopted this foreign Court theory, *the theory* does not work.

The criticism levelled by Dr. Cheshire was attempted to be met by Dr. Griswold :

(1) He shows that the very nature of Private International Law is that in certain circumstances foreign law is preferred to Municipal Law. Therefore, *surrender of English Private International Law* in favour of foreign law is *no serious objection*.

(2) The learned writer points out that the English Court attempts to do justice in a concrete way and not in an abstract manner. They attempt to bring about *uniformity of justice in a matter over which they have exercised jurisdiction*. They never claimed to do justice in any matter over which any

foreign law might exercise jurisdiction or not.

(3) He maintains that the English judges *would never give up administering justice because it was difficult to do so.* Even in a multi-legal system there will be facts which associate the disputes in questions to a particular legal system. There may be difficulty. But it is not impossible to ascertain the law.

(4) Lastly, he points out that the foreign Court theory is adopted only by those countries which have adopted domicile as the connecting factor and not nationality. Therefore, there will be *no conflict of conflict of laws between countries adopting the foreign Court theory.*

In conclusion it can be said that though the foreign Court theory has some merits, it is not free from defects. Therefore, the English Courts apply the theory only in specified circumstances and not generally. The foreign Court theory is applied by English Courts in the following circumstances :

(i) In recognition of foreign decrees of divorces.

(ii) In matters pertaining to testamentary and intestate succession.

(iii) In the matters of legitimacy.

(iv) Title to foreign land.

In conclusion it can be said that the doctrine should not be invoked unless it is plain that the object of the English conflict rule in referring to a foreign law will, on balance, be better served by construing the reference to mean the conflict of that law.

# 10

# ASSIGNMENTS OF MOVABLE PROPERTY

Assignment of Property is different in nature from a contract quite often assignment may be dependent on a contract. In a contract merely personal relations are created. But a contract may purport to transfer, assign or convey property or any interest in property. In such a case the rules that would govern the assignment would be different from the rules that would govern a contract. In a case of an assignment, a right *in rem* is created over the property, whereas in a contract not amounting to assignment, only right *in personam* is created. Besides, some types of assignments may be independent of contracts. They may be either by unilateral acts, or they may be by operation of law.

## A. ASSIGNMENT OF TANGIBLE MOVABLES

Regarding the law that the assignment of tangible movables there are several theories. The merits and defects of those theories are discussed below :

### (1) The Domicile Theory

According to this theory, the validity of the assignment of tangible movables is governed by the law of the domicile of the assignor and the capacity of the assignee to accept the transfer is governed by the law of his domicile. This theory is of long standing origin. The principle of *mobilia sequuatur personam* was adopted by the Italian statutists and was also accepted in Europe and in America until the middle of the 19th century. But, in modern times the law of domicile seems to govern general assignments, but not particular assignments.

The main advantage claimed by this theory is that it prescribes a *certain* and a single choice of law to determine the validity of the assignment of tangible movables. However, the main defect of this theory is that the domicile being dependent on the intention of a person may be quite often unpredictable and therefore it is not suited to commercial transactions. Therefore the theory has been gradually abandoned in the case of particular assignment, though it is still accepted in transactions of non-commercial character.

### (2) The Lex Actus Theory

According to this theory, the validity of a particular assignment of tangible movables is governed by the law of the place where the act of assignment was transacted. The theory has been criticised by many. Dr. Wolff points out that there has to be a difference between transactions which create rights *in rem* as distinct from contracts which give rise merely to personal obligations. The *lex actus* theory is not helpful when rights *in rem* are acquired over movables by operation of law. Further, if there have been several acts of assignments and if these acts have different *leges actus*, then the conflict between such assignments and the priorities among such assignments cannot be solved under this theory. Further, the *lex actus* may be accidental and have no real connection with the transaction.

**(3) The Lex Situs Theory**

*Discuss the "Lex Situs Theory" with reference to the validity of an assignment of movables.*
B. U. Oct. 92

According to this theory, the validity of a particular assignment of tangible movables is governed by the law of the country in which the movables are situated. This theory is widely accepted both under English Law and under Continental legal systems. The main justification of this theory is that in an assignment of tangible movables, the attention of the party is focussed on the movables and their situation. Therefore, it is natural that the *lex situs* must govern the validity of such an assignment. However, difficulties might arise, when the goods are in transit, and the situation of the movables is not definite.

**(4) The Proper Law Theory**

Dr. Cheshire resolves the question of the validity of the assignment of tangible movables into two aspects : (1) Contractual Aspect and (2) Proprietary Aspect.

According to him, the contractual aspect (i.e. the question arising between the parties themselves to a transfer) should be governed by the proper law of the transfer. Such proper law has to be objectively ascertained. The other aspect, the proprietary aspect is to be determined by the *lex situs.*

**(5) The Modern Law**

Though it cannot be said that all the English decisions have exclusively adopted any particular theory, yet it can be said that the English Courts have most strongly favoured the *lex situs.* The position is the outcome of several decisions.

In *Inglis* v. *Usherwood,* (1801) 1 East 515, the facts were as follows :

An English merchant domiciled in England appointed a factor in Russia to buy certain goods and to ship them. The defendant was the Captain of the ship, which was chartered by the English merchant. After the goods were on board, the Russian factor received an information that the English merchant was adjudged a bankrupt. According to Russian law, he demanded that the Captain deliver the cargo to him. The Captain delivered accordingly. But according to English Law, the right of stoppage in transit which the seller had, would come to an end once the goods were delivered to the master of the ship which was chartered by the buyer. In this case the Russian law was applied on the ground that it was *lex actus.* The decision in this case is sufficient authority to hold that English Courts would not apply the law of domicile of the owner. But between the *lex actus* and the *lex situs* which theory has a better claim is not decided by this case.

In another case, *Cammell* v. *Sewell,* (1858) 3 H. & N. 617, the facts of the case were as follows :

A Russian seller shipped in Russia a cargo of timber on a Prussian vessel to an English merchant in England. The vessel having been wrecked off the coast of Norway, the timber was sold to X at a public auction held at the instance of the master in Norway. A suit, brought by the underwriters in the Norwegian Court to set aside the sale, failed. X shipped the timber to England and transferred it to the defendants. The underwriters sued the defendants for its value.

According to the law of Norway, the sale gave a valid title to the buyer in the auction sale, as the Captain in the circumstances of the case could give valid title to a *bona-fide* purchaser for value. But according to English Law, the Captain did not enjoy such power. The Court held that the Norwegian Law was to be applied on the ground that it was the *lex situs.* But here again the *lex situs* and the *lex actus* coincided. Therefore, this case cannot be considered as a decisive authority in support of the *lex situs.*

In *Liverpool Marine Credit Co.* v. *Hunter,* (1867) L.R. 4 Eq. 62, the facts were as follows :

A British ship was mortgaged in England by X, a British subject, to Y, another British subject. It was later arrested at New Orleans, Louisiana, by certain British subjects who were creditors of X. The mortgage was void according to the law of Louisiana. In order to avoid a sale of the ship by the New Orleans Court, Y gave bonds to the creditors for the amount of their debts. Y subsequently filed a bill in England to restrain the creditors from suing on the bonds. Judgment was given for the creditors.

The mortgagee's argument was that the defendant had been guilty of inequitable conduct in taking legal action in America. However, the Court held that the creditors owed no duty to the mortgagee and therefore they were clearly entitled to avail themselves of the American jurisdiction. Further, it was held that the *lex situs* of the ship was to be applied. The House of Lords upheld this decree of the lower Court.

The decisive authority in favour of *lex situs* would be a decision of the House of Lords in *Inglis* v. *Robertson,* (1898) A.C. 616. The facts of the case were as follows :

G, a domiciled Englishman, the owner of whisky stored in a warehouse at Glasgow, held delivery warrants issued by the warehouse-keeper stating that the whisky was held to G's order or 'assigns by endorsement hereon'. G, in return for a loan, delivered in London to Inglis, an English merchant, a letter of hypothecation stating that the whisky was deposited with him as security for the loan, with power of sale. He indorsed the warrants and handed them to Inglis. Inglis gave no notice of right to the warehouse-keeper, Robertson, claiming as personal creditor of G, arrested the whisky in the hands of the warehouse-keeper.

In this case it was held that the law of Scotland which was the *lex situs* would be applied in preference to the law of England. Further in this case, there was a conflict between the *lex situs* of the documents of title and the *lex situs* of the goods. It was also held in this case that when there was such a conflict, the *lex situs* of the goods would prevail.

In another case *Hooper* v. *Gumm,* (1867) L.R. 2 Ch. App. 282, the facts were as follows :

X, a shipbuilder, mortgaged newly constructed ships to Hooper in America by endorsing particulars of the charge on the certificate of registry. As the existence of a mortgage hindered the sale of the ships, Hooper agreed with X not to note the mortgage on the certificates. One such ship was sold in England to the defendant, Gumm. X having become insolvent, the issue before the Court was whether Gumm had acquired the ship, subject to or free from Hooper's mortgage. By American Law, Hooper's title was good, whereas by English Law Gumm acquired an unencumbered title.

In this case the Court held that the title acquired by Gumm according to the *lex situs* must prevail.

The rule that the validity of the particular assignment of tangible movables is governed by the *lex situs* is subject to certain modifications. The title acquired under the *lex situs* may not be recognised in England, if the person acquiring the title has been guilty of unconscionable conduct, while acquiring the title. This rule probably is the outcome of *Freeman* v. *East India Co.*, (1882) 5 B & Ald, 617. In this case the facts were as follows :

> There was a shipwreck near the Cape of Good Hope. The ship was carrying cargo from India to England. Part of this cargo was sold by the master of the ship at Capetown. According to the law of Capetown, the purchaser apparently got a good title. But he was aware of the circumstances under which the cargo was sold. Therefore the Court, applying the doctrine of good faith which it considered was also part of the Roman-Dutch Laws of the Cape, held that the purchaser did not acquire a good title.

## CONDITIONAL SALES AND HIRE PURCHASE AGREEMENTS

In conditional sales and hire purchase agreements a peculiar problem arises. It is possible that according to the law of the country where the goods are sold under the above conditions, a subsequent purchaser from the purchaser may not get a good title even though he is a purchaser for value without notice. On the other hand, such goods may be taken to a country where the purchaser for value without notice may get a good title, and it may also be possible that the goods were removed from one State to the other in breach of the original contract of conditional sale or hire purchase agreement. This problem particularly arises in the case of motor cars which have been sold subject to a hire purchase agreement or subject to a mortgage. Such contracts usually provide that the car should not be removed from the State of sale until payment is fully made. In *Metro Plan Inc.* v. *Kotcher Turner Inc.*, (1594) 296 N.W. 304, 296 Mich. 400, the facts were as follows :

> Maestre, a resident of New Jersey, bought a car in New York in part with a loan from the plaintiffs, a New York car finance corporation. He made a chattel mortgage in the plaintiffs' favour, which restricted the use of the car to New York and New Jersey. Maestre drove the car to Michigan, where he traded it for a sum of money and a credit note towards purchase in the future of a new car. The Michigan dealer duly registered the transfer to himself. On Maestre's failure to keep up his instalments of the purchase price, the plaintiffs sued the Michigan purchaser for conversion of the car. The plaintiffs had also duly registered their mortgage in New York and New Jersey, but not elsewhere.

In this case it was held that the Michigan purchaser did not get a good title. This decision was based on the analogy of the position of *bonafide* purchasers of stolen property. However the Supreme Court of British Columbia has taken a contrary view in *Traders Finance Corporation* v. *Dawson Implements*, (1958) 15 D.L.R. (2d) 515.

## B. INTANGIBLE MOVABLES

*Discuss assignment of choses in action.*
B. U. Apr. 91

Intangible movables, under English law, are interests created by the law. They have only a legal, but not a physical existence. They are capable only of legal movements, but not physical movements. The intangible movables can broadly be classified into two categories : (1) Choses in Action and (2) Incorporeal movables.

(1) Choses in action consists of rights of action for recovery of money, specific property, damages or the enforcement of a right in movable property.

(2) Incorporeal movables would include intangible movables like goodwill, copyright, patents, trademarks and designs.

## VARIOUS THEORIES REGARDING ASSIGNMENT OF INTANGIBLE MOVABLES

As there have been various theories regarding the assignments of tangible movables, there are also a number of theories regarding assignment of intangible movables. Those theories and their merits and defects are summed up below :

**(1) Lex domicilii of the Creditor**

Following the principle of the rule *mobilia sequuntur personam*, it has been contended by writers, like Story, that the validity of the assignment of intangible movables is governed by the law of the domicile of the owner of such property. It is further argued that the domicile theory would have greater force in the case of intangible movables as they have no *situs* or locality, but this theory is subject to the same criticism as in the case of intangible movables. Cheshire points out that — "There appears to be neither authority nor reason for choosing the *lex domicilii* as such, either of the creditor or the debtor, as the proper law to govern an assignment of a debt, and in fact cases may be put in which the choice would lead to absurdity. If a domiciled Englishman, having acquired a right to receive a sum of money from a German by reason of some commercial transaction governed by the law of France, were to assign that debt first to one man in Italy and then to another in Switzerland, it is difficult to adduce any principle which would justify the settlement of a dispute between the parties according to the law either of England or of Germany. On the contrary, the assignee of a debt could not reasonably be expected to realise that he was subjecting his right to the *lex domicilii* either of the creditor or the debtor, especially as the place of domicile might well be unknown quality.

*Discuss the theories regarding the validity of assignment of intangibles.*
B. U. Oct. 92

**(2) Lex Actus Theory**

Another theory is that the law of the country in which the assignment took place, would govern the validity of the assignment of intangible movables. But this theory has obvious limitations. It may be possible to apply this theory to determine the validity of the assignment between the assignor and assignee. But this theory cannot be applied to determine the validity and the effect of the assignment as between the assignor and the original debtor. Neither does this theory help in determining the questions of priorities of several assignments if such assignments have taken place in different countries and if the assignments are valid according to those laws.

*Write a short note on— Assignment of intangibles.*
B. U. May 93

**(3) Theory of Proper Law**

Dr. Cheshire is the main exponent of this theory according to which : "It is reasonable and logical to refer most questions relating to debt to the transaction in which it has its source and to the legal system which governs the transaction." This has been the principle adopted by German, Swiss and Scandinavian Laws. According to this theory, it is the proper law of the original transaction which would govern the validity of the assignment. However, this theory cannot be applied to assignment of intangible movables which are not '*choses in action.*' For example, it would not be proper to speak of a proper law of a copyright or a patent.

## LOCATION OF INTANGIBLE MOVABLES

When one speaks of the *lex situs* of intangible movables it is necessary to determine whether the intangibles have any *situs*. In several judicial observations the existence of the *situs* of the intangible has been denied. Therefore it is necessary for law to impute fictitious locality to such intangibles. Regarding debts it was observed in *Att. Gen.* v. *Bouwens,* (1838) 4 M. W. 171, that the judgment debts are located where the judgment is recorded; special debts are located where the instruments happen to be and simple contract debts are located where the debtor resides. However, this rule cannot be generalised. The fictitious location of debts may depend on the purpose for which it is to be located. Therefore, though the general rule is that the *'choses in action'* are situated where they can be recovered or enforced, yet it is not an invariable rule. Simiarly, it has been held that for the purpose of assignment or transfer, shares in a company are deemed to be situated in the country where the register or branch register of the company is kept on which the name of the assignor is registered. Further, interests arising under a trust fund are considered to be located where the trust is administered.

## MODERN ENGLISH LAW

It has been discussed above that there are several theories regarding the law that would govern the assignment of intangible movables. The English authorities do not conform to any one of these theories in an exclusive manner. Further, it will also be seen that, unlike in the case of tangible movables, a single rule of choice of law may not be applicable to govern the validity of the assignment of intangible movables. This position is very clear from the decision of the Court of appeal in *Republica de Gautemala* v. *Nunez,* (1927) 1 K.B. 669 cases 335. The facts of the cases were as follows :

> Cabrera, a former president of Guatemala, had deposited a large sum of money with a London Bank. He later first assigned the money to his son, who was then an infant, both parties being resident and domiciled in Guatemala. The assignment was valid if tested by English Municipal Law, but invalid by the law of Guatemala, which required the assignment to be made on stamped paper before a notary public and accepted by a next friend appointed by the Court on behalf of the infant assignee, requirements of which had not been complied with. Cabrera, while in prison, subsequently assigned the money to the Republic.

The Lower Court dismissed the claim of the son on the ground that the form required by the law of Guatemala, i.e., the law of the place where the assignment was transacted, had not been complied with. The claim of the Guatemala Government was negatived on the ground of coercion. The Court of Appeal affirmed the judgement of the Lower Court. But the judgments did so for various reasons. Bankers L.J. held the assignments in favour of the son invalid on the ground that it did not satisfy the law of the domicile of the party. On the other hand, Scrutton L.J. treated it as a question of capacity and also as a question of validity and form. These questions according to him were to be determined by *lex domicilii* or the *lex actus*. Further, Lawrence L.J. applied the *lex situs* theory and held the assignment invalid. He also considered that the assignment was invalid for lack of capacity to accept by the assignee according to his personal law and according to the law of the place where the assignment was made.

From the different attitudes adopted in these judgments, it can be seen that different aspects of the assignment of intangible movables are to be governed by different rules of choice of law. These elements of assignments are as follows :

(1) Assignability — Whether the intangible movable is assignable or not.

(2) Capacity — Whether the assignor or the assignee have capacity to do the necessary acts.

(3) Form—

(4) Essential Validity—

(5) Priorities—

(1) *Assignability*— Whether a particular intangible movable is assignable or not is to be determined according to the law under which such intangible movable property arose or was created.

(2) *Capacity*—In this case as in the case of other commercial contracts, there is difference of opinion as to whether the *lex actus* or the *lex domicilii* should govern the capacity. In Guatemala's case the capacity was determined according to both of these laws as they coincided in that case. In *Lee* v. *Abdy*, (1886) 17 Q.B.D. 309, *lex actus* was preferred. Probably the modern tendency is to prefer the *lex actus*.

(3) *Form*—On the authority of Guatemala's case it can be said that the formal validity of the assignment of intangible movables is determined by the *lex actus*. However, if special forms are prescribed by the *lex situs*, the assignment will not be valid, unless such special forms are adhered to.

(4) *Essential Validity*—On the question of the law that determines the essential validity of the assignment of intangible movables, there is no uniform judicial opinion. Authorities are conflicting. *Lex domicilli*, *lex actus* and *lex situs* have been advocated in one decision or the other. In Guatemala's case, Scrutton L.J. considered that the essential validity was governed by the *lex actus* and *lex domicilii*. In *Re Anziani*, (1930) 1 Ch. 407, it was considered that the essential validity would be governed by the *lex actus*. But in this case, *lex actus* and *lex domicilii* coincided. In *Lee* v. *Abdy*, *lex actus* was applied. The judgment of Lawrence L.J. in Guatemala's case supports the *lex situs* theory. In *Re Queensland Mercantile and Agency Co.*, (1891) 1 Ch. 536, the facts were as follows :

> The Union Bank of Australia held debentures issued by the Queensland Company charging unpaid calls on shares in that company. After the unpaid capital had been called but before it had been paid, a Scottish company called the Australasian Investment Company started proceedings in Scotland against the Queensland Company for negligence, and immediately arrested all the money called up on the Queensland Company's shares which were held in Scotland. By Scottish Law this process amounted to an assignment with notice to the debtor. The Queensland Company was being wound up both in Queensland and in England.

It was held in this case that the claim of the Australasian Investment Company was to be determined by Scottish Law. Graveson summaries the position as follows :

***What law governs the assignment of a choses in action ?***
**B. U. Oct. 85**
**Apr. 91**

(1) The validity of the assignment of incorporeal property other than '*choses in action*' would be governed by the *lex situs*. As observed before, the *lex situs* of incorporeal property like patents, trade marks, etc., would be the law under which they are created.

(2) According to Graveson, it is doubtful whether the *lex situs* or the *lex actus*

governs the essential validity of the assignment of choses in action. He thinks the weight of authority is in favour of the *lex situs*. However, he further states that the following rules are well settled :

(a) The fact of the assignment, as between the assignor and the assignee must be determined by the proper law of the assignment. But if the *lex situs* or the *lex actus* declare a particular assignment as a nullity, that rule would prevail.

