ICLR: Appeal Cases/1961/PHILIPSON-STOW AND OTHERS APPELLANTS; AND INLAND REVENUE COMMISSIONERS RESPONDENTS. - [1961] A.C. 727

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PHILIPSON-STOW AND OTHERS APPELLANTS; AND INLAND REVENUE COMMISSIONERS RESPONDENTS.

[HOUSE OF LORDS.]

1960 Oct. 11, 12, 15; Nov. 30.

VISCOUNT SIMONDS, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD DENNING.

Revenue - Estate duty - Property chargeable - Immovable property situate outside Great Britain - Settlement - Testamentary disposition - Property passing on death of tenant for life - Whether property occluded for estate duty purposes - Proper law of disposition - Finance Act, 1949 (12, 13 & 14 Geo. 6, c. 47), s. 28 (2).

Conflict of Laws - Immovable property - Will - Settlement - Trust for sale - Proper law.

Statute - Construction - Tautology - Of little weight - Complex revenue statute (post, pp. 741, 749, 762).

Conflict of Laws - Administration - Construction of will - Governed by domicile of testator when will was made (post, p. 761).

Conflict of Laws - Contract - Proper law - Whether intention of parties conclusive doubted (post, p. 760).

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devaluation of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and ... (c) that the property so situate is by the law of the country in which it is situate, immovable property."

By his will made in English form, a testator, having declared that inasmuch as he had an English domicile, his will should operate so far as the case admitted according to English law, devised certain property in England, defined in the will as "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." He died on May 17, 1908, domiciled in England. His wife died on December 22, 1930, and his eldest son on September 23, 1954. The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. This land was, by the law of South African, immovable property:-

Held (Lord Radcliffe dissenting), (1) that succession to movables was regulated by the law of the domicile of the deceased, and that succession to immovable was regulated by the lex situs (post, pp. **745**, **748**, **761**).

Per Viscount Simonds. Section 28 (2) may contemplate cases - and there may be such cases - where the law of a country may in certain circumstances regality the devaluation of immovables by reference to all other law (post, p. **741**).

Per Lord Denning. A will may nevertheless fall to be construed according to the law of the testator's domicile at the time when he made it (post, p. **761**).

(2) That, accordingly, the "proper law," for the purpose of section 28 (2), was that of South Africa, both on the death of the testator and similarly on the passing of the property on the death of the tenant for life (post, pp. **749**, **762**), and the land was entitled to exemption from estate duty.

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Quaere, whether when the land was sold and the proceeds were gathered in, the proper law regulating the disposition would be English law (post, pp. **743**, **749**, **762**).

In re Moses [1908] 2 Ch. 235; *In re Miller* [1914] 1 Ch. 511, and *In re Berchtold* [1923] 1 Ch. 192 applied.

Attorney-General v. Johnson [1907] 2 K.B. 885 distinguished.

Decision of the Court of Appeal [1960] Ch. 313; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879, C.A. reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R. and Sellers L.J., Harman I,.J. dissenting).

This was an appeal by the appellants, Guyon Philipson-Stow, Sir Walter Charles Norton M.B.E., M.C., and Dame Audrey Frances Philipson Worsley-Taylor, widow, the trustees of the will of Sir Frederic Samuel Philipson Philipson-Stow, the testator, from an order of the Court of Appeal dated November 20, 1959, which dismissed an appeal by the appellants from an order of the Chancery Division of the High Court of Justice (Upjohn J.), made on February 10, 1959, on an application lay the appellants by originating summons pursuant to the administration of Justice (Miscellaneous Provisions) Act, 1933, to have two questions of liability to estate duty determined.

The question raised by this appeal was Whether (as the appellants contended) certain immovable property consisting of seven one-eighth undivided shares in a farm called Steenbokspan situate in the Orange Free State in the Union of South Africa, Which passed on the death on September 23, 1954, of Sir Elliot Philipson Philipson-Stow (hereinafter called "the deceased") under a disposition in the will of his father, Sir Frederic Samuel Philipson Philipson-Stow, the testator, who died in 1908, ought to be treated for the purposes of estate duty as excluded by virtue of section 28 (2) of the Finance Act, 1949, from property passing on the detail of Sir Elliot. This question in turn depended on the question whether the proper law regulating the devaluation of that property or the disposition under or by reason of which it passed on the death of Sir Elliot was the law of South Africa (as the appellants contended and as Harman L.J. would have held) or of England (as the respondents, the Commissioners of Inland Revenue, con tended and as Upjohn J. and the majority of the Court of Appeal held).

