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Article : The issue as to British *renvoi* in the context of the EU Succession Regulation 650/2012 (the "Regulation").

4th May, 2015.

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*Please note that this document has been slightly modified and clarified from that of 1st May, 2015*

There is considerable confusion in the minds of the French advisor in relation to the forced heirship exclusions available under the Regulation for both those British nationals resident in France and those resident within the United Kingdom. This has generated a form of *immobilisme*, rather than a risk conscious action.

I hope that this first summary, mainly directed toward British citizens habitually resident in France will assist here. A second summary for those who are habitually resident within the United Kingdom addressing French interests will follow, as these need not be British citizens.

One fundamental point in the drafting and structure of the EU Succession Regulation is being missed in the current debate. The theories abound in Private International law circles as to whether there is a universal Private International Law or not. That is an abstract theoretical issue of little or no relevance here. We are not dealing with natural law nor any relic of the *ius gentium* applicable to immigrants in the Roman Empire at this time. We are dealing with allocation of jurisdiction to a given Court and then but only then to the laws, generally, which that Court will apply. That is the crux of the issue addressed by the Regulation.

I start off with the mandatory interpretative principle established in §57 of the Preamble to the Regulation which is of full legal effect; I will revert to that later:

> ***..... Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State**.[1]

[1] My emphasis.

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The point is that the Regulation, in line with jurisdictional practice throughout Europe, makes no attempt to do more than it can. The aim of the Regulation is to allocate Jurisdiction over a succession to a court, and regulate afterwards issues of ancillary or subsidiary jurisdiction from that defined point of reference. The principle is that the Court of the Habitual Residence of the deceased has jurisdiction over the succession as a whole. That is the basis of the enunciation at article 4 of the Regulation, which states its application to the case where the individual *de cujus* concerned has their habitual residence in a Member State. I am assuming that this definition has to be taken as excluding the Opt-Out States, being Denmark Ireland and the United Kingdom.

The issue of the option to have the law of the nationality apply to the deceased's succession is an express exception to that rule. Once it is understood that that the Court seized by the Regulation will needs therefore apply the law of another State, be that a Member State or another state, then the issue of *renvois* becomes clear, and the limitations upon "renvoi" and its scope contained in the Regulation at article34, as interpreted as mandated by Preamble § 57 can be defined and understood.

The error made by continentally trained and biased lawyers as to what *renvoi* is in British, here English law is engendering problematic chaos in what is otherwise a very simple situation. The solution is provided in the Regulation.

Put simply the term *renvoi* in English may not refer to exactly the same principles as those prevalent within Europe and honed down by the Regulation.

I will now attempt to summarise the English conceptualisation as to how the concept of *renvoi* is effectively a part of the allocation of jurisdiction in England and Wales, in I hope a sufficiently detailed continental manner. Please bear with me as I do it.

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As observed by Dicey[2], there is a prior issue as to whether the Court has jurisdiction or not. It is only once that question is answered in the affirmative that *renvoi* comes into play to determine whether the Court sits as an English Court or as a foreign court. Once that is understood, the relevance of *renvoi* is put in its correct context, rather than being immediately allowed out of the padlocked cage of its meaning and relevance. That concept is more or less evenly applied in Continental Europe, but I beware of generalisations, here.

In this context, it may be best to revert back in history to Note 1 in the Appendix to the second edition of Dicey's The Law of England with Reference to The Conflict of Laws, 1908[3]. I stress that his work was written without amendment after the coming into force of the Land Transfer Act 1897 in England and Wales which first introduced the concept of a real representative as an executor over English realty, which prior to that passed by direct seisin of the heir or legatee, without intermediary administration. In relation to English law succession as to English or foreign immovables that is of great importance in this context, as we will see later.

Dicey draws conclusions out of the English cases as to what the position is in general in relation to foreign issues, and given his status as a Barrister of the Inner Temple and Professor of Law at Oxford, this summary has been treated as authoritative, but not binding within the context of the overriding jurisdiction of the British Courts concerned[4].

It is interesting to note the context within which the academic concept of *renvoi* in England developed to describe existing legal phenomena. That is necessary to ensure that it is not taken to do or mean more or less than its purpose and is not taken abusively outside its context.