(b) All rights and duties as between the assignee and the original debtor must be determined by the law which governs the essential validity and construction of the original debts.

(c) If the assignment is of an interest under a trust, the legal relationship between the assignee and the trustee will be determined by the law which governs the trust.

(5) *Priorities*—When there have been various assignments of the same intangible movable, if such assignments have taken place under different systems of law and if they are valid according to such legal systems, the question of priorities would arise. It has been observed before that the *lex actus* would not be of any help in determining the question of priorities. The *lex actus* would vary from act to act and therefore it cannot determine which of the acts of an assignment must have a priority. The law that determines the priority must be a law which is constant and does not vary. On this question there is no unanimity. Some told that the question of priority must be governed by the *lex situs* whereas others are of the opinion that it must be governed by the *lex fori* (Law of the Court). There are no direct judicial decisions on the question. The decision in *Kelly* v. *Selwyn*, (1908) 2 Ch. 117 is of very limited authority. The facts of the case are as follows :

An Englishman executed in New York where he was domiciled, an assignment to his wife of the revisionary interest in personalty in England, in the hands of the trustee. No notice of this assignment was given as it was not so required by the New York Law. Subsequently there was a mortgage in England, to the plaintiffs who gave notice of the mortgage to the trustee.

The question before the Court was whether the assignment in England would prevail. It was held that the mortgage in England prevailed over the prior assignment in New York. However this decision was greatly influenced by the fact that the settlor had intended the trust to be governed by English Law. English law was also the *lex situs* and *lex fori*. But the decision applied was English Law on the basis of the true intention of the settlor. Therefore this decision would only eliminate *lex domicilli* from being the law which would govern the priorities. Due to the absence of authority, Graveson is of opinion that the question of priority would be governed by either *lex situs* or *lex fori*. However, Dicey summarises the law on this question as follows :

The priority of competing assignments of a debt or other intangible things is governed by the proper law of the debt or governing the creation of the thing. The editors of Dicey think that this rule accords best with the principle and authority. The decision in *Re Feuvre* v. *Sullivan*, (1855) 10 Moo. P.C. 1, is cited in support of this theory. The facts in this case were as follows :

A, domiciled in Jersey, effects a policy of insurance on his life with an English insurance company. In 1833 A in England, deposits the policy with B, a domiciled Englishman, as security for a loan. In 1834 A falsely tells the company that he has lost the policy and asks for a duplicate. The company issues a duplicate to A without inquiry. In 1835 A assigns the duplicate policy to his wife in Jersey in consideration of £ 400/- alleged to have been paid by her to A. The premiums are duly paid by A or his wife until A's death in 1842. A's wife begins an action on the policy in Jersey, in which B obtains leave to intervene. The Privy Council (reversing the Jersey Court, which had applied Jersey Law) held that the priorities are governed by English Law; and that B has priority, unless A's wife can prove that the assignment to her was made *bona fide* for valuable consideration and without notice of the deposit to B.

*Critically examine the law governing assignment of property on marriage.*

B. U. Apr. 85
Oct. 85
Nov. 93

While coming to the above conclusion the Privy Council observed that the policy was "in every sense an English instrument forming or evidencing an English contract." Cheshire also supports this view. He observes that the proper law of the transaction under which the debt arose is also the only satisfactory legal system to determine the reckoning of competing claimant where the creditor has made more than one assignment.

## C. INVOLUNTARY ASSIGNMENTS

As these assignments take place, generally through judicial proceeding, the principle of the effectiveness must determine the law that would govern the validity of involuntary assignments. It would either be the law of the Court (*lex fori*) or the *lex situs*. In *Swiss Bank Corporation* v. *Boehmisch Industrial Bank*, (1923), 1 K.B. 673, the facts were as follows :

> A garnishee order was made by an English Court against the balance the defendant had at a London Bank. This order was in favour of the plaintiff for enforcement of a judgment against the defendant. The English Court based its judgement on the fact that the property in question was a debt situated within the Court's jurisdiction. However, in this case, the *lex fori* and *lex situs* coincided. When there are several competing involuntary assignments, priorities among them are determined by the *lex situs* of the property. This rule is well established by the decision in *Re Queensland Mercantile and Agency Co.*, (1891) 1 Ch. 536.

# 11

## ASSIGNMENTS OF PROPERTY ON MARRIAGE

*Short note—Critically examine the assignment of property on marriage.*
B. U. Apr. 91
Nov. 93

The effect of marriage on the property of the parties differs from legal system to legal systems. Under some legal systems, the husband and wife may become co-owners of the property belonging to either spouse at the time of the marriage and the property that may be acquired after the marriage. In some legal systems such co-ownership may not develop. There may be separation of goods with a limited duty to maintain out of income. The community of property might vary in its nature from country to country. In some legal systems, the parties may be allowed to regulate their interests in the property by a contract known as the marriage settlement. Some legal systems might provide that certain consequences would flow irrespective of the intention of the parties. The English Conflict of laws rules on this question have to be studied under two parts :

(1) Assignment of property by virtue of marriage when there is no marriage settlement.

(2) The marriage settlement, its validity and the effect of change of domicile.

### (1) ASSIGNMENT OF PROPERTY BY VIRTUE OF MARRIAGE WHEN THERE IS NO MARRIAGE SETTLEMENT

When there is no marriage settlement either in act or implied by law, the primary rule is that the effect of marriage upon the proprietary rights of the parties in movables is determined by the law of the husband's domicile. *Sawer* v. *Shute*, (1792), 1 Anstr, 63, Lindley L.J. observed in *Re Martin* as follows :

It is not necessary to cite authorities to show that it is now settled that, according to International Law as understood and administered in England, effect of marriage upon the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense.

Graveson suggests that the domicile of the husband is the domicile at the date of the marriage. But, Cheshire contends that the domicile is the matrimonial domicile, i.e., the domicile intended by the parties and summarises the law on the question as follows :

The presumption is that the rights of married persons in each other's movables are governed by the *lex domicilli* of the husband at the time of the marriage. This presumption may be rebutted by an express or implied agreement, made before marriage, that their rights shall be governed by the law of some other country in which they have already decided to establish their matrimonial home. Whether such an implied agreement is established depends upon the surrounding circumstance as a whole.

The effect of marriage on the movable property is determined by the *lex situs* of the property.

**The Effect of Change of Domicile**

Generally the position in English Law is, if the matrimonial domicile is abandoned, the proprietary rights of the spouses are governed by the law of the new domicile. This is illustrated in *Lashley* v. *Hog.* (1804) 2 Coop. Cott. 449, as follows :

Hog, a native to Scotland, married an English woman at a time when he was domiciled in England. There was no marriage settlement. After living fifteen years in England the parties acquired a domicile in Scotland. Hog survived his wife and died in 1789. After his death, his daugther, Mrs. Lashley, brought an action in the Scottish Court claiming as the representative of her mother a share in her father's movables which, according to the then law of Scotland, were subject to the doctrine of COMMUNIO BONORUM. The basis of her claim was that, upon the change of domicile from England to Scotland, her father's proprietary rights vis-a-vis his wife became restricted by the Scotish rule of community.

### (2) THE MARRIAGE SETTLEMENT, ITS VALIDITY AND THE EFFECT OF CHANGE OF DOMICILE

A marriage settlement is a contract between the spouses regarding their respective rights in their properties belonging to them at the time of the marriage or acquired subsequently. The general rule is that such a settlement is governed by the proper law of the transaction. However the rules of choice of law governing various elements of a marriage settlement are discussed below :

#### Capacity

The law that governs capacity to make a marriage settlement is the same law which governs capacity to marry. Therefore, capacity to make a marriage settlement regarding movable properties is governed by the law of the domicile of the parties at the time of the marriage. Capacity to make a marriage settlement regarding immovables is governed by the *lex situs*.

#### Formal Validity

The formal validity of a marriage settlement of movables is governed either by the law of place where the settlement is made or the proper law of the settlement. The English Court would hold such settlements formally valid if the formalities prescribed by either of the laws are complied with. In the case of a marriage settlement regarding immovable property, the formal validity is governed by the *lex situs*. It is doubtful whether a marriage settlement complying with the formalities prescribed by the matrimonial domicile, but not by the *lex situs* would be valid. Graveson thinks that probably the English Courts would hold such a settlement as valid.

#### Essential Validity and Construction

The essential validity of a marriage settlement covering immovable property would be governed by the *lex situs*. A settlement regarding movable property would be governed by the proper law of the settlement. The parties may express their intention as to the proper law, in that case such intended law will govern the essential validity and construction of the settlement. In the absence of such indication of the intention, the Courts must ascertain the proper law. The Courts would first presume in favour of the law of the matrimonial domicile which would normally be the domicile of the husband at the date of marriage.

In *Re Egerton's Will Trusts*, (1956) Ch. 593 the facts were as follows :

A person domiciled in England married a woman domiciled in France. For reasons of health he decided to settle in France. He and his wife lived there for two years. At the time of his death, 19 years after the marriage had acquired the French domicile of choice. He had left a will; challenging the validity of the will, the wife claimed that the estate of the deceased husband was subject to the French system of community of property. Though the Court refused to accept that the husband's domicile was in France at the time of the marriage, yet it laid down the law on the question as follows :

(a) There is an initial presumption in favour of the law of the husband's domicile.

(b) That presumption may be rebutted either by an agreement between the parties or by immediate change of domicile after the marriage in such a way as to suggest that the law of the new domicile was intended to apply as from the date of the marriage.

The manner in which the presumption may be rebutted is clear from the decision in *Re Fitzgerald* (1904) 1 Ch. 573. The facts in this case were as follows :

A marriage settlement in Scots form had been made in Scotland between a domiciled Englishman and a domiciled Scotswoman, giving the income of the settled property to the husband after the wife's death and declaring that payment to him "shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors. The husband remained domiciled in England and after his wife's death mortgaged his life interest to English creditors.

It was held in this case that the presumption that the settlement was governed by the matrimonial domicile was rebutted by the circumstances of the case. Therefore the Scottish Law as to be applied and the creditors could not take the husband's life interest.

## THE EFFECT OF CHANGE OF DOMICILE

When there is a contract or a settlement either expressed or implied, subsequent change of domicile will not affect the rights of the parties under such settlements. This rule is applicable where the contract is expressed or implied by law. In *De Nicols* v. *Curlier*, (1900) A.C. 21 cases, 363 the facts were as follows :

Two persons domiciled in France were married in France. Though there was no marriage settlement, yet according to French Law, a settlement giving community of interest would be implied. Subsequently they changed their domicile to England. The husband had purported by a Will to dispose off his entire property. Though he was domiciled in England at the time of his death, it was held by the House of Lords that the community of interest acquired under the French Law of implied settlement was not affected by the subsequent change of domicile. Therefore, the wife's legitimate portion could not be disposed off by the husband's Will.

# 12

# TESTAMENTARY SUCCESSION (WILLS)

In the case of Wills, the conflict of laws is two-dimensional as certain time might have elapsed from the date of making a Will to the date of the death of the testator. The conflict may arise in time, and also in place. Whenever there is a conflict in place, the problem of *'renvoi'* may also arise.

## THE VALIDITY OF WILLS

The general principle regarding the validity of a Will is that a Will disposing off movable property will be governed by the law of the domicile of the testator and a Will disposing off immovable property will be governed by the *lex situs,* but as the domicile of the tastator or the *lex situs* might have changed since the date of making the Will, the problem needs careful consideration. Therefore, it is necessary to deal separately with the various questions that arise in the case of validity of a Will.

### (a) Capacity

*(i) Will of Movables.*— The capacity to make a Will disposing off movable property is governed by the law of the testator, but the question is at what time ? Is it according to the law of his domicile at the time of his death or at the time of making the Will ? There is no conclusive decision on this question. But a majority of writers on this subject hold that the testator must have the capacity according to the law of his domicile at the time of his death. But Graveson adds that such capacity must also have existed at the time of making the Will. He also suggests that "the Courts may well adopt the more liberal suggestion of upholding a Will of movables, if the testator had capacity by the law of his domicile, either at the date of making the Will, or at the date of his death."

*Discuss the law governing testamentary capacity.*

B. U. May 83

*Discuss the rules of conflict of laws relating to the capacity of a person to make*

*(i) A will of movables.*

*(ii) A will of immovables.*

B. U. May 92

*(ii) Wills of Immovables.*— The capacity to make a Will of immovables is governed by the law of the place where the immovables are situated, probably the law as it stands at the time of testator's death would govern such capacity.

### (b) Formal Validity

*(i) Wills Disposing of Immovable Property.*— The general rule is that the formal validity of a Will disposing off immovable property is governed by the law of the place where the property is situated. However, the law regarding the formal validity of a Will has been considerably altered by the Wills Act, 1963. Under this Act the formal validity of a Will disposing off immovable property would also be governed by the various optional laws that would govern the formal validity of a Will disposing off movable property. In addition to this, a Will disposing off immovable property would also be formally valid, if it satisfies the *lex situs.*

*Write note on Formal validity of Will.*

B. U. Oct. 85
Apr. 85

*(ii) Wills of Movables.*— Under common law the formal validity of a Will disposing off movables was governed by the law of the domicile of the testator at the

time of his death. *Bremer* v. *Freeman*, (1857) 100 Moo. P.C. 306. This rule was also subject to the doctrine of *'renvoi'*. The Wills Act of 1861 had introduced certain changes in the common law rule. The Wills Act, 1963 has repealed the earlier Act and has brought in certain changes. The changes brought about by the Wills Act of 1963 could be broadly summed up as follows :

(i) It allows wider choices of legal system to govern the form of Will.

(ii) It preserves formal validity that there is a change in the applicable law after the making of the Will.

(iii) It abrogates the operation of renvoi.

Under the Wills Act of 1963, a Will would be formally valid, if it conforms to Internal Law in force of any one of the following places :

(1) The place where it was executed; or

(2) the place where he was domiciled at the time of its execution or at the time of the testator's death ;

(3) the place where he had his habitual residence at the time of its execution or at the time of the testator's death ;

(4) the country of which he was a national at the time of its execution or at the time of the testator's death.

Further, the Wills Act adds that a Will is formally valid, when it is executed on board a vessel or air-craft, if it conforms to the Internal Law of the country with which the vessel or the air-craft was not closely connected. As observed before the Will disposing off immovable property is formally valid, if it conforms to the Internal Law of the country where the property was situated.

**(c) Essential Validity**

*Comment on– Essential validity of a Will.*

B. U. May 92

The essential validity of a Will would deal with certain substantial rules pertaining to rule against perpetuity, rule against the accumulations of income, the validity of restrictive conditions or the validity of the extent of any disposition made by the Will.

*Write a short note on – Law governing essential validity of a Will.*

B. U. Nov. 93

*(i) Will Disposing of Movable Property* .— The essential validity of a Will disposing off movable property is determined by the law of the testator domiciled at the date of his death. However, though the domicile of the testator between the date of making the Will and the date of his death may affect the extent of disposition he has made in general terms. An example of this can be found in *Re Groos*, (1919) 1 Ch. 572. The facts are as follows :

A Dutch lady made her Will in Holland constituting her husband heir of her movable property except for the 'legitimate portion to which her descendants were entitled'. She died domiciled in England, leaving her husband and five children surviving. By Dutch Law the 'legitimate portion' of the children was three-fourths of the estate, but by English Law it was nothing. It was held that, since the Will operated under English Law, the whole estate passed to the husband.

Quite often, a peculiar question might arise for e.g., attesting by witnesses is a question of form. But the rule that attesting witness of wife or husband is excluded from deriving any benefit under the Will is a question of essential validity. In such circumstances, whether to consider the rule as a question of form or as a question of essential validity may present some difficulty. Such a problem arose in *Re Priest*, the facts of this case are as follows :

> A British subject domiciled in England made his holograph Will in Scotland. The Will was attested by two witnesses. The legacy was given to the wife of one of the attesting witnesses according to the Scottish Law. No attestation of a holograph Will was necessary in this connection. It was held that the testator did not intend to execute it according to the form prescribed by the place where the Will was executed, but he chose the form of English Law and therefore the legacy to the wife of the attesting witness was void.

*(ii) Wills Disposing of Immovables.*—The essential validity of a Will disposing off immovables is governed by the law of the place where the property is situated. But it would be the law as it stood at the time of the testator's death. *Nelson* v. *Bridfort*, (1846) 2 Beav. 547. While deciding the nature of the property disposed off, the English Courts will not apply the equitable doctrine of conversion and re-conversion in the case of foreign Wills. This is illustrated by the decision in *Mayor of Canterbury* v. *Wyburn*, (1895) A.C. 89 (P.C.). The facts were as follows :

> A testator domiciled in Victoria by Will gave money to the Corporation of Canterbury in England for the purchase of English land for charitable purposes. The Corporation was subject to the English Mortmain Acts in respect of the amount of land it could hold, but the Privy Council held that the Will was one of movables and reference must be made to the law of the testator's domicile on the question of essential validity.

**(d) Construction of Wills**

*Explain the conflict of Law's rules governing construction of Wills.*
B. U. May 93

The function of a Court while construing a Will is to ascertain the intention of the testator as expressed in the Will and to give effect to such intention. Different legal systems prescribed certain rules of construction when the intention of the testator is not clearly expressed in the Will. In such circumstances, a problem in Private International Law is to choose a law for construction of the Will when the Will has certain foreign elements. The main and the predominant object of the construction, as observed above is to ascertain the intention of the testator. It has been held in *Re Gansloser's Will Trusts*, (1952) Ch. 30 that it is the proper law of the Will which should determine the construction of the Will. In the case of a Will disposing off immovable property, *lex situs* of the property is considered to be such proper law. The House of Lords held in *Philipson-Stow* v. *Inland Revenue Commissioners*, (1961) A.C. 727 that the proper law of a settlement by Will was the *lex situs*. But if such *lex situs* refers the problem to some other system of law, then construction will be according to such law.

In the case of movables also the same principle has been generally accepted. However, the English Courts would also refer these questions to the law of domicile of the testator at the time of execution of the Will. This rule is based on the assumption that a testator is more familiar with the law of the country in which he is domiciled and obviously he would use words in the Will in the context of such law, but at the same time the English Courts do not adopt any construction which would offend the *lex situs* regarding the nature and duration of the interest which can be created.

In *Nelson* v. *Bridfort* the following fact arose : Lord Nelson, on whom a Sicilian estate and the title of Duke of Bronte had been conferred, devised his land in Sicily to persons in succession in accordance with the Law of England, but contrary to Sicilian Law. It was held that the Will was ineffective to create interests in or limitations on the use of land in Sicily, other than those allowed by Sicilian Law, since "the incidents to real estate, the right of alienating or limiting it or the course of succession to it, depend entirely on the law of the country where the estate is situated."

Now under the Wills Act, 1963, the construction of a Will shall not be altered by reason of any change in the testator's domicile after the execution of the Will. This is inconsistent with the above discussions.

**(e) Revocation of Wills**

A Will may be revoked by the following methods :

(1) Revocation by operation of law.

(2) Revocation by a subsequent Will or such other testamentary act.

**(1) Revocation by Operation of Law :**

A Will may be revoked by operation of law under the following circumstances :

(i) By the subsequent marriage of the testator,

(ii) By change of domicile of the testator.

(i) *Revocation by Subsequent Marriage of the Testator*

According to Wills Act of 1837, a Will is revoked by marriage unless it is explicitly expressed to be made in contemplation of marriage. This rule has not been universally adopted by all the other legal systems. In a case where the Will or the marriage is connected with a foreign legal system, one important question would arise. Where a person marries after making a Will and then dies after acquiring a new domicile, the question may arise whether the law of the domicile at the time of marriage or the law of the domicile at the time of death, determines the effect of marriage on the Will. An answer to this question would depend on classification of the rule as to revocation by marriage. This rule can be classified either as a rule of matrimonial law or as of a testamentary law. It has been held that it is essentially connected with the consequence of marriage. In *Re Martin* the facts were as follows :

A Frenchwoman in 1870 executed a Will in England valid according to French Law, and in 1874 married a Frenchman in England. The Court held that the parties at the time of marriage were domiciled in England although at the time of the death of the testatrix they had acquired a French domicile. If the validity of the Will were to be determined by the law of the domicile at the date of marriage it would have been revoked, whereas by French Law, the law of the domicile, at the date of death, the Will would not have been revoked by the marriage of the parties. The Court held that the domicile at the time of marriage governed the effect of marriage on the Will, and accordingly the English rule prevailed and the Will was revoked.