At the date of the death of the deceased these shares were vested in the trustees of the will of the testator upon trust for sale and on certain other trusts declared by or by reference to that will.

The facts, stated by Viscount Simonds, were as follows: By his will of March 14, 1898, the testator made the following relevant provisions. By clause 2 he declared that he had an English domicile and that it was his wish and intention that his will and any codicil thereto should be construed and operate so far as the case should admit according to the law of England. By clause 3 he appointed executors and trustees. By clause 4 he devised certain property in Sussex to his trustees to the use of his wife for life, with remainder to his trustees for a term of 100 years upon trusts which have been satisfied with remainder to the use of the deceased for life, with remainder to the use of the first and every other son of the deceased one after the other according to their respective seniorities in tail male with remainders over. By clause 5 he cut down the estate in tail male of any person born in his lifetime to a life interest. By clause 25 he devised and bequeathed all his real and personal estate whether situate in the United Kingdom or in South Africa or elsewhere, except as therein mentioned, to his trustees upon trust for sale and conversion with the fullest power of postponement, and directed them to hold the proceeds of such sale and conversion upon trust to make such payments thereout as were therein mentioned and to retain or invest the residue thereof in manner therein authorised. By clause 37 he directed his trustees to hold the ultimate residue of the investments representing his residuary estate after setting aside such sums and making such payments as were therein mentioned upon trust to pay the annual income to his wife during her life, and after her death to hold such ultimate residue as if the moneys or investments representing them were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his settled estates. By clause 39 he gave his trustees a very wide power of investment, by clause 40 he provided that in a certain event the equitable doctrine of election should apply to the dispositions made by his will, and by clause 44 gave to his trustees power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the trusts or powers in Cape Colony or elsewhere abroad.

The testator died on May 17, 1908, without having altered his will except by a codicil which is not material. He was at his death absolutely entitled to five equal undivided one-tenth shares of the farm known as Steenbokspan. Two further shares were acquired and vested in the trustees of the testator's will and one share was acquired by the deceased personally. There was then a partition whereby certain plots were allotted to the holders of

the two remaining shares and the remainder of the farm to the trustees and the deceased in the proportion of seven-eighths and one-eighth. The widow died on December 22, 1930, and, as has already been stated, the deceased died in 1954. His eldest son, having been born in the lifetime of the testator, succeeded to a life estate only in the settled estates. The undivided shares in the South African property to which the testator was entitled at his death were duly registered in the Register of Deeds in Bloemfontein in the names of the trustees, as at a later date were the seven-eighth shares to which they were ultimately entitled. The formal deed of partition was also duly registered. The trustees had not exercised the trust for sale. It followed, and was conceded by the respondents, that the only property, if any, which for estate duty purposes could be deemed to pass on the death of the deceased was the seven-eighth shares of the farm, the South African property.

J. A. Plowman Q.C. and ***R. Cozens-Hardy Horne*** for the appellants. The proper law regulating the devaluation of the testator's immovable property in South Africa or the disposition under or by reason of which it passed on the death of the deceased was the law of South Africa and "is neither the law of Scotland nor of England" Within section 28 (*c*) of the Finance Act, 1949, and so this property, which is situate outside Great Britain, is exempt from duty. In the case of a disposition by will of immovable property situate outside Great Britain, the proper law regulating that disposition is not necessarily the law which the testator intended to govern it. Until the administration is completed the disposition of land is governed by the lex situs, because it is the lex situs which makes the disposition effective or ineffective. There is no sound analogy between the present case and *Duke of*

Marlborough v. Attorney-General,1 which was concerned not with immovables but with movable property and related to a contract inter vivace and not to a will. The question arose out of a marriage settlement entered into in the United States and the trust funds remained there. A devise to trustees is much more like a devise directly to beneficiaries than a marriage settlement.