Firstly the British Court has to have jurisdiction in or over the matter. If it has none, then there is no reason for *renvoi* to be introduced (see below). Articles 4 and 10 of EU Regulation 650/2012 need to be born in mind here in relation to Member States Courts.

The British Courts will not generally attempt to seize inappropriate jurisdiction without a real connecting factor to enable its jurisdiction; here in this case a personal jurisdiction over the deceased, by way of domicile, as opposed to nationality, or a practical jurisdiction over assets

[2] The Law of England with Reference to The Conflict of Laws, 1908, as later expanded
[3] This is appropriate as I will be referring to the Land Transfer Act of 1897which was of immediate relevance to him at the time of his writing.
[4] The Continental lawyer has a tendency to accord greater weight to the opinions of Professors of law than the English Courts, Dicey being one major exception.

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within the jurisdiction as the *lex situs* or place of registration. The issues as to Probate in either case are therefore different. The type of jurisdiction exercised is also different, as, in the last case, it is an ancillary jurisdiction as the English Court does not have full jurisdiction over the deceased person's worldwide estate. There should be no amalgam of these, as to simplify would be to distort.

I stress that the English Courts have had no difficulty in accepting that a Foreign Court might refer to the law of a different nationality in its allocation of the laws applicable: *In re Trufort* (1887) 2 P.D. 94, in particular at page 612.:

There is very little reference to the specific concept of *renvoi* in the prior judgments of the English Courts. Why? Simply because it involves a fiction determining how the English Court is to exercise a jurisdiction which it will have already assumed by that stage in the argument. There is a prior procedure to assume jurisdiction before any issue arises as to whether *renvoi* becomes applicable or not. The principle of *renvoi* in British[5] law is to determine which law the British Court is to apply, either English, British or foreign; and if the latter in what manner it is to act as if it were a foreign court and the extent of the foreign law which it will apply. Either all of it, including the foreign doctrines of Private International Law comparable to *renvoi*, or part of it excluding that foreign doctrine and potential *renvoi* back[6]. The whole *renvoi* issue is related to fears of enforceability of the resulting decision in a relevant area. I would suggest that once seen in that light the continental concerns as to the substantive value of the decision will be put in their place.

I stress here that if the French Court already has jurisdiction over the succession under article 4, that that will be an issue which will be respected by the English courts, prior to their attempting to assume jurisdiction under for example domicile of origin. There may be issues as to which Court gets there first, but that is a separate set of issues.

From that distinction, Dicey was able to formulate the theory of total *renvoi* and consider it to be applied by the British Courts. He did not consider that partial *renvoi* was the guiding principle, in an attempt to conceptualise what is in effect a matter of comity and enforceability of decisions. He accepted the first issue to be addressed was whether the British Court had to assume jurisdiction in the first place. That therefore is the point of departure in respect of the Regulation which is expressed not to apply within the United Kingdom in §82 of its preamble.

[5] "British" and "British Islands" means and includes the United Kingdom of which England and Wales are a part and the Crown Peculiars or Dependencies.
[6] Article 34 of the Regulation deploys both total renvoi (1) and partial renvoi (2) in different cases.

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> (82) In accordance with Articles 1 and 2 of Protocol N° 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.

I cite article 2 of Protocol N° 21, as in my view it confirms the position that the United Kingdom is a State, and therefore a third state for the purposes of the Regulation:

> Article 2
> In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the Community or Union acquis nor form part of Union law as they apply to the United Kingdom or Ireland.

There is no limbo allowed here. Note that it does not go as to defeat a right, once acquired under a measure within the remainder of the EU, those rights will therefore needs be respected under ss. 2 and 3 ECA 1972.

In my view, although the Regulation is not binding or "applicable" within and to the United Kingdom, the English Courts will however have to take it into consideration in accepting any initial jurisdiction over a succession or its administration and would be wrong not to under s.2 (1) ECA 1972, insofar a right given indirectly to an individual under the Regulation is concerned, and also more generally under s.3 (1) and (2). Generally, in the case of a Briton habitually resident in France, there should be no reason for the English Court to be seized, saving in relation to assets situated within its probate Jurisdiction. The effect of the Opt-out is not to deny or negate the application of the Regulation in Europe and in another Court system. The ECA is an Act of Parliament which the Courts are required to observe. The Crown or Parliamentary inaction in not adhering to the Regulation is not an Act repealing those quasi-constitutional sections.