The next point to be considered is as to the effect of the Wills Act, 1963 on revocation of Wills by a subsequent marriage. The problem that would arise can be stated as follows :

A woman makes a Will and subsequently she marries. As a result of this marriage, her domicile is changed. It is also possible that she marries a person domiciled in a country according to the law of which a Will is revoked by subsequent marriage. But the Wills Act, 1963, provides that the formal validity and the construction of a Will should not be affected by the testator's change of domicile after making the Will. Does this provision protect the change of domicile by marriage and subsequent revocation ? The Act protects formal validity and construction, but not the capacity and essential validity. Revocation is closely connected with the essential validity. Further, as held in *Re Martin*, discussed above, the effect of marriage on a Will is a part of matrimonial law. It is not a part of testamentary law. Therefore, the Wills Act, 1963 has no effect on revocation of Will by subsequent marriage and consequent change of domicile.

(ii) *Revocation by Change of Domicile of the Testator*

The traditional rule of common law was that the validity of a Will of movables depended on the law of the domicile of the testator at the time of his death. Therefore, the change of domicile by the testator after making a Will might result in the revocation of the will. However in view of the Wills Act, 1963, the formal validity and the construction of Will will not be affected by subsequent change of domicile. Therefore, a common law rule would be applicable only to the question of capacity and essential validity.

**(2) Revocation by Subsequent Wills :**

A Will revoking another Will is governed by the rule of *same* choice of law regarding—

(a) capacity,

(b) form, and

(c) essential validity

as any *other Will* would be governed.

## WILLS EXERCISING POWER OF APPOINTMENT

Power of appointment means a power conferred on a person to dispose off property belonging to the person who confers the power. The person conferring the power is the donor of the power and the person on whom the power is conferred is the donee of the power. The persons in whose favour the property may be disposed off are called the appointees.

Power of appointment is of two kinds :

(a) General power of appointment.

(b) Special power of appointment.

In a general power of appointment the donor of the power has not restricted the power of appointment of the donee. The donee may exercise his power by disposing off the property in favour of any person he chooses. His choice is not restricted. On the other hand, in the case of special power of appointment the choice of the donee is restricted. He is to dispose off the property in favour of one or more persons among the class or group of persons specified by the donor. For example, the donor might have provided that the donee has to dispose off the property in favour of any of the children of "A". Thus, the choice of the donee is restricted. The difference between these two kinds of powers of appointment is of vital importance, when the donee dies without exercising the power of appointment. In the case of general power of appointment, if the donee fails to exercise the power, the property will devolve as if it were a part of donee's intestate estate. But in the case of a special power of appointment, such property would devolve on all the members of the class or group indicated.

If the donee exercises the power of appointment by a Will, the question is as to whether the Will should be considered as the Will of the donee and the rules of choice of law should be applied as if it is his own Will or should it be considered as the Will of the donor and the rules of choice of law regarding the validity of the Will be accordingly applied. Further, the rules that govern the validity of a Will exercising the power of appointment may also depend on whether the property disposed off is movable or immovable.

## VALIDITY OF WILL EXERCISING THE POWER OF APPOINTMENT OVER IMMOVABLE PROPERTY

In the case of a Will exercising power of appointment over immovable property, it is immaterial whether the power is general or special. As a rule, the *lex situs* of the immovables governs the various elements of the Will. But the formal validity and the construction of the Will might be subject to the provisions of the Wills Act, 1963. The construction of the Will would be according to the law of the domicile of the donor, if it is a special power of appointment and it would be according to the law of the domicile of the donee, if it is a general power of appointment.

## VALIDITY OF WILL EXERCISING THE POWER OF APPOINTMENT OVER MOVABLE PROPERTY

### The capacity to exercise power

The capacity to exercise a general power of appointment over movables is the same as the capacity to make a Will disposing off one's own movable property. In *Re Lewal's Settlement Trusts,* (1918) 2 Ch. 391, the Court held that an infant domiciled in France could exercise a general power of appointment by a Will in French form in accordance with the French Law of testamentary capacity. The capacity to make a Will exercising a special power of appointment over movables, would either be governed by the proper law of the settlement, which conferred the power or by the law of domicile of the testator exercising the power at the time of his death.

### Formal validity

The formal validity of a Will exercising a general power of appointment over movables is governed by the Wills Act, 1963. Before the Wills Act, 1963, it was necessary that special formalities prescribed by the donor of the power had to be complied with. Otherwise the Will exercising the power would not be valid. Now, this is not necessary in view of Section 2(ii) of Wills Act, 1963 which provides that "A Will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power".

### Essential validity

In the case of general power of appointment the essential validity of a Will exercising the power will be considered as the Will of donee. Therefore essential validity is governed by the law of the testator's domicile at the time of his death. In the case of a Will exercising a special power of appointment, the essential validity is determined by the law which governs the instrument conferring the power. In *Pouey* v. *Horden,* (1900) 1 Ch. 492 cases 402, the facts are as follows :

A special power of appointment to be exercised by deed of Will had been conferred by an English settlement on a testatrix domiciled at the date of her death in France. By her Will made in France but executed in English form the testatrix appointed a trust fund among certain of her children and grandchildren. In this case, it was held that the essential validity of the Will was governed by English Law and not by French Law. Therefore, the restrictions under the French Law would not be applicable to the power of appointment.

**Construction of Wills exercising power of appointment**

In the case of Wills exercising general power, the rules of construction will be the same as if it was a Will in which the testator disposed off his own property. In the case of special power of appointment, the power is deemed to be the disposition of property under the instrument conferring the power and therefore the construction would be governed by the law that governs the instrument that conferred the power. However, this view has been slightly modified in *Re McMorram Decd.*, (1958) Ch. 624.

In that case the settlor, domiciled in England, had by Will conferred a special power of appointment on his son, the testator. The son, donee of the special power, being domiciled in Scotland, made a Will in Scottish form containing a general reference to powers, which sufficed under Scottish Law to exercise a special power, but not under English Law.

It was held that the words used in this Will were to be interpreted according to Scottish Law in the context in which they were used.

# 13

# TRUSTS

## THE NATURE OF TRUST

The concept of trust is peculiar to the Anglo-Saxon system of law and to the legal systems of certain Commonwealth countries. The Courts of Equity in England, developed the concept of Trust. The very essence of a trust is, that one person holds an interest in property on behalf of and for the benefit of another person. Under English Law, the trust must have the following three certainties to be valid; they are : (a) Certainty of intention to create a trust, (b) Certainty of property and (c) Certainty of beneficiaries or objects.

The main problem in Private International Law, is that of classification of a trust. When there is a foreign transaction, resembling a trust, when would the English Courts characterise it, as a trust ? Would they insist on all the requirements of English Law ? Consistent with the spirit of Private International Law, the English Courts take a broad approach and would classify a situation as a trust if one person holds an interest in property, on behalf of or for the benefit of another person.

When a foreign transaction resembling a trust arises, the following questions are to be answered :

(a) Is the trust validly created ?

(b) If it is characterised as a trust, would it be consistent with English public policy ? and

(c) The law that would govern the administration of the trust.

## CREATION OF TRUST

In a transaction there may be a trust, which has been validly created or there may be an agreement to create a trust. If the trust is created, it might have been created by deed or by will. These situations must be examined separately.

**Agreement to create a trust**

An agreement to create a trust is not different from any other agreement; the capacity to enter into an agreement is governed by the law of the domicile of the party, or, the law of the place of making the agreement. The form of the agreement would be either according to the law of the place of making the agreement, or, the proper law of the agreement. The essential validity of the agreement would be governed by the proper law. In the case of agreements to create trust, comprising immovable property, the essential validity should be within the limits allowed by the *lex situs*.

**The Trust Deed**

The validity of a trust, of a movable property depends on the *lex situs*. This is so at least, until the land is sold and converted into the proceeds of sale. In other cases, it would be governed by the proper law of the settlement.

## TESTAMENTARY TRUST

The Central principle here is, that, the trust should be valid and the Will creating the trust should be valid. The validity of the trust will be determined by the same rules of choice of law as in the case of a trust deed. The general principles of choice of law, pertaining to testamentary dispositions would also be applicable to Wills creating trust.

## CHARITABLE TRUST

As defined by Lord Macnaughten in *Income-Tax Commissioners* v. *Pemsen*, (1891 A.C. 531), a charitable trust is one, whose objects are, broadly, the relief of poverty, the advancement of education, the advancement of religion, or other purposes beneficial to the community. Formerly, it was considered that the charitable nature of a foreign trust was to be strictly determined according to the definition given above, but recently it has been suggested in *Re Cohns* and in the estate of Maldonado, that whether a trust is charitable or not should be determined by proper law. This view is also supported indirectly by the decision in *Thompson* v. *Thompson*, (1844 1. Coll. 381). However, it should be noted that the classification of the charitable trust must be relative and functional.

## ADMINISTRATION OF TRUST

The law applicable to the administration of trust is the proper law of the trust. This is subject only to the rule that when there are overriding principles of English Public Policy, the proper law must yield to such principles.

# 14

## GENERAL PRINCIPLES RELATING TO JURISDICTION

In Private International Law, our first concern is with the jurisdiction of the Courts. The problem is whether the Courts of the country can exercise jurisdiction over a particular legal dispute. The legislative and executive jurisdiction are problems within the sphere of Public International Law. According to the general principles of International Law, jurisdiction could either territorial or personal. Therefore, the question that would often arise before the Courts is as follows :

(a) Is the Court competent to entertain a particular action ?

(b) Are these persons subject to the jurisdiction of the Court ?

Quite often, the question of choice of jurisdiction and choice of law are interdependent. Jurisdiction of a Court is the legal power and authority to make a valid decision binding on the party or parties concerned in any dispute before such Courts. When there is a foreign element in a dispute, the Court has to decide whether it could exercise such legal power and authority. This is the choice of jurisdiction. After making this choice, the next question would be as to what law the Court has to apply. This is *'choice of law'*.

Though there is a degree of similarity in the claims by several legal systems to exercise jurisdiction yet they seem to claim a greater extent of jurisdiction than they are prepared to concede to other legal systems. But of late the English Courts have increasingly recognised that they should concede to foreign Courts the same extent of jurisdiction as they would claim for themselves. For example, if the English Courts exercise jurisdiction to dissolve a marriage on the ground that the wife has been resident in England for a certain period, the Courts are inclined to recognise the competence of foreign Courts to exercise similar jurisdiction on the same ground.

### PRINCIPLES OF JURISDICTION

Justice and effectiveness are the twin principles on which the English Courts exercise jurisdiction. It is no doubt true that the English Courts exercise jurisdiction to do justice. At the same time the jurisdiction is not to do justice in an academic or a theoretical manner, but to do it in an effective manner. Therefore, justice and effectiveness are the guiding principles which determine the jurisdiction of English Courts. The English Courts will not pronounce a judgement which they cannot enforce, but this does not mean, they will exercise jurisdiction in all cases when they can enforce it. Even when they can enforce it, they will exercise jurisdiction only if it is just.

Effectiveness of jurisdiction might resolve itself into two aspects :

(1) Effectiveness against persons, and

(2) Effectiveness against subject-matter of the suit.

The core of effectiveness is based on the concept of territoriality and the amenability of the persons to the jurisdiction. Therefore, the jurisdiction may be either territorial or extra-territorial. But in certain circumstances the territorial principle may be modified as there may be some persons within the territory immune from the jurisdiction of the Court. This is known as extra-territoriality. Such persons are privileged persons like foreign sovereigns and diplomatic agents.

The concept of extra-territorial jurisdiction takes the jurisdiction beyond the territory of the state. This generally arises when there is submission to this effect by the defendant. Therefore, though territoriality is the basic principle behind effectiveness, the principle of submission widens the jurisdiction of the Court and the principle of extra-territoriality restricts the jurisdiction of the Court.

## TWO KINDS OF JURISDICTION

The jurisdiction of English Courts could broadly be classified into two categories :

(1) Jurisdiction in actions *in personam*, and

(2) Jurisdiction in actions *in rem*.

An action *in personam* is an action with the object of determining the rights and interest of the parties and it binds only the parties to the action. While an action *in rem* is one in which the judgment of the Court binds not only parties to the suit, but all other persons.

### ACTIONS IN REM

There are three kinds of actions *in rem* :

(a) Actions for specific recovery of property,

(b) Admiralty actions and

(c) Actions relating to status.

**(a) Actions for Specific Recovery of Property**

Under English Law, any actions brought in English Court for determining the title to property, either real or personal is an action in *rem*. It is an action *in rem* in the sense that the judgment of the Court constitutes a good title against the whole world notwithstanding certain defects which existed previously in the title to the property. Such jurisdiction is exercised only when the property is situated in England.

*Write short note on : Actions in rem.*
B. U. May 92
May 93

**(b) Admiralty Actions**

Admiralty jurisdiction is the jurisdiction to entertain any claim for damage done by a ship. The jurisdiction may also be in *personam*, but the Court may entertain an action *in rem* against ship or cargo, if such ship or cargo is situated in England. This action does not depend on the presence of the owner, neither does it depend on the nationality of the ship. If the ship is within the jurisdiction, the proceedings may be started by fastening a writ to the mast of the ship.

**(c) Actions Relating to Status**

Jurisdiction determining matters affecting domestic status normally arise out of the fact that the parties are domiciled in England. The residence or nationality of the parties is immaterial. A judgment on the status of the Court of domicile binds not only the parties, but every person who comes into legal relations with them. However, domicile as the basis of jurisdiction is relevant only when the domestic status is the principle question in the dispute. But if it arises as an incidental question and if the Court has jurisdiction otherwise, the Court may pronounce judgment on the incident of the domestic status.

### ACTIONS IN PERSONAM

The English Courts exercise jurisdiction in actions in *personam*, if a writ or a notice of a writ can be served on the defendant. A writ can be served, if the defendant is personally present within the jurisdiction of the Court or submits to the jurisdiction of the particular Court. Further, if an alien defendant is not present in any part of the British Domain a notice of writ may be served under Rule 1 of Order 11 of the Supreme Court. But this notice of service is at the discretion of the Court and is confined to certain kind of causes of action.

## JURISDICTION AND DEFENDANT'S PRESENCE

If a defendant is personally present at the time of service of the writ, the English Courts would entertain jurisdiction in actions in *personam* provided the defendant was not induced to come within the jurisdiction by fraud. For the purpose of this jurisdiction, a writ may be served on any person the moment he arrives on English soil, even though he may have come with the intention of leaving the territory within a short time. Jurisdiction would also be exercised over any firm registered or carrying on business in England. Jurisdiction can be exercised on the partners of a firm, even though they are residing outside the jurisdiction of the Court, provided the firm is carrying on business in England. Similarly, jurisdiction can be exercised over a principal residing out of England if such principal had entered into a contract through an agent residing or carrying on business in England. But leave of Court is required for such service. The law in India is slightly different from this. It is discussed later. However the presence of the defendant is not the only ground on which jurisdiction is exercised by the English Courts. This jurisdiction is based on the principle of effectiveness. But sometimes in the interests of overriding demands of justice, in exceptional cases, the English Court may exercise jurisdiction, even if the defendant is outside its jurisdiction.

## JURISDICTION AND SUBMISSION

English Courts would exercise jurisdiction over a defendant not present in England, if he voluntarily submits to the jurisdiction provided such exercise of jurisdiction could be effective. Such submission may be inferred if there is an agreement to submit to the jurisdiction of the Court or submission may be inferred if he attempts to defend himself in that action. However, the question as to whether it would amount to submission, if the defendant protests before the English Court is important. It has been held that if the defendant does not contest the issue on merits but limits himself to deny jurisdiction, then his appearance will not amount to submission. In *Re Dulles Settlement* (No. 2) (1951) Ch. 842 the facts were as follows :

A child resident in England applied for maintenance against the father—An American citizen living in U.S.A., but having considerable assets in U.K. He refused notice and he asked his solicitor in England to protest against such jurisdiction.

The argument taken up by the plaintiff was that once the defendant or his representative comes to the Court, either for or against the jurisdiction, he (defendant) has submitted himself to the jurisdiction of the Court. The Court of appeal observed that "this is not submission, but merely protest".

The fact that parties agree to submit themselves to the jurisdiction of foreign Court will not exclude the jurisdiction of English Court, the English Court can decide, in its discretion, whether the jurisdiction has to be exercised or not. *The Fehmarn*, (1958) 1 W.R.L. 159.

## JURISDICTION UNDER ORDER 11, RULES OF THE SUPREME COURT

*Briefly examine the various limitations on the application of foreign laws in the English Courts.*
B. U. May 83

Under Order 11, the Rules of the Supreme Court, the English Judge has discretion to permit a writ or a notice of writ to be served in certain cases on persons who happen to be outside the territorial jurisdiction of the Court. This jurisdiction is at the discretion of the Court and cannot be claimed by the plaintiff as of right. The principle on the basis of which such discretion is to be exercised has been summarised as follows :

(a) a foreigner resident abroad should not unjustifiably be made to defend his right in England ;

(b) the foreign defendant should be given the benefit of any doubt arising on the construction of the Order; and

(c) since the foreign defendant is abroad and normally unrepresented on the application for leave to issue the writ or notice, it is the plaintiff's duty to make a frank and complete disclosure of all facts which might influence the Court in granting leave.

The central principle in the exercise of the jurisdiction is that the Court must take into consideration the balance of convenience. If the action could be brought more conveniently in a foreign Court, the English Court should not exercise jurisdiction. The order further enumerates the particular cases in which such jurisdiction could be exercised.

## INDIAN LAW

The Civil Procedure Code in India exercises jurisdiction in a more restricted manner in Actions *in personam*. According to Section 19, whether the suit is for compensation for wrong done to the person or to the movable property, the Court would exercise jurisdiction either if the wrong was done within its jurisdiction or if the defendant resided or carried on business or worked for gain within the jurisdiction of the Court. Section 20 provides that for exercising jurisdiction in other cases either the cause of action must have arisen wholly or in part within the jurisdiction of the Court or the defendant must be actually and voluntarily residing or carrying on business personally working for gain at the commencement of the suit. Mere presence at the time of the service of the writ will not give jurisdiction to the Indian Courts. In this respect, Indian Law differs from the corresponding rule of English Law. Further it has been held that the Court has no jurisdiction in a suit against a non-resident foreigner on a cause of action which arises wholly without the Indian territory. *Bhamboo* v. *Ram Narain*, (1928) 9 Lah. 455. The following consideration would arise in India, if a foreigner does not reside or does not himself carry on business or personally work for gain in India.

If the cause of action arises within the local limits of an Indian Court, it has been held that a non-resident foreigner, who is subject of a foreign State, such as protected native States before Independence may be sued in the Court of India. Further it has been observed that "The rule of Private International Law that a Court has no jurisdiction to enertain a suit against a foreigner who did not reside within its jurisdiction and who had not submitted to it, is subject to the rules of municipal law. A suit is accordingly maintainable in an Indian Court if the cause of action arose within its jurisdiction. (*Narain* v. *Balabadra*, (1957) A.P. 256, but it has also been held that such a decree would be enforceable in foreign Courts. This principle has been affirmed in *Maloji Nar Singh Rao* v. *Shankar Saran* (1962) A.I.R. S.C. 1737. If the cause of action arises within India and the foreigner carries on business through his agent within the local limits of an Indian Court, whether the Court could exercise jurisdiction or not is not well settled. The Bombay High Court had held in *Kesovji* v. *Khimji* (1888) 12 Bom. 507 that it could not exercise jurisdiction. But this decision was disapproved in *Girdhar* v. *Kassigar*, (1893) 17 Bom. 622. However the Madras High Court has held that "Carrying on Business" included carrying on business through an agent in India of a foreigner living outside the jurisdiction. (*Janoo* v. *Batchu*, (1923) 45 Mad. L.J. 471.)

**Jurisdiction over Foreign Immovables**

*State the circumstances under which the English Courts exercise jurisdiction over foreign immovables.*

B. U. Nov 93

Generally under all legal systems it is an accepted principle that jurisdiction over immovable property would be exercised by Courts only if such property is situated within the local limits of the Court. It is also a settled principle that the *lex situs* is the proper law to apply to transactions relating to such immovable property. The only exception to the above rule is to be found in the continental Civil Law systems which have adopted the principle of universal succession to both movable and immovable property. According to those legal systems, the law of nationality will govern succession to movable property as well as immovable property.