The test of liability to estate duty is still that which was applied in *Wallace v. Attorney-General*.2 The parties here differ

1 [1945] Ch. 78; 61 T.R. 159; [1945] 1 All E.R. 165, C.A.

2 (1865) L.R. 1 Ch. 1.

in the application of the test. Intention may affect a disposition but not a devaluation.

*Attorney-General v. Johnson*3 is an unsatisfactory case on a different Act of Parliament. If necessary it should be overruled.

The relevant enactment as to questions of estate duty on foreign immovables is section 2 (2) of the Finance Act, 1894, now replaced by section 28 (2) of the Finance Act, 1949.

The observations in *Wallace's case*4 as to the limitation to be placed on the liability to succession duty indicate that the proper law is the law by virtue of which the beneficiary becomes entitled. Lord Cranworth there said that, "in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country." As a result of that decision a direct devise of foreign immovable property was never charged before 1949. Section 24 of the Finance Act, 1936, retained all the existing exceptions in respect of foreign immovables. As to the practice before 1949, see Green's Death Duties, 2nd ed., pp. 628-629, where *Johnson's case*5 is referred to. The Act of 1949 abolished succession duty and a new criterion of liability to estate duty had to be adopted. That chosen was the proper law regulating the devaluation of the property or the disposition under or by reason of which it passed.

As to the court's approach to the proper law, see *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd*.,6 but that was a case of contract. As to the law which regulates the title to foreign movables, see Dicey's Conflict of Laws, 7th ed., rule 85, pp. 512, 514, 516, 517, 518, 520, 524. The incidents of real estate depend exclusively on the law of the country where the estate is situated: see *Nelson v. Bridport*7 and *In re Moses*.8 The principles there laid down are not affected by the fact that the land in question is subject to a trust for sale: *In re Berchtold*.9 That case shows that the trust for sale in the will of the testator in the present case does not alter the quality of the property in South Africa from immovable to movable. It remains immovable property and so it must be dealt with as such.

*In re White*10 (on appeal *Skinner v. Attorney-General*10 does

3 [1907] 2 K.B. 885.

4 L.R. 1 Ch. 1, 7.

5 [1907] 2 K.B. 885.

6 [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 1 All E.R. 206, P.C.

7 (1846) 8 Beav. 547, 570.

8 [1908] 2 Ch. 235, 239.

9 [1923] 1 Ch. 192, 199, 204 et seq.

10 [1939] Ch. 131, 136, 141; 54 T.L.R. 838; [1938] 2 All E.R. 691, C.A.; [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787, H.L.

not make *Johnson's case*11 any easier to understand by the suggestion that there is a notional conversion, because that would not prevent the property being an immovable. *Attorney-General v. Belilios*12 does not help either and the passages referred to by Upjohn J. are obiter. *Johnson's case*13 is very unsatisfactory because the only point on which it is an authority is as to the location of the property, and it was erroneous in holding that it was situate in England. It is no authority on the further points which might have arisen if the property had been held to be situate in Assam.

The proper law of the "disposition" of movables is necessarily the lex situs. It is not to be accepted that this renders the words "is the law neither of Scotland nor of England" otiose, for if they were otiose in relation to the word "disposition" they would be otiose in relation to "devaluation" also, and devaluation must be a matter of the lex situs. The explanation is that section 28 (2) of the Act of 1949 is an omnibus sweeping-up section applying to many things, and perhaps in framing so comprehensive a section the language has fallen short of perfection.

In summary: (1) The question is whether the proper law regulating the devaluation or the disposition in terms of the Act of 1949 refers to the law which makes effective the disposition under which the property passes. The problem is an equally of the *Marlborough case*,14 which was an echo of the *Wallace case*,15 in Which it was held that the test of liability to succession duty is to ask what was the law which makes the disposition effective. (2) The test has different results when applied to a disposition of immovables by will and when applied to a contract inter vivace affecting movables, as in the *Marlborough* causal Movables by definition can be moved. (3) In a case of the disposition of immovables by will the law which makes the disposition effective is the lex situs: see Dicey's Conflict of Laws, rule 85, and *Nelson v. Bridport*17 and *In re Moses*.18 The lex situs is thus the proper law within section 28 (2). (4) The fact of there being a trust for sale makes no difference. In the case of a direct devise the proper law is necessarily the lex situs. A trust for sale does not turn immovables into movables. The only authority against the

11 [1907] 2 K.B. 885.