How are the English Courts to react to a right granted under the Regulation to an individual habitually resident in France who exercises his right to opt for his nationality in a French will?

S.2. General implementation of Treaties.

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> (1)All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.

The following statement or guidance in §57 in the preamble to the Regulation is of interest here:

> (57) The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for *renvoi* either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such *renvoi* should be accepted in order to ensure international consistency. ***Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State**.[7]

It means, does it not, that it is only the *partial renvoi* in any case of a *renvoi* to the law a non participating Member State which would be applied, not a total *renvoi*. The Opt Out States are not delivered into a form of Limbo in his matter, they have to be treated as third states to avoid the incoherence and inconsistency that that would produce. The result is that the English hypothetical Court would not apply French law as there is no *total renvoi*.

As I have shown, that will be the French Court applying English law without the *renvoi* back. To my mind, this means that the scope of application of *renvoi* within the jurisdiction of a Court of a Member State rendered jurisdictionally competent under article 4 should be constrained in the case of the exercise of a choice of law under article 22.

Assuming therefore that the French Court has jurisdiction in the sense that it asserts it under article 4, to hear and adjudicate on the succession, and to deal with it, there will be no *renvoi* by the hypothetical English Court back to French law, contrary to what certain French lawyers have been heard to say. The Regulation as applicable in France excludes it and requires that English domestic law be adopted despite its tendency to total *renvoi*. This is where the distinction between jurisdiction and the law involved in the *renvoi* becomes apparent. The notion of *partial renvoi* in his case will be respected by the hypothetical English Court, as, put squarely it is none of

[7] My emphasis.

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its business how the French Court deals with the case over which it has full and final jurisdiction. I stress that here it is the French Court in charge.

If a British citizen habitually resident in France makes a will opting for the law of his nationality, the French Court will simply not be able to make French law applicable within its jurisdiction owing to the interpretative direction given to it under § 57 of the Preamble in relation to article 34 which only enables a *partial renvoi* thus excluding further *renvoi* back.

The deployment abroad of United Kingdom *renvoi* in the manner currently being proposed by certain French lawyers will not lead to "international consistency", but chaos. Here it is clear that the reference here to a third state refers to any state other than a participating Member State. King Lear's genius as to interpretation may be summarised as follows: to hold otherwise "that way madness lies". Omitting the principle of *partial renvoi* contained in §57 is a step towards madness generating the very inconsistencies that that paragraph expressed itself to be avoiding and eliminating.

So, back to generalities : in what circumstances, article 4 aside, will the English court have jurisdiction in the first instance, and if so, what law will it apply and in what capacity?

Historically, working from a conflict of law perspective English law only seeks to apprehend and understand foreign law when it is relevant to the assets or the person within its jurisdiction. I will not say more here than that where the individual remains domiciled within the United Kingdom, whether resident there or not, the Administration of Estates Act 1925[8] as amended gives probate jurisdiction to the English court, and a grant of probate over a will or the estate may be obtained. Where the individual concerned is not domiciled in England and Wales, the Probate court will generally only have jurisdiction over the English situs assets and as a matter of enforceability will not seek to go further.

Here given the issue of the relationship enclosed within Regulation 650/2012 between Nationality on the one hand and Domicile or habitual residence on the other, it might be good to revert to Lord Hope's citations and comments in the recent case of Marks v Marks [2005] of the Judgment of Lord Westbury in *Udny v Udny* (1869) LR 1 Sc & Div 441, 457:

Lord Hope citing Lord Westbury:

[8] Note however the comments on the effect of the Land Transfer Act 1897 on the common law prior to that in relation to succession to immovables in England and Wales.

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'§4. "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend."