## COMMON LAW JURISDICTION OVER IMMOVABLES

As a rule, the common law Courts did not exercise jurisdiction over immovable property situated in a foreign country; several factors contributed to the development of these rules. Those factors are briefly summed up as follows :

(1) In the early stages of common law, there was a rule of procedure that any trial of an action relating to land had to be with the assistance of the Jury drawn from people living in the place where the cause of action arose. Such place would naturally be the place of the situation of the property. In the very nature of things, English Courts could not entertain jurisdiction over actions relating to foreign immovables, as they could not summon a Jury from that area. Though this technical rule was subsequently modified after the Judicature Acts of 1873-75 yet there were other reasons which prevented the English Court from exercising jurisdiction over foreign immovables.

*To what extent can an English Court exercise jurisdiction over immovable property situated outside Great Britain ?*

B. U. Oct. 85

(2) The principle of comity as recognised by International Law was also responsible for the non-existence of jurisdiction. Each sovereign was considered to have had exclusive jurisdiction over immovables situated in his territory. Therefore, it was considered against comity for Courts of other countries to exercise jurisdiction over such immovable property. This doctrine was very conspicuous in the 19th century, though it has been criticised by later writers.

(3) The principle of effectiveness was the other factor which prevented the English Court from exercising jurisdiction over foreign immovables. A judgment affecting

land has to be put into effect, generally by executing it in the country where the land is situated. Therefore, there would be no point in an English Court exercising jurisdiction over immovable property situate in another country, if its judgment could not be enforced.

*Write a short note on— Jurisdiction over foreign immovables.* B. U. May 93

(4) Lastly, the question of convenience and justice also prevented the English Courts from exercising jurisdiction over foreign immovables.

To the above mentioned rule that the English Court will not exercise jurisdiction over foreign immovables there are some exceptions recognised even under common law.

(a) The Courts did exercise jurisdiction proceedings relating to the administration of a trust or of the estate of a deceased person in which immovables situated in a foreign country were included.

(b) In cases of lunacy proceedings, English Courts would exercise jurisdiction over lunatics and consequently over their immovable property situated in a foreign country.

(c) In bankruptcy proceedings an English Court would exercise jurisdiction over both the movable and immovable property of the bankrupt "whether situated in England or elsewhere".

## JURISDICTION IN EQUITY

The equitable jurisdiction of the English Courts has extended to foreign immovable properties in the following circumstances :

**(a) Breach of Contract**

The English Courts would exercise jurisdiction, if the nature of the reliefs sought was such as could be obtained by the personal obedience of the defendant and further if such defendant was subject to the jurisdiction of the Court.

*Penn* v. *Lord Baltimore*, (1750) 1 Ves. 444 is a leading authority on the proposition. The facts in this case were as follows :

There was an agreement between the colonies of Pennsylvania and Maryland to fix the agreed boundaries between them. Both parties were before the English Court. The specific performance of the articles of agreement was prayed for in the action. Such decree was granted. The ratio *decidendi* of the case can be put as follows :

"The conscience of the party was bound by this agreement; and being within the jurisdiction of this Court, which acts *in personam*, the Court may properly decree it as an agreement, if there is a foundation for it".

The Courts have always taken into consideration the question as to whether they can effectively enforce their decree while exercising jurisdiction in actions against breach of contract in relation to foreign immovables. The principle of equitable jurisdiction can be summed in the words of Lord Cottenham, LC. as follows :

"If, indeed, the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country in the exercise of their jurisdiction, over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

**(b) Fraud**

The equity Courts would exercise jurisdiction if the defendant has exploited in an unconscionable manner a process of law of the *lex situs* against the plaintiff and consequently injustice has been caused to the plaintiff. Fraud for this purpose would be interrupted in a wider manner. This kind of jurisdiction was exercised in *Cranston* v. *Johnston*, (1796) 3 Ves. 170; the facts were as follows :

The plaintiff failed, through absence abroad, to pay the debt owing in London, whereupon the defendant brought an action in the island of St. Christopher and had judgment executed against the plaintiff's land in the island, which was bought by the defendant and greatly exceeded in value the amount of the judgment. The plaintiff had no notice at the time of these proceedings, but on becoming aware of the defendant's action, attempted to redeem his land by paying the debt. On the defendant's refusal to reconvey, the plaintiff brought action in England.

It was held in this case that the Court could exercise jurisdiction to prevent the injustice arisen out of the defendant's unconscionable use of the process of law in a foreign country.

**(c) Breach of Trust**

The obligation of a trustee is a personal obligation in an equity. Therefore if there is a breach of trust concerning foreign land and if the defendant is subject to the jurisdiction of the Court, the English Court would exercise jurisdiction. The condition for the exercise of the jurisdiction is that either the defendant must be present within the jurisdiction or the goods must be existing there. This condition has reference only to the effective enforcement of the judgment. Such jurisdiction was exercised in *Ewing* v. *Orr-Ewing*, (1883) 9 App. Cas. 34 at p. 40.

## ADMIRALTY JURISDICTION AND FOREIGN IMMOVABLES

*Examine the extent to which English Courts would exercise jurisdiction over foreign immovables.*
B. U. Oct. 85

Under the Supreme Court of Judicature (Consultation) Act 1925, the admiralty judicature of the High Court would extend to any claim for the damage done by a ship. This jurisdiction may be exercised either against the owners of the ship causing damage or against the ship itself or its cargo. In the latter case it is jurisdiction *in rem*. The nature of this jurisdiction happened to be discussed in *The Tolten*, (1946) p. 135 cases 423. The facts of this case were as follows :

"The ship Tolten, while leaving the harbour at Lagos, collided with and damaged a wharf owned and occupied by the United Africa Company, the plaintiff's in the action. The ship having arrived at Liverpool, the plaintiffs started an action *in rem* in the High Court, claiming for damage caused to their wharf through the negligent navigation of the *Tolten.*"

The jurisdiction of the Court was objected on the ground that an action for damage of foreign land could not be entertained by the High Court. The objection was sought to be justified on the basis of the decision of the House of Lords in *British Africa Co.* v. *Campanhia de Mocambique*, (1893) A.C. 602; cases 409. This objection was not accepted on the ground that the common law principle of jurisdiction over foreign land as laid down in the Mocambique case was not applicable to admiralty jurisdiction. This decision of the Court of Appeal was based on the principle that a maritime lien automatically attached to the ship as a result of the damage caused by its fault. Once the ship was within English jurisdiction, effective jurisdiction could be exercised over it.

## PROBATE JURISDICTION

In probate matters, that is while granting probate letters of administration or in action for administration of an estate, the English Courts would exercise jurisdiction over foreign immovables, if the estate comprises movable and immovable property situated in England and also foreign immovable property. But it should be noted that though the English Court may exercise jurisdiction over such foreign immovables, the question of choice of law is treated independently. The *lex situs* would prevail.

## STAY OF ACTION

If a dispute is pending between the same parties in one Court and if the same dispute between the same parties is raised in the Courts of the same country, the second dispute will be stayed until the decision of the former Court is given. This is known as the doctrine of *Sub Judice*. But the problem is whether similar doctrine would be applicable when a dispute between the parties is pending in a Court of a foreign country. Though it is an invariable rule of law that when the matter is pending in the Court of the same country, the second Court should not continue to exercise the jurisdiction; yet when the matter is pending before the foreign Court there is no such invariable rule. It is pending a question of judicial discretion. If a plaintiff were to obtain some definite advantage by starting litigation in the Court of two countries simultaneoulsy he may do so. *Prima facie* there is nothing wrong about it. In *Sealey* v. *Callan*, (1935) P. 135 the facts were as follows :

> A wife, resident in England, petitioned before an English Court for divorce. The husband domiciled and resident in South Africa subsequently started divorce proceeding there, and applied to the English Court for a stay on the wife's action. The English Court refused to grant stay in spite of the fact that the domicile Court had exclusive jurisdiction.

Though such stay is not granted automatically yet the Courts will grant the stay at their discretion. The discretion is not arbitrary but it is exercised on settled judicial principles. The following rules can be formulated to guide judicial discretion in the matter :—

*1. The action pending before the foreign Court must relate generally to the same subject-matter.* It does not matter if the nature of proceedings brought may be different. For example, in *The Marinero*, (1955) P. 58 the facts were as follows :

> There had occurred a collision in Argentine between the ships of the plaintiff and the defendant. The defendant arrested the plaintiff's ship and started proceedings in Argentine. Subsequently the plaintiff arrested a different ship of the defendant in Holland and started proceedings there. Further, he arrested the defendant's ship Marinero, which was not involved in the collision, in Liverpool and started English proceedings. In the case the English Court stayed the proceedings though the subject-matter was different in view of the fact that the cause of action was the same.

*2. The party who seeks for a stay must show that the dual proceedings are vexatious and oppressive.* He may also show that the continuance of both the proceedings was causing serious if not irreparable damage. *McHenry* v. *Louis* (1882) 22 Ch. D. 307. The Court of Appeal laid down certain rules as to when the dual proceedings would be considered to be vexatious or oppressive in *McHenry* v. *Louis*.

(a) If both the proceedings are in the Courts of the United Kingdom, they are *prima facie* vexatious. The plaintiff must prove that they are not vexatious. The burden of proof is on the plaintiff.

(b) If one of the proceedings is in a foreign country there is no presumption that it is *prima facie* vexatious or oppressive. The party, praying for the stay of action, must prove that they are vexatious and oppressive.

(c) If the character of the parties is identical and same in both the proceedings, it may be presumed to be vexatious or oppressive, i.e. if the plaintiff in the foreign action also happens to be the plaintiff in the English action, there may be a presumption that it is oppressive or vexatious.

(d) If the characters of the parties are different, there may not be any such presumption; the person objecting against dual proceedings must prove that the second action is vexatious or oppressive.

In *Cohen* v. *Rothfield*, (1919) 1 K.B. 410 the facts were as follows :

The plaintiff in the English action was a money-lender carrying on business in Scotland and England. The defendant was his manager. While the plaintiff was serving a term of imprisonment, the defendant set up a business of his own with the plaintiff's former customers and received and retained money paid to him on behalf of the plaintiff. The action was brought in England claiming an account of all the money received by the defendant. A few days after the defendant instituted action in Scotland on a counter-claim for money due to him, the plaintiff applied for a stay of the English proceedings. The Court held that the second action before the Scottish Court was not vexatious.

The chief consideration before the Court in granting or refusing stay is the question of balance of convenience. If the Court is of the opinion that the particular proceedings could be tried most conveniently by the foreign Court, then obvioulsy the stay would be granted.

Sometimes, the parties may have agreed to submit their disputes to a foreign Court, in such a case if one of the parties starts proceedings before an English Court, the English Court is not necessarily bound by such agreements between the parties. It is the discretion of the English Court and it may allow the English proceedings to continue.

## PERSONS WHO CANNOT SUE AND WHO CANNOT BE SUED AGAINST

Graveson observes that "personal attributes of plaintiff and defendant are generally irrelevant to the exercise of jurisdiction in *personam*". But this general statement is subject to certain well-known exceptions.

**Persons who cannot sue**

Though as a rule everyone can sue, yet in times of war restrictions are imposed on the ability of an alien enemy to sue. An alien enemy may be a person of any nationality, provided he is residing or carrying on business voluntarily in a hostile country during time of war. A hostile country would also include territory occupied and administered by an enemy power, even though such territory might have originally belonged to a friendly or neutral State. On the other hand, a person or enemy national will have full right of action in English Court, if he is living in England under Royal licence or protection of the Crown.

It has been held by the House of Lords in *Daimler Co.* v. *Continental Tyre & Rubber Co. (Gt. Britain),* (1916) 2 A.C. 307, that a corporation might assume an enemy character, if such corporation though incorporated in England, has enemy association.

An alien enemy may defend an action brought against him, but probably he may not counterclaim. An action brought by him before he became an alien enemy will be suspended so long as he retains any enemy character.

*Discuss : Rahimtoola v. Nizam of Hyderabad.*

B. U. May 83
Nov. 93

**Persons who cannot be sued**

The question of immunities of foreign sovereign and diplomatic representatives, is an overlapping field of Public International Law and Private International Law. As observed by Lord Reid in *Rahimtoola* v. *Nizam of Hyderabad,* (1918) A.C. 379, 404, the principle of immunity is founded on broad consideration of public policy, International Law and comity. This immunity would extend both to the person and to the property of the person enjoying the privilege.

*Examine the extent to which English Courts would exercise jurisdiction over foreign heads of State.*

B. U. Oct. 85

**Foreign Sovereigns**

It is a well settled principle of International Law that the Head of a foreign State is personally immune from the jurisdiction of the English Courts. This immunity is available whether the foreign State is a monarchy or republic. The basis of the immunity is based on several theories, including that of comity, dignity and respect. In brief, the principle of this immunity is that a foreign sovereign cannot be sued in English Courts *unless such foreign sovereign voluntarily submits himself to the jurisdiction of the Court.* The submission must be at the time of the institution of the proceedings. The submission alone can *give* jurisdiction. But such submission is not to be inferred either by the prior conduct of the foreign sovereign or by the agreement he might have entered into. In *Mighell* v. *The Sultan of Johore,* (1894) 1 Q.B. 149 cases 439 the facts were as follows :

*Examine the extent to which English Courts would exercise jurisdiction over :—*

*(a) Foreign immovables.*

*(b) Foreign heads of state.*

B. U. May 92

> The Sultan of Johore was living in England under a false name as a private citizen. He promised to marry the plaintiff, but committed a breach of promise of marriage. It was contended that the foreign sovereign living as a private citizen under a false name, amounted to submission to the jurisdiction of the English Courts. But the Court of Appeal negatived this plea and refused to exercise the jurisdiction on the ground that the submission before the authority of the Court must be on the date of the institution of proceedings. Similarly in *Kahan* v. *Federation of Pakistan* (1951) 2 K.B. 1001 it was held that an agreement of a foreign sovereign to submit to the jurisdiction of the English Courts in a prior contract would not enable the English Courts to exercise jurisdiction. However if the foreign sovereign commences proceedings in England, it amounts to a submission to the jurisdiction of the Court for the purpose of doing justice between the parties. Therefore, the defendant, in such a case, can successfully put up the defence of set-off and also counterclaim provided such claim is connected with the subject-matter of the sovereign's claim. In *High Commissioner of India* v. *Ghosh,* (1960) 1 Q.B. 134 the English Court did not allow the counterclaim by the defendant for defamation in an action brought by a foreign

sovereign for simple debt. This refusal was on the ground that the claim of damages was unconnected with the subject-matter of the sovereign's claim.

Sovereign immunity extends also to Government Department and organisations of foreign sovereign States. However, this immunity would not extend to a foreign corporation, if such organisation has a distinct personality. Whether such an organisation has such a distinct legal personality or not, is to be ascertained according to the relevant foreign law. In *Baccus S.R.L.* v. *Servicio National del Trigo,* (1957) 1 Q.B. 438 the facts were as follows :

The plaintiff, an Italian Company, and the defendant, a section of the Spanish Ministry of Agriculture, agreed for the sale of grain by two contracts submitting disputes to the English Court. The plaintiff sued for breach of contract and the defendant obtained security for costs. Only later was the plea of sovereign immunity raised. It was shown that the Servicio National Del Trigo had a separate corporate existence in Spain, and it was argued that the immunity due to the Spanish sovereign could not extend to another separate legal entity. The Court of Appeal accepted the plea of immunity holding that the legal effect of separate incorporation of a department of State of public service must be judged by the law of the country in question.

The immunity that a foreign sovereign enjoys, is also extended to enforcement of judgment by execution. For purpose of execution, it is further necessary that the foreign sovereign must submit himself to the jurisdiction of the Court.

In case of doubt as to whether a particular person is the head of a foreign State or not, the Courts in England will act on a statement from the appropriate Governmental Department, usually the foreign office or the Commonwealth relations office.

*State Immunity Act, 1978* : The principle whereby a distinction is made between the sovereign functions and commercial activities of the State and jurisdiction is exercised by courts in case of commercial activities alone is known as the restrictive theory of sovereign immunity. Several countries including England have adopted this distinction. In England the matter is presently regulated by the State Immunity Act, 1978.

In *Alcomb Ltd.* v. *Republic of Colombia* [(1984) 2 W.L.R. 750], the provisions of the 1978 Act had come up for consideration before the House of Lords, wherein in House of Lords held that in terms of provisions of the State Immunity Act, 1978, a bank account used for an embassy was *prima facie* non-commercial and set aside the garnishee order upon a certificate of the defendant's ambassador that the funds in the bank account were intended to be used only in the day to day running of the diplomatic mission.

In *Intpro Properties (U.K.) Ltd* v. *Sauvel* [(1983) 2 W.L.R. 908], the plaintiff had filed proceedings against a French diplomat, for an alleged breach of covenant in respect of premises owned by him and occupied by the French diplomat, impleading the French Government. The French Government claimed immunity and contended that it could not be impleaded in English Courts. It was held that under the State Immunity Act, 1978 case, the suit was for damages for an alleged breach of covenant and the French Government's right or title to possession of the premises was not in issue, the French Government was not entitled to any immunity.

In *Westminster City Council* v. *Government of the Islamic Republic of Iran* [(1986) 1 W.L.R.], it has been observed that diplomatic immunity will not apply to a building which has ceased to be the embassy of the foreign state, for instance when the foreign state has broken off diplomatic ties.

**Diplomatic Representative and Their Staffs**

This branch of Private International Law is also based on certain principles of Public International Law adopted as part of English Law. Immunity to diplomatic representatives, is an ancient principle of Public International Law. These ancient principles have been modified and incorporated in the Vienna Convention of 1961 on Diplomatic Relations. Based on this Convention, the Diplomatic Privileges Act, 1964 provides for immunities to diplomatic agents. The Act is applicable to diplomatic agents, their official premises, communications and property. The privilege of an ambassador applies also to members of his family living with him and to his minor child living with him and to his minor child living with him or not, over whom he exercises some parental control, provided such child can be treated as a part of the household of the diplomatic agent.

The Act confers on diplomatic agents complete immunity from criminal jurisdiction of the receiving State. It also confers immunity from any administration jurisdiction except in the following cases :

(a) In real action relating to immovable property in the territory of receiving State, excepting the territory which is held for the purpose of the embassy,

(b) actions relating to succession in which the diplomatic representative is involved as a private person, and

(c) actions relating to professional or commercial activity in a private capacity.

A diplomatic agent can claim immunity in respect of a counter-claim, against him not relating to a claim he has brought before the Court.

However, it should be noted that the diplomatic agent enjoys immunity from the jurisdiction of the Court, but not immunity from liability. Further such immunity may be waived by voluntary submission to the jurisdiction. But the consent of the Sovereign is necessary for such waiver. The waiver must be expressed.

The immunity given to the diplomatic agent has been conferred on the Commonwealth High Commissioners, and the Ambassador for the Republic of Ireland. It is also extended to their families, officials and domestic staff.

In *R* v. *MADAN* (1961) 2 Q.B. 1, a check employed by the Indian High Commissioner in the United Kingdom was convicted for criminal offence of making wrongful gain by false pretences, his diplomatic status being unknown to the court. Subsequently, the High Commissioner waived the immunity to which the clerk was entitled. On the clerk's appeal from conviction the Court of Criminal Appeal held that diplomatic immunity need not be expressly claimed; that its existence rendered the exercise of jurisdiction null and void until the waiver occurred; that waiver must be made by a person with full knowledge of his rights, and be made by or on behalf of the chief representative of the country concerned.

IMMUNITY OF PROPERTY OF FOREIGN SOVEREIGN

The property of a foreign sovereign is generally immune from the jurisdiction of the English Courts. [*The Porto Alexandre*, (1920) p. 30]. The title of the foreign sovereign must be neither illusory nor manifestly defective. He has to claim the immunity. It has been observed in *Juan Ismail & Co.* v. *Republic of Indonesia*, (1951) A.C. 72, that—

The Court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the Court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.

Property for purpose of this immunity has a wider meaning. It not only includes ownership or possession, but also certain other rights. The immunity applies to state property as warships or the furniture of an Embassy. It is also extended to debts, but it will not be extended to immovables except in the case of Embassy premises.