12 [1928] 1 K.B. 798, 809, 821-822, 827; 44 T.L.R. 214, C.A.

13 [1907] 2 K.B. 885.

14 [1945] Ch. 78

15 L.R. 1 Ch. 1.

16 [1945] Ch. 78.

17 8 Beav. 547.

18 [1908] 2 Ch. 235.

appellants on this point is *Johnson's case*.19 There is no sufficient reason for departing from the well-established principle in Dicey.

R. Cozens-Hardy Horne following. Section 28 (2) could have been differently drafted but, as drafted, it imposes two sets of conditions, first the condition as to the proper law regulating the devolution of the property, following *Wallace's case*,20 and then three subsidiary conditions. Section 28 (2) (*c*) dealt with the case of immovable property not dealt with up to that point. For the present purpose what passed was immovable property situate abroad and not a chose in action which can be regarded as situate in this country. In those circumstances, one asks what is the proper law regulating or governing the devaluation. It must be the law of South Africa.

Peter Austere Q.C. and ***E. B. Stamp*** for the respondents. Where the passing of the property involves no change in the legal estate the court can give effect to the testator's intention. Here the legal estate in the farm vested in the trustees of the testator after his death; the legal estate remained in them on the death of the tenant for life and the beneficiary was another tenant for life. This passing is regulated by the proper law, using the phrase in its ordinary sense, of the testator's will, which is the law of England, because that was provided in the will.

In ascertaining the proper law, whether in connection with a contract, a voluntary disposition or a settlement created by will (such as is here in question), one should not admit any difference between a settlement inter vivace and one created by will, once it has come into effect and is operating. Once the law of South Africa has allowed the trustees to take the property, there is no longer any regulation of it by that law, so that the passing of this property on the death of the tenant for life was purely regulated by English law.

In the case of a contract dealing with a mortgage on land in a foreign country, one looks at the intention of the parties gathered from all the circumstances in ascertaining the proper law.

But for this matter of the proper law, all the conditions required to exempt this land from estate duty are fulfilled. But one must look at the intention of the parties even in the case of a contract which deals with land abroad: see *British South Africa Co. v. De Beers Consolidated Mines Ltd*.21 The fact that a

19 [1907] 2 K.B. 885.

20 L.R. 1 Ch. 1.

21 [1910] 2 Ch. 502, 512 et seq., 517 et seq., 522 et seq.; 26 T.L.R. 591, C.A.; [1912] A.C. 52; 28 T.L.R. 114, H.L.

proper law of the contract is necessarily the lex situs and one must go through the process of finding what it is.

*Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*22 and *Mount Albert Borough Causal v. Australasian Temperance and General Mutual Life Israelis Society Ltd.*,23 which indicate that in the case of contracts one should look at the intention of the parties. The intention is to be derived from the form of the disposition read in the light of the surrounding circumstances, including the character and domicile of the parties. In the case of a marriage settlement also one must look at the intention of the parties: *Duke of Marlborough v. Attorney-General*.24 See also *Iveagh v. Inland Revenue Commissioners*.25

Here all the indications are that the proper law of this disposition is English law. The testator thought that was the proper law: see clause 2 of his will. He left all his residuary estate, including the land in South Africa, in one mass on trust for sale: see clause 25. All the beneficiaries were English and the trustees were English. Clause 40 deals with election. Apart from the fact that part of the property is abroad, there is nothing to bring in the law of South Africa.

The proper law of a disposition is determined, once and for all, at the date when it becomes operational, and in the case of a testamentary disposition that is the date of the death: see the *Marlborough case*26 and the *Belilios case*.27

If the appellants were right and in every case of immovable property the proper law regulating or governing its devaluation must be the law of the country where it is situate, section 28 (2) would be tautologous. For their purposes, to produce a universal exemption property situate abroad, the subsection should have been differently phrased and expressed. The phrase beginning "the disposition under ..." would be otiose if all one had to do, in order to discover the proper law, was to look where the land was situate. If that were so it would have been sufficient to enact paragraph (c) of subsection (2). But what must be

22 [1937] A.C. 500, 528-529; 53 T.L.R. 507; [1937] 2 All E.R. 164, H.L.