5. Translated into language with which we are familiar today, the point that Lord Westbury was making was that cases where a question of public law is in issue must be distinguished from cases where the issue is one of private law. Public law issues raise questions which concern what Lord Westbury described as the person's political status. The criteria by which status for the purpose of these questions is to be judged may differ from country to country, according to the rules that it lays down as to who may lawfully enter or lawfully remain there. Private law issues, on the other hand, are referred to the law of the person's domicile. The criteria for the determination of a person's domicile are governed by a single principle which ought to be capable of being applied universally. The importance of this distinction has not always been recognised.'

Lord Hope continues at § 8

'8. The chapter of the Digest in which the fragment appears is headed "*Ad municipalem et de incolis*". A *municipium* in Roman law was a town, particularly a town in Italy, which possessed the right of Roman citizenship but was governed by its own laws. Chapter 50 deals with the rights of persons resident in a *municipium* and describes the rules by which it was determined whether a person had a *domicilium* there. As for *incolae*, the following definition is provided: *Incola est, qui in aliqua regione domicilium suum contulit, quem Graeci* πάροικον *appellant*. [An *incola* is a person who has taken up his *domicilum* in a place, whom the Greeks call a πάροικος.]: Digest, 50, 16, 239. The Greek word πάροικος was regarded by Justinian as having the same meaning as the Latin word *colonus*: Justinian, 1, 34, 1. As Buckland, A Textbook of Roman Law, 3rd ed (1963) p 86, note 14 explains, persons resident in a community had widely different civil rights from the point of view

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of *civitas* according to their classification in society. These rights included the use of public facilities such as baths, and the right to invoke the civil jurisdiction of the magistrate. Leaving aside those residents who because they were *cives* were specially privileged, there were various other classes of residents such as *coloni*, or *incolae*, whose rights were more or less restricted according to the class in which the person was placed. These disabilities related to matters of public as well as private law. Persons resident in the Latin colonies, for example, were on a level with Romans in the ordinary relations of private law, but they could not serve in Roman legions or hold a Roman magistracy: Buckland, pp 92-93.

9. It would not be surprising to find that there was a rule in Roman law that a person had to be lawfully resident in the community before he could acquire a *domicilium* there, as the law did not distinguish between the public and the private law consequences of his presence in the community. But I think that the concept embraced by the word *domicilium* in Roman law is more accurately reflected today, as it is in civilian jurisdictions, by the words "home" or "residence" than by the word "domicile". The word "home" in article 8(1) of the European Convention for the Protection of Fundamental Rights and Freedoms, for example, is expressed in other languages as "*suo domicile*", "*proprio domicile*" and "*suo domicilio*". With us the word "domicile" has acquired a narrower meaning[9]. It refers to what Lord Westbury described as a person's civil status for the purpose of determining various rights in private law.'

The concept of nationality contained in the Regulation is one of Public Law, as opposed to the private law concept of habitual residence. There is no doubt that Lord Hope was referring in his judgement to domicile as being an insular variant upon the continental private law allocation of habitual residence as a congruent concept to domicile. That is important in considering any corollary between that of the British concept of domicile of origin, and that of nationality in this area. The Continentals do not need to assimilate or address the issue of the domicile of origin, as this is not part of their classification arrangements as to jurisdiction over the individual. However, to the extent that there may be factual issues involved, in certain circumstances, a

[9] I would suggest "different" as it can in effect be broader, as will be seen below.

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parallel might be drawn between the concept of nationality, a public law concept, and that of domicile of origin, a private law concept. The parallel is by way of contrast rather than comparison.

This is an old chestnut, as the EU Jurisdiction Regulation Council Regulation (EC) N° 44/2001 by a supreme instability of drafting would send a British court to its own definition of domicile, apparently, rather than to the prior Community law notion of residence, which was prevalent throughout the prior EU Jurisdiction Conventions. The potential conceptual chaos caused by this in jurisdictional issue is immense. see the Preamble

> (11) .....The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> (12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

then

> *Article 59*
> 1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.
> 2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

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The chaos is that an individual who has an English domicile of origin from a mother or father may in practice find themselves sued in the British Courts without any allusion to the fact that he may not in fact have any residence connection with the United Kingdom, and no address for service within the jurisdiction. As a pan European concept of habitual residence is not used as a connecting factor in that Regulation, no need was seen to incorporate a further limitation on *renvoi* there or in Regulation 650/2012.