This question of immunity is a little uncertain in the following cases :

**Immunity of Property used by a foreign State in the Courts of Trade**

With an increase in the commerce of the States, this question has assumed great importance. In *Companic Naviera Vascongada* v. *S.S. Cristina*—(1938) A.C. 485; cases 4.—Lord Maugham and Lord Macmillan were of the opinion that immunity should not be extended to State-owned ships used for the purpose of trade. This case was also decided under the recommendation of Brussels' Convention of 1926. But in *Dollfus Mieg-el Cie* v. *Bank of England*, (1950) Ch. 333, the Court of appeal was not in agreement on this issue and decided otherwise.

*Discuss : Rahimtoola v. Nizam of Hyderabad.*

B. U. May 83
Nov. 93

THE COURTS OF EQUITY have not tolerated the principles of immunity to the extent that the common law Courts have. While exercising equitable jurisdiction, the English Courts have not abstained from administering the trust in which a foreign sovereign is interested, provided the trustee is within the jurisdiction of the Court. In *Rahimtoola* v. *Nizam of Hyderabad*, (1958) A.C. 379 the facts were follows :

In 1948 the agent of the Nizam of Hyderabad, without authority, transferred a large sum of money belonging to the Nizam in an English bank to Rahimtoola, then the Pakistani High Commissioner in London, who accepted it on instructions from his government. The Nizam sued Rahimtoola and the bank for recovery of the money. The Government of Pakistan, as legal owner of the debt through their agent, Rahimtoola, claimed immunity from suit.

The House of Lords though not in agreement with the reasoning in the judgement, allowed the plea of the Government of Pakistan.

**Immunity to Representatives of International Organisation**

The privileges given to diplomatic agents have been extended to a number of International parties.

*Indian Law*

In India the general principles of International Law have been accepted by the Courts in the matter of criminal jurisdiction. However, in the matter of civil jurisdiction, though, the general principles are accepted, yet some details regarding the procedures are laid down in Sections 84, 85 and 86 of the Civil Procedure Code. Section 84 provides that a foreign State may sue in any competent Court for purpose of enforcing a private right vested in the Ruler of such State or in any officer of such State in his public capacity. Further, Section 86 provides that no Ruler of a foreign State may be sued in any Court, otherwise competent to try the suit except with the consent of the Central Government, certified in writing by the Secretary to that Government. However, a person as a tenant of an immovable property may sue such Ruler from whom he holds the property, without such consent. It is also provided that the Central Government may give such consent only, if the following conditions are fulfilled :

The Ruler—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to him by this section.

The above provisions are also applicable to—

(a) any Ambassador or Envoy of a foreign State ;

(b) any High Commissioner of a Commonwealth country; and

(c) any such member of the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf as they apply in relation to the Ruler of a foreign State.

# 15

## MATRIMONIAL CAUSES

*Write a short note on Hyde v. Hyde.* B. U. May 83

Before the establishment of the Divorce Court in 1857 the jurisdiction of the English Courts in Matrimonial Causes was with the English ecclesiastical Courts. In 1857 they were transferred to the secular Courts. English Courts have exercised jurisdiction in matrimonial causes only if the marriage is a Christian marriage as defined in *Hyde* v. *Hyde*.

The following are the matrimonial causes which shall be discussed in this chapter :

(a) Divorce.

(b) Nullity of Marriage.

(c) Judicial Separation.

(d) Restitution of Conjugal Rights.

(e) Jactitation of Marriage.

The difference between the first two matrimonial causes must be clearly understood.

Divorce is a process by means of which an existing valid marriage is dissolved as a result of the decree of divorce and the matrimonial status of the parties comes to an end from the date of the decree.

Nullity of marriage could be in two ways :— Nullity of a void marriage and annulment of a voidable marriage. In the case of a nullity of a void marriage, a judicial declaration is sought by way of caution. A void marriage is no marriage at all. No matrimonial status was established. Therefore, the nullity decree brings no change in the status of the parties. It is also possible that the parties may have different domicile, whereas in the case of a voidable marriage the marriage is valid and subsisting unless avoided. It is the decree of annulment which brings an end to the matrimonial status. The parties to the proceedings, in this case, being validly married have the same domicile. The difference between a divorce decree and a decree annulling a voidable marriage must be noted. In both the cases, a subsisting marriage is brought to an end and therefore, there is a change in the status of the parties. In divorce the marriage is dissolved due to some wrong being done by the respondent subsequent to the marriage, whereas in the case of the annulment of the voidable marriage, the facts which render the marriage voidable were generally in existence at the time of the formation of the marriage. There is only one exception that being unwillingness to consummate the marriage.

In all these matrimonial causes three questions generally arise :

(1) when would an English Court exercise jurisdiction ?

(2) what law would it apply ?

(3) under what circumstances would it recognise the decree of a foreign Court ?

# DIVORCE

Before the establishment of Divorce Court in 1857 a marriage in England could be dissolved only a private Act of Parliament. But now, the High Court has jurisdiction under the Matrimonial Causes Act.

## CHOICE OF JURISDICTION

As a rule the English Court will exercise jurisdiction to dissolve a marriage, only if the parties are domiciled in England. However, this exclusive adherence to the domicile as the basis of jurisdiction had resulted in great injustice and hardship. As Graveson observes, "The domicilary basis of jurisdiction, based as it is on the two principles of the domicile-status relation and the unity of domicile of husband and wife, has become increasingly inadequate in the past half-century to satisfy the needs of a changing society characterised in particular by the legal independence (in almost everything but the acquisition of an independent domicile) of the married woman."

Having realised the inadequacy of domicile as the basis of jurisdiction several statutory exceptions have been introduced. These changes have been introduced in Matrimonial Causes Act, 1937, Law Reform (Miscellaneous Provisions) Act, 1949 and the Matrimonial Causes Act, 1950.

### Divorce in Presumption of Death

If the whereabouts of the husband are not known for over a period of 7 years, it shall be presumed that he is dead. But it may be quite risky to act on the basis of this presumption. There may be other causes where the other party may be presumed to be dead. In such circumstances a decree of the Court dissolving the marriage on the presumption of death may be necessary. Under the Matrimonial Causes Act, 1950, Sec. 18(2) a wife can petition to keep such a decree, if she is resident in England at the commencement of proceedings and has been ordinarily resident there for 3 years immediately prior thereto. Further Sec. 16(1) of the same Act provides that any married person alleging reasonable grounds for supposing the other party to the marriage dead, may, if he is domiciled in England, petition to the Court to have it presumed that the other party is dead and to have the marriage dissolved. The provisions of Sec. 16(1) are avoidable when either the husband or the wife is the petitioner, while the provisions of Sec. 18(2) are avoidable when the wife is the petitioner.

### On the Ground of Desertion or Deportation

According to Sec. 18(1)(a) of the Matrimonial Causes Act, 1950 the Court has jurisdiction to dissolve the marriage on the ground that a wife has been deserted by the husband or that her husband has been deported from the United Kingdom. This jurisdiction can be exercised if the husband was domiciled in England and Wales immediately before the desertion or deportation. This jurisdiction can be exercised even though the husband might have changed his domicile, since the desertion or deportation.

### Additional Jurisdiction in Proceedings by Wife

Under the Matrimonial Causes Act, 1950, Sec. 18(1)(b), the wife can petition for a decree of divorce or for a nullity decree, if the wife is resident in England has been ordinarily resident there for a period of 3 years preceding the presentation of the petition provided the husband is not domiciled in any other part of the United Kingdom, the Channel Islands or the Isle of Man. Ordinarily resident for the purpose of the above provisions would not exclude absence from England for a few months' duration. It was held in *Stransky* v. *Stransky*, (1954) P. 428 that Mrs. Stransky who had spent periods of several months with her husband in various European countries was held to be ordinarily resident as she had retained a home in England.

**Act of 1973**

Under the Domicile and Matrimonial Proceedings Act, 1973 the English Courts would exercise jurisdiction to dissolve a marriage if either of the parties to the marriage—

(a) is domiciled in England and Wales on the date when the proceedings are begun; or

(b) if such party is habitually resident in England and Wales throughout the period of one year prior to the date of the petition.

## CHOICE OF LAW

As the decree of divorce dissolves an existing matrimonial status, jurisdiction is mainly exercised by the Courts where the parties are domiciled and the law of each Court is applied. The jurisdiction is exercised on the basis of the statutory exceptions. When the parties are not domiciled in England a difficulty could arise. But that has been solved by Matrimonial Causes Act, 1950, Section 18(3). The clause provides that "in any proceedings in which the Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto, if both parties were domiciled in England at the time of the proceedings". Therefore, in divorce proceedings the English Courts will apply English Law, when jurisdiction is exercised on the basis of statutory exceptions. This was also the principle under the Matrimonial Causes Act, 1937. *Zanelli* v. *Zanelli*, (1948) 64 T.L.R. 556 was decided under the Matrimonial Causes Act, 1937. The facts of this case were as follows :

The wife was resident in England, but the husband and the wife were Italian nationals, domiciled in Italy. The wife petitioned under the Matrimonial Causes Act, 1937 as she was resident in England for the required time. According to Italian Law, the marriage could not be dissolved. An English Court applying the English Law, granted decree of divorce.

## RECOGNITION OF FOREIGN DECREES

*When will a foreign divorce decree be recognised by English Court ?*

B. U. Apr. 85

*Under what circumstances will an English Court recognise a decree of a foreign Court annulling a void or voidable marriage ?*

B. U. May 83
May 92

The general principle in recognising a foreign decree is that the Court pronouncing it must have been a competent Court and the procedure adopted by that Court must not be contrary to the principles of natural justice. The same principle is adopted in the case of recognition of foreign divorce decrees. Generally, the domiciliary Courts are considered to be competent Courts and their decrees are recognised in England unless there has been a flagrant injustice. In such circumstances, the English Courts refused to recognise foreign decrees offending against the English ideas of justice. (*Gray* v. *Formosa*-(1963) P. 259). While recognising such decrees, the ground on which the divorce was granted is immaterial, even if the marriage has been dissolved by the competent Court for a cause insufficient in English law, yet the decree will be recognised.

Though domiciliary Courts are recognised as primarily competent to dissolve marriage, yet there have been some qualifications of this rule.

Graveson observes, "The principle of the exclusive recognition of foreign divorce decrees pronounced by the Court of domicile is subject to two qualifications". They are—(1) The rule laid down in *Amritage* v. *Attorney General*, (1960) P. 135 Cases 383. The facts of the case are as follows :

The husband and wife were domiciled in the State of New York. The wife obtained a divorce in South Dakota on grounds of desertion. On this ground she would not have obtained the divorce by a Court of New York, but the law of New York recognised the divorce as valid. Therefore, it was held that the English Courts would also recognise such South Dakota decree as valid. The rule in this case can be stated as follows :

The English Courts recognise not only the divorce decrees of domicliary Courts, but also such divorce decrees as are recognised as valid by the law of the domicile of the parties.

The qualification is the rule laid down in *Tavers* v. *Holley*, (1955) 1. W.L.R. 422. The facts of this case were as follows :

The wife obtained a decree of divorce from a Court of New South Wales at a time when her husband probably was no longer domiciled in that State, having deserted her. The New South Wales Court exercised jurisdiction by virtue of a local statute essentially similar to the English Matrimonial Causes Act, 1937, S. 13. Later the husband petitioned in the English High Court for divorce, thus raising the direct issue of the recognition of the New South Wales decree.

The Court observed in this case "that our Court in this matter should recognise jurisdiction which they themselves claim. The decision in this case laid down the basis for recognising decrees of Courts in the jurisdiction of which the parties were not domiciled. Here the Court recognised the decree of the New South Wales Court as though that Court had exercised jurisdiction under a statute similar to the English Matrimonial Causes Act. However, it has been held differently in *Dunne* v. *Saban*, (1955) P. 178. The facts of this case were as follows :

The divorce decree was of the Court in Florida. The jurisdiction was exercised on the basis of residence within the jurisdiction of Court for ninety days. The English Court's refusal to recognise under the law of Florida was not identical to the period required under English Law. However, the rule of mechanical legislative similarity has been modified in subsequent cases. In these subsequent cases the English Courts have changed over from the mechanical legislative similarity rule to a realistic view.

*Write short note on : Travers v. Holley.*

B. U. Apr. 85
Apr. 91

*To what extent do English Courts recognise foreign divorce ? Discuss.*

B. U. Oct. 85

*Write a short note on— Recognition of foreign decree of divorce.*

B. U. May 93

In *Arnold* v. *Arnold*, (1957) 2 W.L.R. 366 the facts are as follows :

The Finland Court granted a decree of divorce to a wife on the ground of desertion for one year and upwards. The wife had resided in Finland for many years. In this case the English Courts recognised the Finish decree on the ground that had the circumstances which existed in Finland, existed in England, it would have justified the exercise of jurisdiction by English Courts.

In another case *Robinson Scott* v. *Robinson Scott*, (1958) P. 71 the facts were as follows :

A man domiciled in England had married a woman domiciled in Switzerland.

The marriage was solemnised in Switzerland. The husband returned to England shortly after the marriage. The wife who had never left Switzerland, petitioned to the Swiss Court for divorce. The Swiss Court exercised jurisdiction on the basis of wife's domicile in Switzerland. This rule of Switzerland that the wife retained her Swiss domicile after her marriage with a man domiciled in England was contrary to the English principles of unity of domicile of husband and wife. Nevertheless, the English Court recognised the Swiss divorce decree. The jurisdiction for recognition of the decree was that the wife had in fact resided in Switzerland for more than three years immediately preceding to the presentation of her petition. If those circumstances had existed in England the English Court would be entitled to exercise jurisdiction. Rule in *Robinson Scott* v. *Robinson Scott* has also been approved in *Manning* v. *Manning*, (1958) P. 71.

It should be noted that the original rule of legislative similarity as laid down in *Tavers* v. *Holley* has been changed over to a rule of similarity in circumstances.

As Graveon observes, there has been a development for jurisdiction reciprocity to substantive reciprocity. The English Courts would not recognise a decree if the foreign Court has exercised jurisdiction on the basis of the husband's petition and on the basis of his residential qualifications. Such was the decision in *Levett* v. *Levett & Smith*, (1957) P. 156. The facts of this case were as follows :

*Write a short note on : Armitage v. Att. Gen.*

B. U. Oct. 81
Apr. 91
May 92
May 93
Nov. 93

A domiciled Englishman married in Germany a domiciled German woman in 1947 and the parties lived together in England. In 1952, the wife deserted the husband and returned to Germany, where she petitioned for divorce. The German Court exercised jurisdiction on the basis of the wife's ordinary residence, no fixed period for such being required. The husband cross-petitioned in the German Court, which granted him a decree of divorce and dismissed the wife's petition. The husband then petitioned in the English Court for a declaration that the German decree had dissolved his marriage.

The Court refused to grant the declaration to recognise such non-domiciliary jurisdiction on the husband's petition.

In *Mountbatten* v. *Mountbatten*, (1959) P. 43 an attempt was made to press the application of the combined effect of the exceptions laid down in *Armitage* v. *Att. Gen.* and *Travers* v. *Holley*. But the attempt did not succeed. The facts of this case were as follows :

The parties were domiciled in England but resident for more than three years in New York. The wife petitioned for divorce in Mexico, appearing personally, while the husband appeared by attorney and decree was granted. A decree given under these circumstances being recognised as valid in New York.

The husband petitioned in England for a declaration that the decree of the Mexican Court had dissolved his marriage. His arguments were as follows :

(1) In *Armitage* v. *Att. Gen.* it was held that the English Court would recognise a decree which was recognised by the Court of domicile, though not pronounced by the Court of domicile.

(2) In *Travers* v. *Holley* it was held that the English Court would recognise a decree based on a jurisdiction similar to the one which the English Court themselves exercised, even though the parties were not domiciled.

(3) By combining the effect of these two rules, it was pressed that the decree of Mexican Court which would be recognised by the Court of New York was to be

recognised by the English Court, as the Court of New York would be a competent Court under the rule in *Travers* v. *Holley*. But the Court refused to extend the rule in *Travers* v. *Holley* and thereby recognise the Mexican decree.

The law on the question of recognition of foreign divorce decrees has undergone considerable change after the decision of the House of Lords in *Indyka* v. *Indkya* (1967) 3 W.L.R. 510. The facts of this case were as follows :

Rudolph Indyka married twice, first Helena and secondly Rose. Rudolph, whose domicile of origin was Czechosiovakia, married Helena in Czechoslovakia in 1938. From 1938 to 1945, Rudholph was fighting the Germans outside Czechoslovakia and was unable to communicate with Helena. In 1946, he settled in England, where he acquired a domicile of choice. In 1949, Helena obtained decree of divorce in Czechoslovakia. Ten years later the husband went through a ceremony of marriage in England with Rose. In 1965, Rose petitioned for divorce in England, a proceeding which logically presupposed the existence of a valid marriage. On the husband's allegation that his marriage to her was void for bigamy because the earlier Czechoslovak decree of divorce obtained by Helena was not valid in English Law, the issue of the validity of the marriage was taken as the first and subsidiary question, itself depending on the recognition in England of the Czechoslovak divorce.

The Trial Court had held the English marriage void as the Czechoslovak decree was not recognised. However, in appeal it was held that the Czechoslovak decree could be recognised because there existed in Czechoslovakia circumstances which, if existing in England whenever justified the jurisdiction of the English Court, as the facts revealed the wife was ordinarily residing in Czechoslovakia for more than three years. However, the difficulty was that in 1949 there was no such law in existence in England. One of the judgments of the House of Lords stated that whether a foreign decree is to be recognised should be answered by the Court in the light of its prèsent policy, regardless (within reason) of when the decree was granted. Thus the House of Lords recognised the divorce granted by the Czechosolvakian Court. The various opinion pronouncements by the House of Lords in this case have been ably summed up by Graveson as follows :—

The decrees will be recognised as pronounced by the Courts :

1. of the country of the domicile of the parties on the principle of Le Mesurier's case (Lord Leid, Lord Wilberforce) ;
2. of a country other than that of the domicile of the parties, if recognised by the law of the parties' domicile, on the principle of *Armitage* v. *Att. Gen.* Lord Wilberforce);
3. on a basis corresponding to that on which English Courts exercise jurisdiction on the principle of *Travers* v. *Holley* (Lords Morris of Borth-y-Gest)
4. on a basis corresponding to that generally permitted to the English Court but excluding special legislation (Lord Reid; Lord Pearson); or more widely (Lord Pearce);
5. of the country of nationality of the parties where also (a) the petitioner had a real and substantial connection with the country (Lord Morris of Borth-y-Gest, Lord Pearson); or (b) jurisdiction was exercised on the basis of such nationality (Lord Pearce);
6. of the country with which the petitioner has a real and substantial connection, to which such factors as residence and nationality may contribute (Lord

Wilberforce); or which is "the predominant country with regard to the parties" (Lord Pearce);

7. of the country of the matrimonial home in which the petitioner continues to live (Lord Reid);
8. of the country of the habitual residence of a wife-petitioner (Lord Reid);
9. of the country of residence of a wife-petitioner if a substantial connection exists between her and that country (Lord Wilberforce);

The reasons for decision in *Indyka* v. *Indyka* happened to be considered by the Court in *Angelo* v. *Angelo*, 1968, 1 W.L.R. 401. The facts of this case were the following :—

The wife was a German national habitually resident in Germany. Her husband was a British subject originally domiciled in England but possibly domiciled in France at the time the German Courts exercised the jurisdiction. Before the German Court, the wife had petitioned for divorce and had obtained the decree. The decree was recognised by the English Court on the ground that the test laid down in *Indyka's* case was answered in this case also.

In *Tijanic* v. *Tijanic*, (1968), P. 181, the facts were as follows :

The wife was domiciled in Czechoslovakia and always lived there. The husband, originally of Czechoslovak Nationality and domicile, had settled in England and acquired British domicile. The Czechoslovak decree for dissolving marriage was the result of joint proceedings. The English Court recognised this decree.

In *Brown* v. *Brown*, (1968) 2 W.L.R. 969 a Swedish wife of a person domiciled in England had obtained a divorce decree after three years residence in Sweden.

Thus it can be seen that the principle laid down in *Robinson Scott* v. *Robinson Scott* is extended by the decision in *Indyka* v. *Indyka*. In this case, the test of real and substantial connection was adopted. It also appears that the decree of nationality would be recognised by English Courts.