23 [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206, P.C.

24 [1945] Ch. 78, 88.

25 [1954] Ch. 364, 369 et seq.; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.

26 [1945] Ch. 78, 85.

27 [1928] 1 K.B. 798, 822.

here the cesser of the life interest of the deceased, when a new life interest came into operation. The disposition is the effect of the instrument. *In re Moses*,28 *In re Miller*29 and *Nelson v. Bridport*30 were cases of true conflict, but in the present case there is no such conflict, since, once South African law allows the English trust to come into operation, the South African law falls out altogether.

If the appellants are right, the effect of section 28 (2) has been to bring into existence an important exemption from estate duty which did not operate before the Act of 1949 came into force. As the law then stood, there would leave been a claim for estate duty in the circumstances of the present case. As to the previous law, the appellants are reading more into *Wallace's case*31 than it Contained: see how Lord Cranworth32 defined the question. Note particularly the words "becoming entitled." *Johnson's case*33 is relied on. In 1949 it was treated as authoritative. Beneficiaries under a trust "become entitled" by virtue of a trust which is in England, although land held on trust is abroad. It is admitted that this disposition would not have come into effect if the law of South Africa had forbidden it, but once it I lad come into effect the English law governed it: see the reference to *Johnson's case*34 in Hanson's Death Duties, 8th ed. (1931), p. 96. See also the *Belilios case*,35 *per* Lord Hanworth M.R. and Lawrence L.J. The test of exigibility under the earlier law now repealed is the same as that to be applied to the present case, and by it ditty is exigible because succession duty would have been exigible. Further, the legislature did not intend, by substituting a new criterion, to alter the area of the tax. If it had been intended that immovable property situate abroad was always to be exempt, it whaled have been easy for the Act to say so. But at the time of the Passing of the Act the law laid down in *Johnson's case*36 was cycle that duty would have been leviable in respect of this particular land. If the appellants were right, then in the case of an English settlement made in England the trustees by investing in foreign land might change the proper law. That would produce a curious effect.

28 [1908] 2 Ch 235, 239.

29 [1914] 1 Ch. 511.

30 8 Beav. 547.

31 L.R. 1 Ch. 1.

32 Ibid. 7.

33 [1907] 2 K.B. 885, 893-894.

34 [1907] 2 K.B. 885.

35 [1928] 1 K.B. 798, 809, 827.

36 [1907] 2 K.B. 885.

There is a distinction between what occurs on death and what occurs as a result of the clauses of the will coming into operation. The vesting of the land on the testator's death, the devolution, depended on South African law. On his death the immovables vested according to the lex situs in the person entitled according to that law, and the administration must be in accordance with that law. But, once that duty has been performed, the assets must be treated according to the English trusts set out in the testator's will. That situation occurred on the death of this testator. On the death of the life tenant there was the cesser of one equitable life interest and the start of another.

Harman L.J. in the Court of Appeal expressed the view that the proper law regulating the devaluation of property situate abroad or the disposition under or by virtue of which it passes is always the lex situs. If that were right the exemption conferred by section 28 (2) so far as it related to immovable property situate abroad would, contrary to the wording of the section, be unlimited and no effect could be given to the condition of exemption that it must be shown that the proper law regulating the devaluation of the property or the disposition by reason of which it passes is the law neither of England nor of Scotland, for, if Harman L.J. were right, the proper law could never be the law of England or Scotland.

The proper law of the administration and of the execution of the trusts may be different: see *Attorney-General v. Campbell*.37

Reliance is placed on the liability to estate duty as expressed in sections 1 and 2 (1) (*b*) of the anions Act, 1894.

E. B. Stamp following. Under the Act of 1894 there was a charge on property situate abroad (see section 8), but it was unenforceable because the law of one country does not recognise the fiscal laws of another. The exception in section 20 (2) dealt only with British possessions, thus distin-

guishing between property in British possessions and property in a foreign country because it might be possible to enforce fiscal claims in British possessions. See also section 8 (4).