I wish to stress here that in English conflict of laws cases, questions of jurisdiction frequently tend to overshadow questions of choice of law.

There is therefore a potential solution to the issues raised as to what law is to be applied under the Succession Regulation. Is the matter actually to be brought before the English Court in the first place?

Here I refer to Dicey's comment at § 2 of the Appendix at page 719:

> "In truth, the acceptance of the doctrine of renvoi by English Courts is most intimately connected with their theories as to jurisdiction."

So, using the example of a British Citizen habitually resident in France who executes two wills, one for his English assets with the nomination of an English executor, and the main one, for his French assets, with an English law option; but appointing a French *executeur testamentaire* under the relevant provisions of the Code civil, varying the attribution of powers as he is entitled and see fit.

There is therefore a first jurisdictional allocation process prior to *renvoi*:

1. Under the Regulation: Is the deceased habitually resident somewhere, and if so where?

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a. If in France, article 4 applies to the succession as a whole and there will be no renvoi were French law to be applied. Article 34 is of no application;
b. If in the United Kingdom, France would not take jurisdiction over the whole succession, but only as an subsidiary jurisdiction under article 10;

However

c. If the deceased is considered domiciled, for example by way of origin, in France under the English concept, albeit habitually resident in England, the English Courts would only have probate jurisdiction over British assets, not over assets elsewhere, including France and would hesitate to act on the basis of a domicile as there would be significant IHT implications on the grant of probate were domicile to be used as an admitted basis for the grant.

The difficulty here is to determine whether the existing English deployment of the concept of *renvoi* is any more than a convenient theory to explain how the Court approaches the matter of initial jurisdiction. Does it decide to sit as an English Court or as a foreign court is decided after it decides whether it may sit as a court in the first place? Yes, but only after. That is where the Regulation's mandatory allocation of jurisdiction to the Court of the Member States trumps any further discussion as to jurisdiction, I would suggest under ss. 2 and 3 ECA 1972. That the Regulation is rendered Opt Out by Parliamentary inaction is not sufficient to override these sections.

In other words, if, here, English law is to apply, it may simply allocate jurisdiction to a foreign court or system of administration without concerning itself as to *renvoi*. This is where the Continental approach differs, as evidenced by their obsession with *renvoi* developed in correspondence between ECAS Europe with Dan Harris in order to resolve purely esoteric issue of no relevance to the application of the laws of England and Wales.

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The interim conclusion being that the Regulation itself in this case provides for a *partial renvoi*, I will now go deeper into the English mechanics. Here it is necessary to cite the clear minded academic authority, and if it can be graced with the term legal authority of Professor North of Oxford University. Halsbury's Laws of England Conflict of Laws (Volume 19 (2011) §729[10] :

> "The administration of a deceased person's assets is governed by the law of the country from which the personal representative derives his authority to collect them[1]. Thus irrespective of whether the administration is principal or ancillary[2], assets administered by an English personal representative[3] must be administered according to English law[4], and assets administered by a foreign personal representative[5] must be administered according to the law of that foreign country[6].
>
> A personal representative who has collected assets in a foreign country under a grant obtained there is thus entitled to hold them against a personal representative under an English grant[7], and a personal representative under an English grant is not accountable in his capacity as personal representative for assets received by him under a foreign grant[8]."

This is not *renvoi*, deciding whether -figuratively- to wear wigs or sit or plead bareheaded; it is administration. The rule applies irrespective of whether the administration is principal, which it would be were the individual to be domiciled within the United Kingdom in the Probate jurisdiction, or outside it. In other terms, for the theoretical English Court, the notion of habitual residence and nationality option is not in issue at that point. If the succession is managed with the appointment of the equivalent of a personal representative abroad, in other words in the case of an *executeur testamentaire*, the English courts will submit to that foreign set of administration principles, as there is nothing in England and Wales which requires the Probate Court to intervene. That would be the case even were the individual habitually resident in France to not have lost a domicile within the United Kingdom whether that be a domicile of choice or a domicile of origin. In essence that is resolved by the principles of conflict or rather

[10] Succession of learned "Oxford" presence in this area.