**Decree's of Courts of Nationality**

Though the basis of exercises for jurisdiction in Anglo-Saxon and Commonwealth countries is generally domicile; yet, in many continental countries nationality would be the basis. In these circumstances the question that would arise is as to whether the English Courts would recognise the decrees of foreign Courts dissolving the marriage of nationals not domiciled there. It appears that the general rule is that the English Courts would not recognise such decrees unless the Court of domicile itself recognises it. However there are some isolated exceptional decisions. In *Metzger* v. *Metzger*, (1936) 3 All E.R. 130 the facts were as follows :

A German Court had dissolved the marriage of German nationals who were probably domiciled outside Germany. In this case the English Court recognised the German decree on the ground that nationality was the proper basis of jurisdiction according to German Law.

English Courts would also recognise a divorce by Legislative Act of the country in which the parties are domiciled.

As observed above, the House of Lords has approved that the divorce decree of a Court of nationality would be recognised by English Courts.

*Limits to the above rule*

The general discussion on recognition of foreign decrees is subject to the following limits :

(1) Such recognition would be subject to public policy in English Law. As Lord Wilberforce observed in *Indyka* v. *Indyka*, the question of evasion of law in matters of divorce would be a rule of public policy.

(2) The second limitation is that the English Court would refuse to recognise a foreign decree when the result would be to cause grave injustice. (According to Lord Pearson and Lord Moris of Borth-y-Gest in *Indyka* v. *Indyka*.)

**An Indian case**

*Satya* v. *Teja Singh* (A.I.R. 1975 S.C. 105).

The Supreme Court of India refused to recognise the divorce decree of a Court of Nevada on the following grounds :

(a) residence for the purpose of acquiring domicile must answer a quantitative as well as a qualitative test,

(b) whether a person is domiciled in a country will be determined according to Indian Private International Law.

(c) A foreign decree obtained by fraud will not be recognised by Indian Courts.

DIVORCE BY PRIVATE ACT OF THE PARTIES

In several legal systems it may be possible for parties to dissolve a marriage by private acts without taking recourse to judicial proceedings. In such cases the question would be as to whether the English Courts would recognise such a divorce. There is no doubt that these divorces would be recognised by the English Courts, if such divorces would be recognised by the English Courts, if such divorces are valid according to the personal law of the parties, and if the divorces are of marriages which were celebrated outside England. But would the English Courts recognise such divorce if the marriage was celebrated in England in English form and if the personal law of the parties permitted such divorce ? This question arose in *R.* v. *Hammersmith*, Superintendent, Registrar of Marriages, ex. p. Mir. Anwaruddin, (1917) 1 K.B. 634. The facts of this case were as follows :

A marriage was celebrated in England in English form, between a man domiciled in Egypt and a woman domiciled in England. This marriage was dissolved in Egypt by Talak. This form of Mohammedan divorce was recognised by law of Egypt where the parties were domiciled. The Court refused to recognise the decree on these grounds :

(1) English Law recognise a divorce by judicial decree only.

(2) The form of divorce was appropriate only to a Mohammedan marriage and not to a monogamous marriage. Therefore, the English marriage could not be dissolved by Talak. The decision in this case has been criticised on the ground that the English Court should have recognised the status created by the law of domicile of the parties.

Recently in *Yusuf* v. *Yusuf* (The *Times*, August 1, 1957) the old position has changed to considerable extent. The facts of this case were as follows :

A marriage celebrated in England between a domiciled English woman and a domiciled Egyptian Muslim was dissolved by a Muslim form of divorce. The divorce was unilateral in form but consensual in fact. It had taken place in the appropriate Cairo Court. The English Court recognised the validity of this divorce.

In a later case *Russ* v. *Russ* (*Ibid.* at p. 98, per Scarman) an Egyptian divorce by Talak of an English marriage was recognised. The decision in this case has been distinguished from the one in Hammersmith's case there was no such judicial proceedings for divorce.

(1) In *Russ* v. *Russ*, certain judicial formality took place in the Egyptian Court which was a Court of the parties domicile. But in Hammersmith's case there was no such judicial proceeding for divorce.

(2) Recognition of divorce in Hammersmith's case would have offended against natural justice. But in *Russ* v. *Russ* it would have promoted natural justice.

It can be concluded that there is a growing liberal tendency on the part of the English Courts in recognition of foreign divorces.

This view is further confirmed by the decision in *Lee* v. *Lau*, (1964) 3 W.L.R. 750. In this case the parties domiciled in Hong Kong had entered into a marriage which though polygamous in nature was valid according to the law of Hong Kong. Such marriage was dissolved by mutual agreement, this dissolution being valid according to the law of Hong Kong. The husband petitioned before the English Court when he was domiciled in England for a declaration that the marriage was validly dissolved. The English Court made such declaration.

In *Har-Shefi* v. *Har-Shefi*, (1953) P. 161 the facts were as follows :

Husband and wife were of Jewish faith, the wife being domiciled before marriage in England and the husband in Israel. While the parties were resident in England though domiciled in Israel the marriage was dissolved by religious decree of the Rabbinical Court in London. The husband was deported to Israel, where he remained, and the wife petitioned in England for a declaration that the Jewish divorce had validly dissolved her marriage.

The Court of Appeal held in this case that the divorce was valid as the divorce was recognised by the law of domicile of the parties. But in *Joseph* v. *Joseph* (1953) 1 W.L.R. 1182, such a decree of the Rabbinical Court dissolving marriage of parties domiciled in England was not recognised. This was also a decision made by the Court of Appeal.

## ANNULMENT OF VOIDABLE MARRIAGE

**Jurisdiction of English Courts**

*(1) Domicile :—* It is well settled that if both the parties are domiciled in England jurisdiction will be exercised.

*(2) Residence :—* It was held in *Inverclyde* v. *Inverclyde*, (1931) P. 29; Cases 501 that English Court would not exercise jurisdiction on the basis of residence of the parties within the jurisdiction. The facts in that case were as follows :

The parties were domiciled in Scotland but resident in England. The marriage was celebrated in England. The Court refused to exercise jurisdiction on the ground that annulment of a voidable marriage was different from declaring nullity of a void marriage. In annulment of a voidable marriage there will be an alternation of status and the judgment would be a judgment *in rem*. Therefore, jurisdiction could not be exercised unless the parties were domiciled in England. This decision was indirectly supported by the Court of Appeal in *De Renville* v. *De Renville*. However the Court of Appeal examined the problem in detail in *Ramsay-Fairfax* v. *Ramsay-Fairfax*, (1956) P. 115. The facts of this case were as follows :—

The parties were domiciled in Scotland and resident in England. The wife petitioned for nullity on the ground of wilful refusal to consummate marriage or impotence. Her residence was not enough to bring the case under the Matrimonial Causes Act, 1950, Sec. 18(1)(b). The husband protested against the jurisdiction. The Court decided to exercise jurisdiction on the ground that both the parties were resident in England. The husband went in appeal to the Court of Appeal. The Court of Appeal upheld the decision of the Lower Court overruling *Inverclyde* v. *Inverclyde*, though the Court of Appeal appreciated the distinction between a voidable and a void marriage. Yet it held that common residence of the parties was sufficient ground to exercise jurisdiction. The case has been approved in *Easterbrook* v. *Easterbrook*, (1944) P. 10. The facts of this case were as follows :

The parties were domiciled in Canada. The marriage was celebrated in England and the parties were resident in England. The petition was presented on the ground of wilful refusal to consummate the marriage. The Court held that it had jurisdiction to annul the marriage.

On similar facts the Court exercised jurisdiction in *Hutter* v. *Hutter*, (1944) P. 95. This case was argued by the King's Proctor.

(3) *Place of Celebration* :— The House of Lords has held in *Ross-Smith* v. *Ross-Smith* that mere celebration of marriage in England does not give jurisdiction to English Court for annulling a voidable marriage.

**Choice of law** :— The question of choice of law to annul a voidable marriage can be treated in the following three ways.

(1) As relating to the formation of the marriage, in this case the law of domicile of the parties would determine the question.

(2) As grounds upon which the Court would grant remedy of annulment, in this case the law would be the law of the Court. (*lex fori*).

(3) As a separate and special question of essential validity in this case there is to be a separate rule of choice of law, apart from the one determining the validity of the marriage.

The Courts in England had followed the second method and applied English law until 1947. But the Court of Appeal adopted the third method and laid down a separate rule of choice of law. In *De Renville* v. *De Renville*, the facts of the case were as follows :—

A marriage was celebrated in France between a domiciled Frenchman and domiciled Englishwoman. The Frenchman was at all material times resident in France. The wife petitioned before an English Court for annulling the marriage on the ground that the marriage was voidable due to wilful refusal to consummate the marriage or inability to consummate it. The preliminary question that arose in this case was whether the English Court could exercise jurisdiction as the parties were not domiciled in England. To answer that preliminary question, it was necessary to determine whether the marriage was void or voidable. The Court had to determine whether it would apply English Law or French Law for that purpose. The Court held that the question would be determined by French Law, because *that was the law of husband's domicile at the rate of the marriage or preferably because at the date of the decision it was the law of matrimonial domicile.* After this decision it can be said that the rule of choice of law for determining whether the marriage is void or voidable, is that the law of matrimonial domicile would be applied. The Court of Appeal has laid down the same principle in *Casey* v. *Casey* (1949) P. 420. Therefore a completely new and independent rule of choice of law has been created.

**Recognition of foreign decrees annulling a voidable marriage**

On this question, Graveson observes as follows :

The law on the recognition of foreign decrees of nullity of voidable marriage is completely unsettled, but it is considered that recognition should depend on the existence of similar basis of jurisdiction as that of English Courts.

## NULLITY OF MARRIAGE

A decree of nullity would hold that an alleged marriage never existed. A void marriage is no marriage at all. Therefore a person whose marriage is void may remarry without obtaining any decree of nullity. A marriage may be void for want of capacity on the party or the parties, for want of essential validity or for want of formal validity. A void marriage has not brought the status of marriage, therefore the nullity decree does not alter the status of the parties. In this case also the following three questions are to be discussed :

(a) Choice of Jurisdiction.

(b) Choice of law.

(c) Recognition of foreign decrees of nullity.

**(a) Choice of Jurisdiction**

The English Courts would exercise jurisdiction to grant a decree of nullity under the following circumstances :

(1) *Domicile* :— If both the parties are domiciled in England at the time of institution of the proceedings, the English Courts do exercise jurisdiction. Their exercise of jurisdiction would be irrespective of the place of celebration of marriage or the domicile of the parties at the time of celebration of the marriage. (*Salvesen* v. *The Administrator of Austrian Property* (1927) A.C. 641, Cases 488).

(2) *Residence* : The English Courts would exercise jurisdiction to grant nullity of a void marriage, if both the parties are resident within the jurisdiction of the Court. It appears that the Courts would exercise jurisdiction even if the respondent alone was resident within the jurisdiction. (*Garthwaite* v. *Garthwaite*, (1864) P. 356 at p. 390). At one time, it was thought that the petitioner's residence would alone be sufficient for exercise of the jurisdiction. The decision of the Court of Appeal in *De Renville* v. *De Renville*, (1947) P. 168 has disapproved this basis of jurisdiction.

(3) *Place of Celebration of Marriage* :—English Courts have exercised the jurisdiction to grant nullity decree of a void marriage, if the marriage is celebrated in England, though the parties were domiciled outside England at the time of the marriage. In *Simonin* v. *Mallac*, (1860) 2 Sw. & Tr. 67 Cases 153, the facts were as follows :

Two persons domiciled in France married in England. The purpose of celebrating the marriage in England was to evade the rules of French Law which required the parties at their age to obtain consent of their parents to their marriage. The English Courts exercised jurisdiction on the ground that the marriage had been performed in England. The jurisdiction was exercised on the ground that by professing to enter into a contract in England the parties had agreed that the force and the effect of the contract may be determined by an English tribunal.

The fallacy of this reasoning was examined by the House of Lords in *Ross Smith* v. *Ross Smith*, (1963) A.C. 280; the facts of this case were as follows :

A marriage had taken place in England, the wife being resident in England, but the husband resident and domiciled in Scotland. The wife petitioned for a decree of nullity on the ground of wilful refusal to consummate the marriage, or, alternatively, incapacity on the part of the husband.

Though this decision was in connection with the voidable marriage, the importance of the decision is in its examination of the principle laid down in *Simonin* v. *Mallac*. The House of Lords held firstly, that marriage should not be treated as other contracts and secondly, that since 1894, after the decision in *Sardar Gurdayal Singh* v. *Rajah of Faridkote*, (1894) A.C. 670, 683 it was well settled that making of a contract in England did not confer jurisdiction on English Courts.

Though the basis of the decision in *Simonin* v. *Mallac* is challenged, yet the rule that if the marriage is celebrated in England, the English Courts would exercise jurisdiction, to declare void, such a marriage, is well settled.

**Act of 1973**

The Domicile and Matrimonial Proceedings Act of 1973 lays down the exclusive grounds of jurisdiction for annulment of any marriage, void or voidable in the following terms :—

(a) is domiciled in England and Wales on the date when the proceedings are begun; or

(b) was habitually resident in England and Wales throughout the period of one year ending with that date; or

(c) died before that date and either—

  (i) was at death domiciled in England and Wales, or

  (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.

**(b) Choice of Law**

The question of determining whether a marriage is void or valid is determined by the rules of same choice of law as those which would govern the validity of marriage. The question would be as to whether the parties had capacity, whether the marriage was essentially valid and whether it was formally valid. The rules of choice of law on these aspects of the validity of marriage have already been discussed under the Chapter on "Marriage".

**(c) Recognition of Foreign Decrees of Nullity**

The English Courts have recognized foreign decrees of nullity, if such Foreign Courts had jurisdiction under the following circumstances :

**(1) Domicile**

The English Courts recognized the decrees of nullity pronounced by the Courts of the country in which the parties were domiciled. Such decrees would be recognised even if the marriages were celebrated in England. In *Salvesen* v. *Administrator of Austrian Property,* (1927) A.C. 641; Case 488 the facts were as follows :

A Scotswoman domiciled in Scotland married a domiciled Austrian in Paris, thereby acquiring his nationality. As a result of the war of 1914-1918 her property came under the control of the Public Administrator, and she accordingly tried to have her marriage annulled. The parties had acquired a domicile in Wiesbaden, and the competent Court of Wiesbaden granted a decree of nullity of the French marriage, on the ground of non-observance of the French requirements as to residence and publication.

The House of Lords recognised the foreign decree in this case as valid. In *Simonin* v. *Mallac* and *Agden* v. *Agden*, the English Courts did not recognise the decree of the Court of domicile, declaring a marriage celebrated in England to be void. But recently in *Galene* v. *Galene*, (1939) P. 237 the English Courts recognised a French decree of nullity which declared the marriage celebrated in England void. The basis of recognition was on the ground that the parties were domiciled in France.

Another problem that would arise in the case of decrees of nullity is that as the marriage is not valid there may not be unity of domicile of the man and the woman. Graveson thinks that on the authority of the decision in Salvesen's case the English Courts would recognise a decree of nullity, if either of the parties or even if the petitioner alone is domiciled in the jurisdiction of the Foreign Court. A contrary view was held in *Chapelle* v. *Chapelle*, (1950), P. 134. But this decision is now overruled by the decision in *Gray* v. *Formosa*, (1963) P. 259. In *Gray* v. *Formosa* the facts were as follows :

A man domiciled in Greece had married a woman domiciled in England. The marriage was celebrated in England. It conformed to the formalities prescribed in English Law, but not to the requirements of the husband's religious law. The Court held in this case that there was a valid marriage according to English Law at the time of the commencement of the proceedings in the Foreign Court. The parties were domiciled in Malta and therefore the Malta decree granting the nullity of marriage was to be recognised by the English Court. The main reason which persuaded the English Court to come to this conclusion was that otherwise it would offend the English views of substantial justice. This principle of justice was reaffirmed in *Lepre* v. *Lepre*, (1965) P. 52.

**Place of Celebration of Marriage**

*Discuss : Travers v. Holley.*
B. U. Apr. 85

As the general principle, the rule in *Travers* v. *Holley* is adopted in recognition of foreign decrees pertaining to matrimonial causes. The English Courts would recognise the decree of nullity pronounced by the Court of the country in which the marriage was celebrated. In *Mitford* v. *Mitford*, (1923) P. 139 the facts were as follows :

*Critically examine— Recognition of judicial separation in conflict of laws.*
B. U. Apr. 91
Oct. 92
May 93

A domiciled Englishman and domiciled German woman were married in Germany. A German Court granted nullity of such marriage. The English Court recognised such German decree. On the same reasoning of reciprocity the English Court recognised a decree of the Israeli Court in *Corbett* v. *Corbett*, (1957) 1 W.L.R. 486.

However it seems that it is a well-settled principle that the jurisdiction of the Courts of the place of celebration of the marriage should be limited to matters governed by the law of the place of celebration. Such matters would generally be questions pertaining to formalities of marriage.

**(2) Judicial Separation**

A decree of judicial separation does not affect the existence of the status of marriage in English Law. It merely enables the parties to live apart. Therefore jurisdiction would exist if the parties are domiciled in England though resident elsewhere. It can also be exercised on the basis of the respondent's residence. Even the possession of the house in England by the respondent may be sufficient for the purpose of jurisdiction. The wife could also petition on the basis of her residence under the Matrimonial Causes Act, 1950, Section 18(1) (a). The law that would be applied is the law of the Court where she resides.

**Act of 1971**

In pursuance of the provisions of the Hague Convention regarding recognition of overseas divorces and legal separations, the recognition of Divorces and Legal Separations Act was passed in 1971. The salient features of this Act came into effect from January 1, 1972. As a result of this Act, foreign decrees of divorces and legal separations will be recognised if such decrees were obtained in the following circumstances :—

(1) either husband or wife was habitually resident in that country, or

(2) either husband or wife was a national of that country. It must be noted that if a particular country treats, domicile as the ground of jurisdiction, habitual residence will be equivalent to domicile.

(3) either husband or wife was domiciled in that country.

In addition to the above provisions, there are some particular provisions regarding the British Isles. These are not of much interest to students of Indian law as they do not deal with any general provisions.

*Non-Judicial Divorces*—Sec. 2 of the 1971 Act provides for recognition of foreign decree of divorce obtained in "judicial proceedings or other proceedings" if the grounds of divorce specified in the Act exist. The object of the 1971 Act was to reduce or prevent the continuance of "Limping marriages".

In *Choudhary* v. *Choudhary* [(1985) 2 W.L.R. 350], Cumming-Bruce L.J. observed that "other proceedings" cannot be interpreted so widely as to cover all divorces obtained by any means which are officially recognized in the country where such divorce is obtained. Thus some proceedings are necessary and pronouncement of bare *talaq* is not such proceedings.

In the laws of many countries which recognize non-judicial divorces some public proceedings are necessary, although they are nothing more than a public record or public seal on such divorces. These may be termed as other proceedings.

The term "other proceedings" has come up for interpretation in several cases. One such case is *Quazi* v. *Quazi* [(1980) A.C. 744], wherein the House of Lords recognized a divorce obtained in Pakistan by *talaq* followed by compliance with the procedural requirements of the Pakistani Muslim Family Laws Ordinance, 1961 as a divorce obtained by "other proceedings" within the intendment of sec. 2 of the 1971 Act as supplemented by sec. 16 of the Domicile and Matrimonial Proceedings Act, 1973. However, the House of Lords did not express any opinion as regards bare talaqs which are effective without any further procedure.

In *Ex parte Ghulam Fatima* [(1986) 2. W.L.R. 693], the House of Lords observed that "the proceedings" under sec. 2 of the 1971 Act meant a single set of proceedings instituted in the same country as that in which the divorce was ultimately obtained, it did not contemplate proceedings which take place partly in England and partly in another country.

**(3) Recognition of Foreign Decrees of Judicial Separation**

The general rule in *Travers* v. *Holley* will be applied in recognition of such decrees subject to the following conditions :

(1) Recognition should be confined to decrees that are final.

(2) By change of the domicile of either of the parties, their personal status may be governed by a new system of law.

**(4) Restitution of Conjugal Rights**

This decree also does not change the status of a party to the marriage. Therefore jurisdiction is not limited to the domicile. Jurisdiction can also be exercised on the ground of the residence of the parties or even on the residence of the petitioning wife alone. Jurisdiction has also been exercised on the ground that the matrimonial home existed within the jurisdiction. There are also authorities wherein jurisdiction was exercised on the ground of the residence of the respondent alone.