Even if an owner of property cannot choose the law by which a conveyance of it will be regulated, he can create interests which are regulated by English law behind the curtain of a trust for sale. A testator cannot create a series of limitations of immovable property situate abroad and direct that the relations of the trustees to the property shall be governed by English law, but

37 (1872) L.R. 5 H.L. 524, 527-528, H.L.

sale, the income shall be held on certain trusts. Two parties to a contract relating to immovables situate abroad can choose the law regulating their equitable interests: see *British South Africa Co. v. De Beers consolidated Mines Ltd*.38 Here the testator has shown the intention that the rights and interests under his will should be governed by English law. The trustees of his will are subject to the jurisdiction of the courts here. If they had failed to account for all the income and had claimed that by the law of Settle Africa trustees were entitled to deduct a proportion of it for expenses, the courts would not have allowed that. The courts will not inquire in South Africa what are the obligations of trustees under a trust for sale, for that cannot affect the rights of beneficiaries inter se under English law. The South African courts cannot alter the trusts of an English will. The disposition under or by reason of which this property passed was the testator's will.

Section (2) should be construed as a whole. Even divorced from the expression "proper law," the word "regulating" is not strictly apt to describe the law which makes the disposition effective. The reference to "regulating" the disposition presupposes the existence of a disposition under which the property does pass. If so, it is not apt to describe the disposition by which the interest comes into existence or under which it acquires its validity. "Regulating" is not an apt expression to describe the law which determines the validity of the disposition. There is no significant difference between "regulating" and "governing." In relation to a contract the word "governing" is used, not in relation to the determination of the validity of a contract, but always in relation to its construction and the rights of the parties.

In Dicey's Conflict of Laws, 7th ed., p. 717, it is stated in rule 148 that the "proper law of a contract" means the law by which the parties intended it to be governed. This was approved in *Kahler v. Midland Bank Ltd*.39 See also the *Marlborough case*.40 The proper law of the contract, when ascertained by the intention of the parties, governs its construction and their rights and obligations. So, too, in the case of a disposition, when it is shown, by whatever process, what is the proper law, that governs the construction of the document and the rights of the parties.

38 [1910] 2 Ch. 502, 513.

39 [1950] A.C. 24, 28-29; 65 T.L.R. 603; [1949] 2 All E.R. 621, H.L.

40 [1945] Ch. 78, 89-90.

If the law of South Africa did not recognise the rights of the new beneficially in this case, the duty of the trustees would be to sell under the trust for sale. The rights of the beneficiary under the English trust cannot be affected by South African law. The expression "regulating" does not connote the capacity to make the disposition: see Dicey's Conflict of Laws, rule 149, p. 751, rule 151, p. 769, and rule 152, pp. 774-777.

This property passed by reason of clause 37 of the will.

By the effect of sections 1 and 2 of the Act of 1894, what passed and became liable to duty was the property itself. In the terms of the Act that was an artificial conception because in a case like the Present the title to the farm remained the same.

J. A. Plowman Q.C. in reply. The proper law regulating the disposition of foreign immovables is normally the lex situs and it makes no difference that there is a trust for sale. Cases of contract were distinguished in the *British Africa case*.41 Here intention does not enter into the matter, because this is a case not of a contract but of a disposition. All the indications are that the testator intended the proper law to be English, but intention is irrelevant when dealing with a disposition by will of foreign immovables.

As to section 28 (2) of the Act of 1949, the respondents' argument depends on Whether *Johnson case*42 was rightly or wrongly decided. Even if it was regilt, one is now considering a different Act, which, as a matter of construction, has altered the law laid down in that case. If, as is submitted, the case was wrongly decided, the Act has not altered the law. It was considered in *In re White*,43 but on appeal the House of Lords threw no light on the matter *(Skinner v. Attorney-General*44.

Whoever was regarded by the courts of South Africa as being entitled to the property would be put into possession by the South African courts and it would be of no use for the English courts to say that the trustees should sell the property and remit the proceeds to England because in such circumstances the South African court would prevent the sale by injunction. In the last resort, therefore, the law regulating the disposition remains the South African law: see what Harman L.J. said in the Court of Appeal.45

41 [1910] 2 Ch. 502, 513.

42 [1907] 2 K.B. 885.

43 [1939] Ch. 131.

44 [1940] A.C. 350.