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the absence of any conflict, rather than by inventing them under the more esoteric Private International Law.

Footnotes to §729 are:

- 1 *Preston v Melville* (1841) 8 Cl & Fin 1, HL; *Blackwood v R* (1882) 8 App Cas 82, PC; *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Ewing v Orr Ewing* (1885) 10 App Cas 453, HL; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA; *Re Wilks, Keefer v Wilks* [1935] Ch 645; *Re Kehr, Martin v Foges* [1952] Ch 26, [1951] 2 All ER 812. As to the appointment and powers of personal representatives generally see **wills and intestacy** vol 103 (2010) para 605 et seq.

  The United Kingdom is a signatory to the Convention Concerning the International Administration of the Estates of Deceased Persons (The Hague, 2 October 1973) which entered into force on 1 July 1993, but at the date at which this volume states the law the United Kingdom had not ratified that Convention.

- 2 Principal administration is administration of the deceased's assets under the authority of the country of the deceased's domicile; ancillary administration is administration under the authority of some other country.
- 3 . I.e. a person administering the assets under the authority of English domestic law, either by virtue of entitlement to an English grant of probate as an executor, or by virtue of an English grant of letters of administration. For present purposes, an English personal representative includes a personal representative acting under a grant resealed in England pursuant to the Colonial Probates Act 1892 or under a Scottish confirmation or Northern Ireland grant of representation recognised by virtue of the Administration of Estates Act 1971 s 1: see **wills and intestacy** vol 103 (2010) para 831 et seq. See also Dicey, Morris and Collins *The Conflict of Laws* (14th Edn, 2006) paras 26-019–26-020 (p 1222). As to the meanings of 'English' and 'English law' see para 305.
- 4 See the cases cited in note 1; and paras 732–735.
- 5 Ie a person administering the assets under the authority of the law of a foreign country, in some cases by virtue of a grant from the courts of that country, but not in all cases: see e.g. *Re Achillopoulos, Johnson v Mavromichali* [1928] Ch 433.
- 6 *Huthwaite v Phaire* (1840) 1 Man & G 159; *Cook v Gregson* (1854) 2 Drew 286 (assets prematurely transmitted to another country directed to be administered according to the law of the country in which they were collected).

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- 7 *Currie v Bircham* (1822) 1 Dow & Ry KB 35; *Jauncy v Sealey* (1686) 1 Vern 397. There is an exception to this in the case of an administration action: see para 731.
- 8 See Dicey, Morris and Collins *The Conflict of Laws* (14th Edn, 2006) para 26-027 (p 1225). There is an exception to this in the case of an administration action: see para 731.

It is clear that this represents reasonably clearly the law of administration of the estate in the Probate jurisdiction and the law relating to the administration of the assets and debts outside the jurisdiction. There is no mention made here of *renvoi* as there is no use for it to be otherwise than inferred. It is administration, not succession, neither does the administration invoke an issue of Private international law or of conflict. It is therefore clear that so long as a will limited to assets outside the jurisdiction is concerned, and so long as the French near equivalent of an executor, an *executeur testamentaire*[11] is appointed under the will governing foreign as opposed to English assets, English law is agreeable to that, as it simplifies the position and no conflict arises. Need one say more? It would appear so.

Going to Professor North's **§ 730***:*

**730. Administration and succession distinguished.**

Administration does not include the distribution to beneficiaries of the deceased's net assets after payment of all debts, duties and expenses[1]: this is a matter of succession, which is governed by separate rules[2]. The rules of English domestic law relating to the order of payment of debts[3], and the power to postpone sale of assets[4] and to make payments out of the estate for the maintenance or advancement of minor beneficiaries[5], are rules of administration; the rules of English law which determine the order of application of assets in payment of debts or legacies are rules of succession[6].

Foot notes to §730:

[11] The principles governing *executeurs testamentaires* are set out at articles 1025 to 1034 of the French Code civil. The main distinction being that the *executeur* acts by a form of civil mandate over assets, not by a transfer of the assets.