**Jactitation of Marriage**

This cause of action arises when a person falsely claims that he or she is married to the petitioner. The remedy in such cases is perpetual injunction restraining the respondent from making such claims. The jurisdiction will be the same as in the case of judicial separation. Obviously the question of choice of law would be the same as would determine whether there has been a valid marriage or not.

## CONDITIONS OF ACTIONABILITY

The conditions for actionability of an act committed abroad have been summed up in *Phillips* v. *Eyre*, (1870) L.R. 6 Q.B. 1 at P. 28 Cases 540 as follows :

*Write short note on : Foreign torts actionable in English Courts.*

B. U. Apr. 65

*Write a short note on : Re. The Halley.*

B. U. Oct. 85
Nov. 93

*Write a short note on :— Phillips v. Eyre.*

B. U. Oct. 85
Apr. 91
Oct. 92
May 93

"As a general rule, in order to found a suit in England, for a wrong, alleged to have been committed abroad, two conditions must be fulfilled. Firstly, wrong must be of such a character that it would have been actionable, if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done."

The first condition is that the wrong must be of such a character that it would have been actionable, if committed in England. In other words it must have been a tort according to English Law. Here the English Law of tort is applied, and the wrong is classified according to English Law. In other words it means that the English Courts would give judgment to the plaintiff in an action founded on a wrong committed in a foreign country, if it is proved that such an act would have been a tort if committed in England. However, this rule may work some hardship and inconvenience. For e.g., in *The Halley*, (1868) L.R. 2 P.C. 193, the facts were as follows :

There was a collision between an English and Dutch ships in Dutch waters. Collision was due to the negligence of the pilot of the English ship. According to Dutch Law the owners of the ship were compelled to appoint the pilot. The owners of the English ship would be liable to make good the loss according to Dutch Law, but not according to English Law. The Court held that the defendants were not liable as the employment of a compulsory pilot, excused the defendants under English Law. The rule laid down in this case could be summed up as follows :

When an action is brought before an English Court based on a foreign wrongful act, the defences which are available for wrong committed in England, would also be available.

*"An English Court will have jurisdiction over a foreign tort only if two conditions are satisfied." Explain with reference to case law.*

B. U. May 83
Nov. 93

The second condition is that the act must not have been justifiable by the law of the place where it was done. It is not necessary that such act must have been a tort according to the foreign law. It must have been a wrong according to the law of the country and the wrong may be of any kind. It may be civil wrong or a criminal wrong. It is pointed out that this rule may result in an anomalous position. An act which would not create rights to damages under foreign law, may give rise to such right in England. In *Machaldo* v. *Frontes*, (1897) 2 Q.B. 231, Cases 549, the facts were as follows :

*Analyse the actionability of Foreign Tort.*

B. U. Apr. 91

A libel was published in Brazil. According to the law of Brazil there could only be a criminal prosecution, but no civil action for damages. Nevertheless the Court of Appeal held that the damages could be awarded in an English action. However, defences available under foreign law would also be considered as defence in an

English action. In *The Mary Moxham,* (1876) L.R. 1 P.D. 107, the facts were as follows :

*Examine the conditions of actionability of a foreign tort.*

B. U. Apr. 85 May 92

An English ship had collided with the pier in Spanish territorial waters. An action was brought in an English Court against the owners of the English ship. According to Spanish Law the owners of the ship could not be held liable for negligence of their servants. This plea was considered as a good defence in an English action and therefore the defendants were held not liable, as illustrated in *Phillips* v. *Eyre.* A subsequent legalisation of the act under foreign law would also be a good defence.

## PROPER LAW OF TORTS

It has been observed before that the place of commission of the tort will be the basis of liability. If the tortious act is justifiable under law of the place where it was committed such tort is not actionable in England. However, after 1945, many writers and decisions have questioned the appropriateness of having the place of commission as the exclusive basis of liability. As Lord Denning M.R. has, observed, the problem of choice of law in tort constitutes one of the most vexed questions in Private International Law. Dr. Morris has advocated, in his several articles, for the development of a proper law of torts, in which the place of commission need not be a decisive factor of liability. This idea also found support in a decision of the Supreme Court of Nova Scotia in *Abbot Smith* v. *Governor of the University of Toranto,* Prof. Kahn-Freund had also advocated for the law of the social environment. THE SECOND RESTATEMENT of Conflict of Laws of the American Law Institute has also advocated a doctrine of proper law.

In *Babcock* v. *Jackson* (191 NE 279), the doctrine of proper law of torts found emphatic recognition by the Court of Appeal of New York. In this case the facts were as follows :

Mr. Jackson and Miss Babcock were residents of New York State. Miss Babcock was injured through negligent driving by Mr. Jackson while she was a passenger in his car in Ontario. The law of Ontario exempts drivers from liability of injury to guest passengers. New York Law imposes such liability, Miss Babcock sued Mr. Jackson in New York State for damages for the negligence committed in Ontario.

The Court applied the law of New York rejecting the law of the place of the commission of the tort on the ground that it was unjust and anamolus.

Sometime back this matter happened to be considered by the House of Lords in England in its decision in *Boys* v. *Chaplain.* The facts of the case are as follows :

Boys and Chaplain were British subjects normally residents in England. Boys was serving in the Royal Air Force and Chaplain in the Royal Navy. When both of them were serving in Malta, due to the negligent driving of Chaplain, Boys was injured. According to the law of Malta, the damages of £ 53 alone could be recovered, as the law of Malta did not award any damages for pain and suffering. The High Court awarded damages according to English Law following the decision in *Machaldo* v. *Frontes.* The sum awarded was £ 2,300. The Court of Appeal confirmed the decision of the High Court. Lord Denning M.R. formulated a new basis for assessing tortous liability and that was the proper law of torts. But Lord Upjohn thought that there was no analogy with the law of contract as the intention of the parties was totally irrelevant in creating tortuous liability and therefore, he thought that the doctrine should not be imported into torts from the law of contracts. In the House of Lords, the decision of the Court of Appeal was confirmed but the majority treated it as a question of quantification of damages and therefore the law of the Court i.e., English Law, was applicable. But at least two judgments tried to canvas for adoption of proper law of torts in England. (*Machaldo* v. *Frontes* was overruled by the House of Lords in *Boys* v. *Chaplin*.)

The same question again came up for consideration before the Court of Appeal in *Coupland* v. *Arabian Gulf Oil Co.* [(1983) 1 W.L.R. 1136]. The plaintiff whilst working for the Arabain Gulf Oil Company in Libya had an accident resulting in amputation of his leg below the knee. He filed a suit in England for claiming damages for the tort of negligence and breach of contract in causing the accident. It was held that Libyan Law was irrelevant to the claim in tort, since the tort was actionable by the *lex loci delicti commissi* as well as the *Lex Fori*, the ordinary common law principle of negligence would apply.

Though the doctrine of the proper law of torts has been criticised on the ground that it would lead to uncertainty, yet it is superior to the law of the Court and to the law of the place where tort was committed. It is superior, as a basis of liability, to the law of the Court because it will discourage the evil on forum shopping. It is superior to the law of the place of the commission of tort because such place may be accidental and totally irrelevant in assessing liability. This may be particularly so in the case of transitory torts.

After the decision of the House of Lords in *Boys* v. *Chaplain* [(1969) 3 W.L.R. 32], the learned writer Morris has formulated the rule as follows :—

The general rule is that, an act done in a foreign country is a tort and is actionable as such in England if two conditions are satisfied (1) it is actionable as a tort according to English Law, or in other words it would amount to a tort if the act were done in England; and (2) it is actionable according to the Law of the foreign country where it was done. However, a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

Application of the above rule poses a problem in a situation where the act originates in one country and is completed in another. These are known as double locality cases. One such case is *Metall & Rohstoff* v. *Donaldon Inc.* [(1985) 3 W.L.R. 563), wherein the Court of Appeal has said that, our courts will look back over the series of events constituting the tort and ask themselves "Where in substance did this cause of action arise ?" In answering this question the courts will apply exclusively English Law. If they find that the tort was committed (1) Within their jurisdiction then English Law would be applied; (2) in a foreign country they will impose liability only if (a) the relevant events would have amounted to a tort had they all taken place in England, and (b) the alleged tort would be actionable in the country where it was committed.

**Wrongs committed on the High Seas**

It is obvious that when a wrong is committed within the territorial waters of a country it will be deemed to have been committed within the territory of that country. However, certain rules of maritime law may also be applied. But when a wrong is committed outside the territorial waters the following rules are applicable :

(a) When a wrong has taken place within a ship, the law of the place of commission is the law of the ship's flag. In an English action, it would be considered as if the tort was committed in the territories of the State.

(b) In the case of collision between two ships, the general maritime law would be applied. In such a case the laws of the flags of the ships would be immaterial.

**Wrongs committed in and from the Air**

As a rule the general rules discussed above regarding liability for tortious act would also be applicable to torts committed in aircrafts. Liabilities committed in aerial navigation area, to a large extent, governed by internal convention and statutes based on such convention.

**The Place of Commission of an Unjustifiable Act**

Though we have often referred to "the place where the act was committed", it may always be not clear as to where the act is committed. The act might have originated in one territory and be complete in another. The weight of English authorities is in favour of considering that an act is committed in that place where it is completed. In *George Monro Limited* v. *The American Cynamid & Chemical Corporation*, (1944) K.B. 432 the facts were as follows :

As a result of the use of certain vermicide manufactured by certain American manufacturers, a certain English farmer suffered certain damage. The farmer brought an action against the English distributors, and succeeded. The English distributors in turn sued the American Corporation. The Court had to decide as to whether the tort was committed in England for purpose of granting leave to serve a notice of writ. The Court held that the tort which was the sale of a dangerous article, without giving a warning was committed in America. The Court observed that the relevant question there, was not where the damage was committed, but the relevant question was where the wrongful act was committed. As an act of sale was completed in America, the Court held the act was committed in America.

# 17

# THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Several theories are advocated to justify the recognition and enforcement of foreign judgments. Before going into the details of the theories, it is necessary to distinguish between recognition and enforcement. The foreign decree may have to be recognised in English proceedings, for example, in a matrimonial proceedings it may be relevant to recognise a foreign decree or in a matter of succession, it may be necessary to recognise a foreign adoption decree. Enforcement would mean giving effect to a foreign judgment. Mostly, the judgments which are to be enforced are judgments for payment of money.

## THE DOCTRINE OF ENGLISH COURTS

### 1. Comity

*Critically examine : Enforcement of foreign judgment.*
B. U. May 83

Comity is supposed to be one of the bases of recognition and enforcement of foreign judgments. The idea here, is that the Courts of one sovereign would recognise judgments of the Courts of another sovereign, on the basis of reciprocity. Story was an exponent of this doctrine. The doctrine is rarely true, in view of the fact that, the English Courts seldom enquire into the fact, as to whether the Foreign Courts would recognise their judgments or not. While enforcing a foreign judgment, other considerations find place in recognising or not such judgments. The trace of the doctrine of Comity, can only be found in International Conventions on enforcements of foreign judgments.

### 2. Obligation

Another theory, which is advocated as the basis of recognition and enforcement of foreign judgments, is that a foreign judgment creates an obligation which should be enforced by the English Courts. The doctrine of obligation can be accepted to a limited extent, as the basis of foreign judgment, but this theory fails to explain the basis of recognition of foreign judgments.

### 3. Justice

The real basis of recognition or enforcement of foreign judgments would be the same as the basis of Private International Law itself , i.e. JUSTICE as Lord Brougham observed in *Warrender* v. *Warrender*, (1835) 2 Cl 8 F. 488, the Court of England can hardly be said to act from *courtesy ex-comitate but ex-debito justitiae.*

### 4. Enforcement of foreign judgment

As a rule, at Common Law foreign judgment itself, could not be enforced. An action had to be brought on such foreign judgment, but now, under some statues, foreign judgments can be registered and then enforced as a decree of the English Court.

## THE CONDITIONS UNDER WHICH FOREIGN JUDGMENTS MAY BE ENFORCED

### 1. Competent Jurisdiction

*Examine the rules of English Private International Law regarding enforcement of foreign judgments.*

B. U. May 93

English Courts would recognise the decree of a Foreign Court only if such Foreign Court is competent. Competence may be either according to the national law of the country of the Court or it may be according to English rules of Private International Law. Generally, it is said, that competence of a Foreign Court would be determined according to English Private International Law. Lindley M.R. observed in *Pemberton* v. *Huges*, (1899 1 CH. 781) that if the Foreign Court was competent according to International Law, a foreign judgment could not be challenged. But Graveson is of the opinion that the English Courts cannot ignore the fact that a foreign judgment is a nullity on the ground that a Foreign Court is incompetent.

It has been held in *Adams* v. *Adams*, (1971) P. 188 that the foreign court must be a competent court by its Municipal Law also.

The following may be the circumstance under which the Foreign Court will be recognised to be a Court of competent jurisdiction :—

(i) *Actions in Personam.*—In the case of actions in *personam* the Foreign Court would be recognised to be competent under the following circumstances :

(a) If the defendant is present within the jurisdiction at the date of institution of proceeding, it is immaterial if the defendant is not present within such jurisdiction, subsequent to the institution. (*Schibsby* v. *Westenholz*, (1870) L.R. 6 Q. B. 155).

(b) If the defendant is a national of the country of the Court, it will generally be considered that the Court is competent. However, Graveson, is of the opinion that nationality may be relevant in Public International Law and in matters of criminal jurisdiction, but it cannot be a valid ground for exercising civil jurisdiction, when the defendant is not present within the jurisdiction of the Court.

(c) The Court will be considered to be competent if the defendant voluntarily submits himself to the jurisdiction of the Court. Such submission may be expressed or implied. It may be by agreeing to submit or by appearing as plaintiff in an unsuccessful action. The defendant will be subject to the jurisdiction of the Foreign Court if he submits himself without protest. But there is some doubt, as to whether the Court would have jurisdiction if the defendant appeared under protest. The Court of Appeal has held that when the property of the defendant is involved in the litigation, appearance under protest does not amount to submission. (*Re Dulles' Settlement No. 2*).

Answer the following giving reasons :—A judgment for damages in respect of a tort committed in the Isle of Man was obtained in a Manx Court against a domiciled Englishman residing in England, who had been duly served with process under a Manx rule, corresponding to the English Order 11, Rule 1. By his advocate, he entered a protest against the jurisdiction of Manx Court, but his motion to set aside the writ was dismissed by the Court after there had been argument on both sides. The defendant took no further part in the proceedings and the plaintiff having obtained judgment brought action in England to have it enforced. Will the plaintiff succeed ?

[Ans.—The facts of the case are similar to those in *Harris* v. *Taylor*. In this case the Court of Appeal held that there was valid submission to the jurisdiction of the Foreign Court. However, the decision is considered to be confined to the facts of the case and it is not an authority on what constitutes a submission to jurisdiction generally. (*In Re Dulles' Settlement* (No. 2) (1951) Ch. 842)

(ii) *Actions in rem.*—In the case of actions *in rem*, pertaining to property, the situation of property is considered as a valid ground for exercising jurisdiction.

(iii) *Actions pertaining to Domestic Status.*—The general rule here, is that, domicile is the basis for the exercise of jurisdiction over proceedings involving domestic States. But this rule is extended by the principles laid down in *Travers* v. *Holly* and *Armitage* v. *Attorney General* (Both these cases are discussed earlier).

**2. Final and Conclusive Judgment**

A foreign judgment will not be recognised unless it is a final and conclusive judgment. A judgment is considered final and conclusive only when the matter is completely settled and disposed off. It would be considered final and conclusive even though there is a possibility of an appeal to a higher Court.

In the cases of Award of alimony, or maintenance by Foreign Courts, they are not conclusive and final as the Foreign Court may vary them. They are final only when the Foreign Court has no power of variation.

**3. The Judgment must be for a definite Sum**

A foreign judgment *in personam* will not be recognised or enforced unless it is for a fixed and definite sum of money. It is for a fixed and definite sum of money if the sum can be ascertained by a simple arithmetical process. (*Beatty* v. *Beatty*, 1924, 1 KB 807).

## EFFECT OF MISTAKE ON A FOREIGN JUDGMENT

Once the above conditions are fulfilled the English Courts will not refuse to recognise or enforce a foreign judgment on the ground of either mistake of Law or mistake of fact. The foreign judgment cannot be questioned on merits (*Godard* v. *Gray*).

## DEFENCES TO ACTIONS ON FOREIGN JUDGMENTS

Though a foreign judgment is conclusive, and the English Courts do not reopen the merits of the case, yet certain defences are available against a foreign judgment. These defences are summarised below :

**(a) Fraud**

It is a good defence to an English action for the enforcement of a foreign judgment that such judgment was obtained by fraud. Such fraud may be in the nature of collusion between parties to foreign proceedings. It may be abuse of the procedure of the Foreign Court or it may be question of bias, on the part of the judges Fraud to be a defence must be such, as would render the foreign proceedings contrary to principles of natural justice.

**(b) Against English Public Policy**

The English Courts will refuse to enforce a foreign judgment if it is contrary to English public policy. Questions pertaining to English public policy have been discussed in detail in the next Chapter.

**(c) Disregard of English Ideas of Natural Justice**

Where a foreign judgment has been given in a matter contrary to English ideas of natural justice, the English Courts will not enforce it. *Macalpine* v. *Macalpine*, (1958) P. 35). The defences under this head may be on the ground that no notice was given to the other party, etc. A mere irregularity of proceedings will not be sufficient to challenge a foreign judgment if no substantial injustice is thereby caused. The Law on this points has been laid down, by the Court of Appeal in *Pemberton* v. *Huges*, as follows :

"If a judgment is pronounced by a Foreign Court over person within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the Foreign Court, unless they offend against English views of substantial justice".

## ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION

There are certain statutory provisions which provide for enforcement of foreign judgments by registration. They are as follows :

**(a) The Judgments Extension Act, 1868**

This Act permits enforcement of foreign judgments to a limited extent. The judgments registrable are those given in respect of debt, damages, or costs. The judgments of the Courts of England, Northern Ireland and Scotland could be registered in any of these Courts.

**(b) The Administration of Justice Act, 1920**

This Act provides for registration of judgments of Superior Courts in the British dominions, Protectorates and Mandated Territories.

**(c) The Foreign Judgments (Reciprocal Enforcement) Act, 1933**

This Act provides for registration of judgments of the Courts of Commonwealth countries and of other foreign countries on a reciprocal basis. The registration of judgments can be set aside on the following grounds:

(i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act; or

(ii) that the Courts of the country of the original Court had no jurisdiction in the circumstances of the case; or

(iii) that the judgment debtor, being the defendant in the proceedings in the original Court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original Court) receive a notice of those proceeding in sufficient time to enable him to defend the proceedings and did not appear; or

(iv) that the judgment was obtained by fraud; or

(v) that the enforcement of the judgment would be contrary to public policy in the country of the registration Court; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made.

## INDIAN LAW

A foreign judgment can be enforced by a suit upon the judgment in India. However, under Sections 44 and 44A certain foreign judgments can be enforced by proceedings in execution.

A foreign judgment is conclusive as to any matter adjudicated between the same parties or between parties under whom they or any of them, claim litigating under the same title. However, Section 13 of the Code of Civil Procedure provides that on certain grounds the conclusive nature of foreign judgments can be challenged; these grounds are as follows :

(a) where it has not been given on the merits of the case;

(b) where it has not been pronounced by a Court of competent jurisdiction;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of International Law or a refusal to recognise the law of India in cases; in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

# 18

# THE LIMITS FOR APPLICATION OF FOREIGN LAW

*Discuss briefly/ state shortly the various limits on the application of foreign law in the English Court.*

B. U. June 75
May 93

The rule of conflict of laws discussed in the previous chapters are subject to certain limits. Some of the limits have been already discussed. Those limits were particular to the relevant rules of conflict of laws. But apart from those particular limits, there are certain general limits on the application of Foreign Law, which need to be discussed. It has been noticed that the most important basis for applying the rules of Private International Law is the anxiety of the Courts to do justice. When the English Courts want to do justice, obviously it would be justice in the English sense. It is possible that the English concept of the justice would often be offended by a particular rule of Foreign Law. In such circumstances English concept of justice must prevail. Similarly there could be certain fundamental principles of English Law which must prevail over the rules of Conflict of Laws discussed in the previous Chapters.