45 [1960] Ch. 313, 336-337; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879.

Dicey's Conflict of Laws, rule 156, p. 814, deals specifically with the effect of a contract with regard to immovables.

Their Lordships took time for consideration.

Nov. 30. VISCOUNT SIMONDS stated the facts and continued: The question whether this property is to be deemed to pass on the death of the deceased so as to make estate duty exigible on that event depends on the meaning and effect of a few words in section 28 (2) of the Finance Act, 1949. That subsection is as follows: "As respects property passing on the death of a person dying after the commencement of this Part of this Act, subsection (2) of section 2 of the Finance Act, 1894, (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and section 24 of the Finance Act, 1936 (which restricts the exemption conferred by the said subsection (2)), shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and that one at least of the following conditions is satisfied, namely, - (*a*) That the deceased did not die domiciled in any part of Great Britain; (*b*) that the property so situate passes under or by reason of a disposition - (i) made by a person who, at the date at which the disposition took effect, was domiciled elsewhere than in some part of Great Britain; and (ii) not made, directly or indirectly, on behalf of, or at the expense of, or out of funds provided by, a person who at that date was domiciled in some part of Great Britain; (*c*) that the property so situate is, by the law of the country in which it is situate, immovable property; or if the property so situate passes only by virtue of paragraph (*c*) of subsection (1) of section 2 of the Finance Act, 1894, as having been the subject of a gift inter vivace and it is shown that one at least of the said conditions is satisfied."

It would not be proper to come to a final conclusion upon the meaning of what I think are the vital words of this section - "proper law regulating the devaluation of the property so situate or the disposition under or by virtue of which it passes" - without some reference to the earlier law. But it is legitimate

first to see whether the positive enactment in the section has by itself a sufficiently clear meaning. In my opinion, it has.

To obtain exemption, property situate abroad must by the law of the country in which it is situate be immovable property. That condition is satisfied in the present case.

But it must further be established that the "proper law" regulating its devolution or the disposition under which it passes is not the law of England or of Scotland. It is urged, as I understand the argument, that, if in every case it is a corollary of the property being immovable by the law of the country in which it is situate that the proper law regulating its devolution, etc., should be the law of that country, the section is tautologous. I do not think that this is so. The section may contemplate cases - and there may be such cases - where the law of a country, though it regards certain property as an immovable, may yet in certain circumstances regulate its devolution, etc., by reference to another law. Nor, even if there is some tautology, does it have much weight with me. That is a common feature of legislation and in this very section there appear to be other examples of it. But,

tautology or not, the question is, what was the proper law regulating the devolution of the South African property or the disposition under which it passed?

First, the question suggests itself, what is the "proper" law? Does it add anything to "law" simpliciter? It relates to both devolution and disposition. In regard to the former, I cannot see, and no one has been able to suggest, that it has any meaning at all: in regard to the latter, some assistance may be got from what was said in *Duke of Marlborough v. Attorney-General*.1 There is the underlying suggestion that, just as in relation to a contract the intention of the parties is an important factor in determining what is its proper law, so in relation to a settlement the intention of the settlor is to be ascertained by admissible evidence and, if possible, given effect to. This may well be so and the same principle may be applicable to a will. But in the present case at least it is otiose, for the testator has by clause 2 of his will declared his wish and intention to be that his will should operate and be construed according to the law of England. The question remains whether, so far as the South African property is concerned, his disposition is "regulated" by the law of South Africa. I find myself unable to give any effective meaning to

1 [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165, C.A.

"proper." It may be added that, whatever the settlor's intention it cannot prevail against the relevant law.