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- 1 *Re Wilks, Keefer v Wilks* [1935] Ch 645 at 648.
- 2 See paras 738–762.
- 3 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA. As to the meanings of 'English' and 'English law' see para 305; and as to the meaning of 'English domestic law' see para 302 note 3.
- 4 *Re Wilks, Keefer v Wilks* [1935] Ch 645.
- 5 *Re Kehr, Martin v Foges* [1952] Ch 26, [1951] 2 All ER 812.
- 6 *Re Hewit, Lawson v Duncan* [1891] 3 Ch 568.

The rules as to succession are different. This is the section in question in relation to the jurisdiction to be exercised by the French Court as the lead court under article 4.

The English Court does not need to take jurisdiction over the foreign assets movable or immovable as they are not within its primary or ancillary jurisdiction. there is no need for any conflict to arise. Hence the term "follow", as opposed to "renvoi" in the next paragraph.

**739. Jurisdiction of foreign courts.**

The English[1] court will follow the decision of the court of the domicile of the deceased at the date of his death upon any question with regard to the succession to his movables, wherever situated[2]. It will follow the decision of the court of the country where his immovables are situated upon any question with regard to the succession to those immovables[3].

Footnotes:

- 1 As to the meanings of 'English' and 'English law' see para 305.
- 2 *Larpent v Sindry* (1828) 1 Hag Ecc 382; *Moore v Budd* (1832) 4 Hag Ecc 346; *Enohin v Wylie* (1862) 10 HL Cas 1; *Re Cosnahan's Goods* (1866) LR 1 P & D 183; *Doglioni v Crispin* (1866) LR 1 HL 301; *Re Smith's Goods* (1868) 16 WR 1130; *Miller v James* (1872) LR 3 P & D 4; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL (subsequent proceedings (1885) 10 App Cas 453, HL); *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Re Yahuda's Estate* [1956] P

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388, [1956] 2 All ER 262. It is otherwise if the foreign decision is contrary to English public policy: *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 275.

- 3 This follows from the principle that the English court will recognise a judgment in rem given by the court of a foreign country with regard to immovable property situated within that country: see para 440. Cf *Re Trepca Mines Ltd* [1960] 3 All ER 304n, [1960] 1 WLR 1273, CA.

When set out in this manner without the prejudice of esoteric issues of *renvoi*, the matter is simple.

One of the issues about enforcement of foreign judgements is whether the foreign court had jurisdiction to render one. Article 4 and article 10 are sufficient responses. Will the English Court gainsay a Regulation when reminded of ss. 2 and 3 ECA, 1972? In my view that is unlikely if it sees the advantage.

To my mind, the superficial fact that the Regulation is inapplicable within the United Kingdom is not a matter of overriding relevance. Does one contemplate that an English Court would use caselaw prior to ss. 2 and 3 ECA 1972 to override a French jurisdiction in this matter, given the Probate Court's historic respect for foreign arrangement equivalent to probate in particular the recognition of *executeurs testamentaires* over foreign personal and immovable property? "Inapplicability", an unknown concept, is simply not a sufficient reason for barring comity, where the jurisdiction exercised *in rem* or *in personam* by the foreign i.e. French Court is granted by a European Regulation.

I therefore take the case where a British national dies after 17th August 2015 habitually resident in France and makes an option for the law of his nationality in this case England and Wales, by an express disposition in either one or both of two wills. He makes one will for his property situated in England and a second, bearing the express nationality option, which relates to his

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assets in France. In his French will, he appoints an *executeur testamentaire* responsible for the administration of his French succession prior to it being shared out by succession.

I stress here that the concept of an *executeur testamentaire* as such will be recognised under English law as the administrative mechanism in the competent jurisdiction, here France. I would not advise the use of a *légataire universelle*, as that concept is not readily assimilated to an English equivalent, and would in fact render the fundamental succession aspects subject to French rather than English law; a contradiction in terms which woudl render any attempt to elude French forced heirship a little difficult to guarantee.

In this case, the French Court is the Court of jurisdiction under article 4 of the Regulation, being the court of the Member State in which the deceased was habitually resident. The reason why English law is applied is simply because of the express option. Were it not be in a position to apply the law of the option under article 22 , the French court would simply apply French law as the law applicable absent the option, unless of course there was an issue under Regulation article 21.2, which here, absent for example disgruntled issue from prior unions, would be the exception rather than the rule.