The limits on the application of Foreign Laws can be summed up as follows :

(1) **Public Policy**

- (a) International relations.
- (b) Contracts in restraints of trade.
- (c) Trading with the enemy.
- (d) Liability for permanent maintenance of illegitimate children.

(2) **English Idea of Justice and Morality**

- (a) Acts contrary to English ideas of justice.
- (b) Contracts tainted with immorality.
- (c) Foreign confiscation and requisition of property.

(3) **Foreign Penal Laws**

(4) **Foreign Revenue Laws**

(5) **English Laws having Extra-territorial Operation**

## (1) PUBLIC POLICY

*Examine, with the help of case law, public policy as a limit on the application of Foreign Laws.*

B. U. Oct. 92
Nov. 93

Public policy is an indefinite concept which indicates that certain matters are regarded as fundamental to the State and society at large. The purpose behind public policy is to protect social institution. Such public policy might be laid down either by an Act of the Parliament or by a decision of the Court. Generally, the concept of the public policy is the same when it operates either in the field of Private International Law or in the field of purely local transactions. But its application may differ in decree and occasion. The English Courts have applied the concept of the public policy in a more liberal manner than they would do while dealing with purely municipal cases.

Continental writers also have a similar concept known as *ordre public*. They have also distinguished between internal and external *public order*. Though Lord Halsbury denied in *Janson* v. *Driefontein Consolidated Mines*, (1902) A.C. 484 at 490 that any Court could invent a new head of policy, yet the concept of public policy has been extended from time to time. There could be newer categories of public policy. Notwithstanding such possibility the categories of public policy are as follows :—

**(a) International Relations**

*Write a short note on— Public policy as a limitation on the application of Foreign Laws.*

B. U. Apr. 91

The English Courts will not assist any transaction which by its illegal purpose may threaten to compromise friendly international relations of the British Government. In *De Wutz* v. *Hendricks*, (1824) 2 Bing. 314 the Court refused to enforce a contract made in England, the purpose of the contract being to assist a rebellion by subject of friendly foreign State.

In *Regazzoni* v. *K.C. Sethia* (1944) *Ltd.*, (1958) A.C. 301, 318, ante, p. 367 the facts were as follows :

There was a contract for sale of Indian Jute bags which were to be delivered in Italy. It was the intention of the parties, however, that, the jute bags should be transhipped or sold in Italy to South African purchaser. Indian Law had prohibited exports to South Africa. The English Court refused to enforce such contract. While refusing to enforce the contract, the House of Lords made a distinction between the refusal of English Courts to enforce foreign penal and revenue laws, and their refusal to enforce a contract performable only by a breach of the law of a friendly foreign State. Non-recognition of a foreign penal law would not mean that that would be instrumental in promoting breach of such law. The Court took the view that it would refuse to enforce or to award damages for the breach of a contract, which involves the violation of Foreign Law in foreign soil.

**(b) Contracts in Restraints of Trade**

The English Courts will not enforce foreign contract which is in restraint of trade. A dicta to this effect can be found in *Rousillon* v. *Rousillon*, (1880) 40 Ch. D. 351.

**(c) Trading with the Enemy**

*Discuss : Arab Bank Ltd. v. Barclays Bank.*

B. U. Apr. 85

It is a well settled rule of English Law that the English Courts will not enforce a contract which is in the nature of trade with the enemy during the times of war. This is based on the rule of public policy that assistance should not be given to the enemy in time of war. Whether a particular transaction amounts to trading with the enemy or not is determined not by the intention of the parties, but by the actual or the possible results of the transaction. In *Arab Bank Ltd.* v. *Barclays Bank*, (1953) 2 Q. B. 537, affirmed (1954) A.C. 495, the facts were as follows :

The Arab Bank in Jerusalem had a large credit balance at the Jerusalem Branch of Barclays Bank, when the British mandate over Palestine ended in 1948 and war broke out between the custodian of Absentee Property of all assets of absentees, into which category the Arab Bank fell. Barclays Bank accordingly paid the credit balance to the Israeli Custodian and were sued in England by the Arab Bank for the equivalent sum as money had and received or under the doctrine of unjust enrichment. The defendant's head office was in England, but under the contract the plaintiff had submitted itself irrecoverably to the jurisdiction of the Courts of Jerusalem and payment to the Arab Bank would under the circumstances have been a criminal offence by Israeli Law.

The Court of Appeal held that the contractual relationship between the customer and the bank came to an end by war, so far as future transactions were concerned. The credit balance of the customer became a debt from the defendants to the plaintiff. But it was a debt which could be recovered only at the branch at which the account was kept.

**(d) Liability for Permanent Maintenance of Illegitimate Children**

Another ground of public policy was laid down in *Re Macartney*, (1921) 1 Ch. 522; cases 649. The facts were as follows :

The Court of Malta where the father of illegitimate child was domiciled had passed a judgment for the payment of maintenance of the child for the life-time of the child against the estate of its deceased father. The mother of the illegitimate child sought to enforce it against the estate in England. The Court refused to enforce the payment on the ground that the general permanent recognition of illegitimate children and their mother is contrary to the established policy in England.

## (2) ENGLISH IDEAS OF JUSTICE AND MORALITY

The concepts of justice and morality being relative, vary from one legal system to another. The English Court have refused to enforce a transaction, if a transaction offends English ideas of justice and morality though such transaction might have been valid under the relevant foreign law. Under this head the following principles can be discussed :

*Discuss 'English ideas of justice and morality' and 'foreign revenue laws' as limits on the application of foreign law.*

B. U. Oct. 85
May 92

**(a) Acts contrary to English Ideas of Justice**

This idea of justice has played an important role particularly in recognition and enforcement of foreign judgment. If the English Courts have felt that either inadequate notice was given to the defendant in a foreign proceedings or if the foreign Court had an interest in the outcome of the proceedings, they have refused to recognise and enforce such foreign judgment. These principles now have been incorporated in Foreign judgment (Reciprocal Enforcement) Act, 1933.

**(b) Contracts tainted with Immorality**

Contracts valid according to a relevant foreign law have not been enforced by English Courts on the ground of suppression of English proceedings or if the contract was of a champertous nature. It has been already noted that in *Hope* v. *Hope*, the English Court refused to uphold an agreement for collusive divorce.

**(c) Foreign Confiscation and Requisition of Property**

In the 20th Century there have been a number of confiscatory measures. The laws in several countries have transferred property compulsorily from the owner to the State or from the owner to the others. The attitude of the English Courts on this question can be summed up as follows :—

*Short note—Critically examine Foreign Penal Laws as a limit on the application of foreign laws.*

B. U. Oct. 92

> A foreign State has authority to deal with matters within its territory. Therefore, the confiscatory or such other order would be recognised in England, if it deals only with the property or persons within the territorial jurisdiction of such foreign State. *Luther* v. *Sagor*, (1921) 3 K.B. 532 Cases 637.

Such order will not be recognised in relation to property outside the territory or control of the foreign power at the date of the decree.

## (3) FOREIGN PENAL LAW

The English Courts refused to enforce a Foreign Penal Law. But it should be noted that the English Courts may recognise Foreign Penal Laws for certain purposes though they may not directly enforce such laws in England. It has already been noted in *Regazzoni* v. *K.C. Sethia* (1944) *Ltd.* (1958) A.C. 301, that a Foreign Penal Law was recognised and the Court held that it will not be an instrument in promotion of the breach of such Foreign Law. Similarly the proprietary rights acquired on the operation of a Foreign Law have also been recognised in England

*State the limitations placed by English Courts on the application of (i) foreign penal laws; (ii) foreign revenue laws.*
D. U. Oct. 85

## (4) FOREIGN REVENUE LAWS

As observed by Tomlin J. in *Re Visser*, (1928) 1 Ch. 877 Cases 646 that it is a well recognised rule of English Law that the English Courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States. The same principle was applied by the House of Lords in *Government of India* v. *Taylor*, (1955) 2 W.L.R. 303. The facts in this case were as follows :

The Delhi Electric Supply and Traction Co. Ltd. was a company registered in England that had carried on business in India. The company owed certain sum of money to the Indian Government by way of capital profits tax. The company went into voluntary winding up. The House of Lords held that the claim of Indian Government could not be enforced by the English Courts.

A distinction must be made between the foreign revenue laws and laws relating to foreign exchange control. The laws relating to foreign exchange control are not for the purpose for raising revenue but they have the job of maintaining the international value of its currency. As observed by Upjohn J., in *Re Claim by Helbert Wagg & Co. Ltd.*, (1956) Ch. 323, at p. 351, the English Courts would recognise the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. The English Courts would recognise such foreign regulations, even though such regulations may have the sanction of foreign criminal law or such regulations may have partially confiscatory character.

The decision in *Ralli Bros* v. *Compania Naviera Sota* v. *Aznar*, (1920) 2 K.B. 287, & Chap. II has been already referred to in the Chapter on Contracts.

## (5) ENGLISH LAW OF EXTRA-TERRITORIAL OPERATION

The Acts of the Parliament having extra-territorial jurisdiction are generally concerned with certain social and political factors, implicit in public policy. They are made properly effective through the legislature. Therefore when an English statute expressly or by a necessary implication is intended to operate outside England, the rules of Private International Law discussed in the previous chapters will be subject to such English Laws having extra-territorial operation. But Act of the Parliament will be given a strictly territorial effect, unless an English statute expressly or by a necessary implication is intended to operate outside England. In *Brook* v. *Brook* and *Pugh* v. *Pugh* marriage celebrated outside England were held void as they infringed the marriage law of England.

In *Boisevain* v. *Weil*, (1950) A.C. 327, the facts in this case were as follows :

A British subject who was resident in Monaco had borrowed from a Dutch subject also resident in Monaco. He had borrowed a sum of French Francs during the war and according to the contract it had to be repayed in Sterling after the war. It was held by the House of Lords that the Defence (Finance) Regulations, 1939 prohibited such dealings and the regulations were applicable to British subjects everywhere.

# INDEX OF CASES


**A**

Abbot Smith *v.* Governor of the University of Toranto 124
Abraham *v.* Att. Gen. 45
Adam *v.* Adams 128
Alcomb Ltd. *v.* Republic of Colombia 104
Alcock *v.* Smith 60
Alhaji Mohammed *v.* Knott 31
Ali *v.* Ali 31
Angelo *v.* Angelo 114
Annesley, Re 70
Anziani, Re 79
Apt *v.* Apt 34
Arab Bank Ltd. *v.* Barclays Bank 133
Armitage *v.* Att. Gen. 71, 111, 112, 113, 128
Arnold *v.* Arnold 111
Askew, Re 70
Assunzione, The 53
Att. Gen. *v.* Bouwens 78

**B**

B's Settlement, Re 49
Babcock *v.* Jackson 124
Baccus S.R.L. *v.* Servicio National del Trigo 104
Baindail *v.* Baindail 30, 51
Bank of Africa *v.* Cohen 57
Beatty *v.* Beatty 129
Beaumont, Re 20
Bethell, Re 39
Berchtold, Re 65
Bhamboo *v.* Ram Narain 97
Bischoffsheim, Re 42
Boissevain *v.* Weil 136
Bomgbose *v.* Daniel 42
Bonacina, Re 64
Boys *v.* Chaplain 124
Bremer *v.* Freeman 86
British South Africa *v.* Campanhia de Mocambique 100
Brinkley *v.* Att. Gen. 29
Brook *v.* Brook 35, 36 ,135
Brown *v.* Brown 114
Brude *v.* Bruce 19
Burbidge, Re 49

**C**

Calvin's Case 9
Cammell *v.* Sewell 74
Casey *v.* Casey 118
Cesena Sulphur Co. *v.* Nicholson 24
Chapelle *v.* Chapelle 120
Chapman *v.* Cottrell 61
Cheni *v.* Cheni 31
Choudhary *v.* Choudhary 121
Cohn, Re 66
Cohen *v.* Rothfield 102
Coleman *v.* Shany 31
Collier *v.* Riwaz 69
Compagnie de Armement Maritime S.A. *v.* Compagnie Tunisienne de Navigation S.A. 54
Compania Naviera Vascongada *v.* S.S. Christina 106
Corbett *v.* Corbett 120
Cowan *v.* O'Connor 56
Cook's Trust, Re 21
Coupland *v.* Arabian Gulf Oil Co. 125
Cranston *v.* Johnston 100

**D**

D'Almedia Araujo Ida *v.* Sir Fredrick Becker & Co. Ltd. 55
Daimler Co. Ltd. *v.* Continental Tyre and Rubber Co. 24, 103

Dalloz 68
Dalrymple v. Dalrymple 34
De Nicols v. Curlier 84
De Renville v. De Renville 37, 117, 118
Deveze, Re 61
De Wilton, Re 33
De Wutz v. Hendricks 133
Didisheim v. London and Westminster Bank 50
Di Savini v. Losada 48
Dollfus Mieg-el Cie v. Bank of England 106
Donaldson v. Donaldson 17
Doucet v. Geoghegan 13
Duke of Wellington, Re. Deceased 70
Dulles' Settlement (No. 2) Re 46, 96, 128
Dunne v. Saban 111

E

Easterbrook v. Easterbrook 117
Egerton's Will Trust, Re 83
Egyptian Delta Land and Investment v. Todd 24
Embiricos v. Anglo-Austrian Bank 60
Ewing v. Orr-Ewing 100
Exparte Ghulam Fatima 122

F

Fehmarn, The 97
Feuvre v. Sullivan, Re 80
Fitzgerald, Re 84
Forgo's Case 68
Forsikring Sakticselskapet Vesta v. Butelur 54
Freeman v. East India Co. 76

G

Galene v. Galene 120
Gansloser's Will Trusts, Re 87
Garthwaite v. Garthwaite 118
George Monro Limited v. The American Cynamide and Chemical Corp. 126
Girdhar v. Kassigar 98
Godard v. Gray 129
Goodman's Trust, Re 43
Govt. of India v. Taylor 135
Gray v. Farmosa 110, 120
Groos, Re 86
Grove, Re 43

H

Halley, The 123
Harrison v. Harrison 19
Har-Shefi v. Har-Shefi 116
Harvey v. Farnie 30
Helbert Wagg and Co. Ltd. 135
High Commissioner of India v. Ghosh 103
Hooper v. Hooper 38
Hooper v. Gumm 75
Hope v. Hope 57, 134
Huber v. Steiner 65
Hutter v. Hutter 117
Hyde v. Hyde 29, 31, 108

I

Income-tax Commnrs. v. Premsen 93
Indyka v. Indyka 113, 114, 115
Intpro Properties Ltd. v. Sauvel 104
Inglis v. Roberston 75
Inglis v. Usherwood 74
Inverclyde v. Inverclyde 116
Industrie, The 55

J

Jacobs v. Credit Lyonnais 54
Janoo v. Batchu 98
Janson v. Driefontein Consolidated Mines 133
Joseph v. Joseph 116
Juan Ismail & Co. v. Republic of Indonesia 105

K

Kahan v. Federation of Pakistan 103
Kahler v. Midland Bank Ltd. 55

Kelly *v.* Selwyn 50
Kesovji *v.* Khimji 98
Kenward *v.* Kenward 33
Kochanski *v.* Kochanska 39
Koechlin *v.* Kestenbaum 60
Korvine's Trust, Re 66

L

Langley's Settlement Trusts, Re 27
Lashley *v.* Hog 33
Lee *v.* Abdy 79
Lee *v.* Lau 116
Le Mesurier's Case 113
Lepre *v.* Lepre 120
Levett *v.* Levett & Smith 112
Lewal's Settlement Trusts, Re 90
Liverpool Marine Credit Co. *v.* Hunter 75
Lord Advocate *v.* Jaffrey 22
Louis De Readt *v.* Union of India 17
Luck, Re 26
Luck's Settlement Trust, Re 44
Luther *v.* Sagor 134

M

Macalpine *v.* Macalpine 130
Macartney, Re 134
Machaldo *v.* Frontes 123, 124
Maldonado, In the Estate of ... 64, 66
Maher *v.* Maher 29, 30
Male *v.* Roberts 51
Maloji Nair Singh Rao *v.* Shankar Saran 98
Marinero, The 101
Manning *v.* Manning 112
Marshall, Re 46
Martin, Re 14, 18, 82, 88
Mary Moxham, The 124
May *v.* May 17
Mayor of Canterbury *v.* Wyburn 87
McHenry *v.* Louis 102
McMorram, Re, Deceased 91
Mehta *v.* Mehta 31
Metlies *v.* National Bank of Greece and Athens 26
Metall & Rohsoff *v.* Donaldon Inc. 125
Metro Plan Inc. *v.* Kotcher Turner, Inc. 76
Mette *v.* Mette 36
Metzger *v.* Metzger 114
Mighell *v.* The Sultan of Johore 103
Mitford *v.* Mitford 120
Mount Albert Borough Council *v.* Australasian Temperance etc. Society 52
Mountbatten *v.* Mountbatten 112

N

Nachimson *v.* Nachimson 29, 67
Narain *v.* Balabadra 98
Nelson *v.* Bridfort 87
Negent *v.* Vetsera 48

O

Ogden *v.* Ogden 34, 64, 65
Ohochuku *v.* Ohochuku 26

P

Paine, Re 36
Parkasho *v.* Singh 32
Pelegrim *v.* Courts 50
Pemberton *v.* Huges 128, 130
Penn *v.* Lord Baltimore 99
Philips *v.* Eyre 123, 124
Philipson-Stow *v.* Inland Revenue Commisioners 87
Pillinski *v.* Pillinska 38
Poney *v.* Harden 90
Porto Alexandre, The 105
Pretson *v.* Pretson 39
Priest, Re 87
Pugh *v.* Pugh 135

Q

Quazi *v.* Quazi 121
Queensland Mercantile and Agency Co., Re 79, 87

R

R v. Hammersmith, etc. 115
R v. Madan 105
Raffenel, In the Goods of 19
Rahimtoola v. Nizam of Hyderabad 103, 106
Ralli Bros. v. Compania Naviera Sota Y. Aznar 56, 135
Ramsay v. Liverpool Royal Infirmatory 15, 17
Ramsay-Fairfax v. Ramsay-Fairfax 117
Regazzoni v. K.C. Sethia Ltd. 56, 58, 133
Republica de Gautemala v. Nunez 78
Robinson Scott v. Robinson Scott 111, 112, 114
Ross Smith v. Ross Smith 117, 119
Ross, Re 70
Rousillon v. Rousillon 133
Russ v. Russ 116

S

Salvesen v. Administrator of Austrian Property 26, 118, 120
Sardar Gurdayal Singh v. Raja of Faridkote 119
Satya v. Teja Singh 115
Sawer v. Shute 81
Schibsby v. Westenholz 128
Scott v. Att. Gen. 37
Scullard, Re 22
Sealey v. Callan 101
Selot's Trusts, Re 27
Shahnaz v. Rizwan 32
Shaw v. Gould 41, 43
Simonin v. Mallac 118, 119
Sinha Peerage Claim 30
Sotto-mayor v. De Barros (No. 1) 36
Sotto-mayor v. De Barros (No. 2) 29, 51
Srinivasan v. Srinivasan 30
Starkowaski v. Att. Gen. 3, 38
Stranksy v. Straniksy 110
Swedish Central Rly. v. Thomson 24
Swiss Bank Corpn. v. Boehmische Industrial Bank 81

T

Tames Miller & Partners v. Whitworth Street Estate (Manchaster) Ltd. 54
Taczanowska v. Taczanowski 38, 39
The Industrie 55
Thompson v. Thompson 93
Tijanic v. Tijanic 114
Tolten, The 100
Tomkinson v. The First Pennsylvania Banking and Trust Co. 53
Torni, The 52, 53
Traders Finance Corpn. v. Dawson Implements 76
Travers v. Holley 111, 112, 113, 122

U

Udny v. Udny 14, 15

V

Vita Food Products v. Unus Shipping Company 52

W

Wallach, Re 21
Warrender v. Warrender 36, 127
Westminster Council v. Government of the I.R. of Iran 104
Wilby Re 46
Wilson, Re 46
Winans v. Att. Gen. 15
Wolfenden v. Wolfenden 40
Wood v. Wood 28
Worms v. De Valdor 26

Y

Yusuf v. Yusuf 115

Z

Zanelli v. Zanelli 110
Zivrostenska Banka National Corpn. v. Frankman 55