It is rumoured that, contrary to the interpretative direction given at §57 of the Regulations' preamble as to deploying *partial renvoi*, the French Court would then look to the whole of English law including *renvoi*. I believe this to be wrong. But, if it did, what would it find in the English law?

Stressing the prior comments on the English Probate Court's recognition of foreign *executeurs*, the *executeur* is required to follow the English principles summarised in §730 and §739 There is no conflict, and in the event of one in the exercise of the various provisions of the will, English law will be the reference point. What is more the French Court does not physically transfer the

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jurisdiction to the English Court, it remains the court in session. It can rely upon ss. 2 and 3 ECA 1972 to assume that the English Court, not just as a matter of comity, will not attempt to subvert the Regulation in its application outside the United Kingdom, by a Member State Court validly seized by virtue of and acting in accordance with article 4 of the Regulation. The French Court might also rightly assume that the English Court will not seek to assume that French Law has not been changed so as to exclude the Regulation either!

Put straight, once one assumes that French law includes the Regulation, then the issue as to the presumed total *renvoi* by a hypothetical English Court back to the French Court validly seised under article 4 of the succession is a figment of a fertile imagination.

Here I stress that the Administration of Estates Act 1925 is limited in its scope of territorial application to England and Wales, not France, and therefore the English law of succession does not apply to the *executeur* of the French will in this instance. It would apply to the executor of the separate English will to the extent of assets within the English probate jurisdiction but no further. Note that there is no requirement that there be only one will and only one executor in the Regulation! The Germans did not get that far.

Finally, there may be queries as to how French immovable property can transfer through an *executeur* to the legatees under English law.

The answer is of a blinding simplicity, and is referred to in Halsbury Wills and Intestacy (Volume 102 (2010))at §944 footnote 1. I expand upon that as follows:

The Land Transfer Act 1897 instituting the concept of a real representative in England and Wales, I stress not in Ireland or in Scotland only affected English land. Prior to that the heirs

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and legatees of the deceased took the land immediately on death, and there was no administration in the sense of the need for a personal representative or executor. To that extent "*le mort saisisait le vif*" in relation to English realty i.e. immovables prior to 1st January 1898 . The law of England in relation to immovable property situated outside the jurisdiction was not amended by the Land Transfer Act which refers only to English realty. Any possible misunderstanding or confusion as to jurisdiction was cleared up in the subsequent enactments as illustrated by s. 58 of the Administration of Estates Act 1925 :

> **58 Short title, commencement and extent.**
>
> (1)This Act may be cited as the Administration of Estates Act, 1925.
>
> (2). . . . . F1
>
> (3)This Act extends to England and Wales only.

The result is that English law continues to recognise the direct seisin of heirs and legatees as to immovables outside the jurisdiction, as that was not the object of Parliament's express intention or, short of reinvading the Continent, then within its sovereign capacity. That the English illusion of absolute English Parliamentary sovereignty does not extend beyond Berwick on Tweed into Scotland is amply illustrated by the comment in the decision of the Inner House in *MacCormick v Lord Advocate* 1953 SC 396, 1953 SLT 255: Per the President Lord Cooper of Culross "the principle of unlimited sovereignty of Parliament is a distinctively English principle and has no counterpart in Scottish constitutional law".

I submit that the cases cited by Professor North will be interpreted in this novel situation of a European private law initiative in a positive not in a negative manner. To some extent, the European Regulation does render certainty as between Courts in a manner with which the

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Article : The issue as to British *renvoi* in the context of the EU Succession Regulation 650/2012 (the "Regulation")

Date: 4th May, 2015

.../...

British Courts may be comfortable within their assessment of conflict and Private International Law issues as to jurisdiction and recognition of judgements. I suggest that our continental peers may be over concerned with notions of continental *renvoi,* as opposed to what any putative English Court might actually do in the mind of the French *juge* addressing the succession as the lead court under article 4.

*Immobilisme* is not an option. Advised action in awareness of the risks is needed.

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