The next question is, what is the meaning of "disposition"? I accept the view that devolution and disposition are mutually exclusive and are exhaustive of the ways in which property can pass on death, and further (to use the words of Upjohn J.2 that it is perfectly clear that the property passed on the death of the son under or by reason of a disposition (the testator's will) and not by devolution. What, then, does "disposition" mean? Is it the instrument, will or settlement, by which property is disposed of? Or is it the provision in an instrument which deals with particular property? In the latter case there can presumably be several dispositions in a single instrument. Linked with this question is another, namely, is the "proper law" regulating the disposition ascertainable once and for all, or may it change from time to time as successive interests take effect in possession? It appeared to me that on both sides the argument shifted from time to time to get the advantage of a favourable wind. I do not myself find it possible to say that the instrument, be it will or settlement, is the "disposition" intended by the section. Such a construction would be impossible to apply, for example, to a will which, being in other respects an "English will," purported to devise in strict settlement land in South Africa. For to part of it English law, to another part South African law, would apply. I say "apply" not "regulate" because I do not wish to beg any question. I am driven, then, to conclude that "disposition" does not mean "instrument," unless some such words are added as "quoad the particular devise or bequest." That, in effect, is to say that "disposition" means the particular devise or bequest.

Does this conclusion lead to the further conclusion that in respect of a single disposition the relevant law is not ascertained once and for all when the instrument becomes effective? I think that almost inevitably it does. We have seen that there may be two relevant laws at the date of the instrument taking effect. This very case supplies an illustration. For it is as certain that at the death of the testator South African law applied to his South African as English law to his Sussex property. If the relevant law was determined once and for all, that would be the end of this case; for then South

African law would continue to apply to the South African property. But, difficult as the question is and anomalous as are the results that may follow any answer to it,

2 [1959] Ch. 395, 405; [1959] 2 W.L.R. 427; [1959] 1 All E.R. 583.

I have come to the conclusion that the proper law may change with a change in the subject-matter. Applying that to the present case, I should not exclude the possibility that, if and when the South African property is sold and the proceeds are gathered in, the proper law regulating the disposition will be English law. It is not necessary for the purpose of this case to decide that question.

Until, however, the subject-matter has changed its nature and, having been an immovable, it has become a movable, I see no justification for saying that the relevant law has ceased to be South African. What is it that passed on the death of the deceased? Inasmuch as the Crown is claiming duty upon the land in South Africa, it is not admissible to contend that anything passed except that land or that duty, if exigible at all, is exigible upon anything except its value. By English law it may be regarded as converted into personalty: it remains by South African law immovable property as in fact it is. Therefore, though, as I have said, a future sale of the land may result in a change of the relevant law, I am of opinion that, until that event, the law remains that of South Africa.

Some difficulty has been caused, unnecessarily, as I think, by the use of the word "regulating." It was freely conceded that it means no more and no less than "governing," a more familiar word in this context. If so, whether the question is one of capacity or formality or validity, it is South African law which governs the disposition, and it is in the courts of South Africa that the ultimate sanction for its enforcement lies. It is irrelevant (if it is the fact) that there is no conflict upon any material point between the law of England and that of South Africa. If there was a conflict, that of South Africa would prevail. If the disposition is operative according to its terms as understood by English law, that is because South African law permits it. Though it permits it now, a change in the law of South Africa in regard to the disposition or tenure of land in that country would be effective to change the position.

There is little authority directly in point. I do not think that the word "regulating" has been commonly used in this context. But, as I have said, it appears to mean no more than "governing," or perhaps "determining." If so, such cases as *In re Moses*3 and *In re Miller*4 are helpful. It is true that they do no more than illustrate the general rule which is thus stated by

3 [1908] 2 Ch. 235.

4 [1914] 1 Ch. 511.

Dicey in his Conflict of Laws, 7th ed., in regard to contracts - rule 156 - "The formal and material validity, interpretation and effect of a contract with regard to an immovable are governed by the proper law of the contract. The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (lex situs)." I am assuming that, so far as may be, the same rule applies to a will or settlement. The first-named case is interesting as the decision of a very learned judge who plainly thought the case too clear for argument. There the subject-matter of a settlement made by a will was in part leasehold property, an immovable, situate in the Transvaal. The tenant for life, if English law had applied, would have had her enjoyment limited by the so-called rule in *Howe v. Lord Dartmouth*.5 "In *Freke v. Lord Carbery*,6" said the learned judge,7 "Lord Selborne L.C. decided that the validity of a testamentary disposition of an English leasehold was governed by the law of England, i.e., the lex loci rei sitae, and not by the law of the testator's domicil. The same principle was applied in *In the Goods of Gentili*8 and the same principle "is applicable here." He therefore held that the widow was entitled to enjoy the leaseholds in specie during her widowhood.

I may also refer to the case of *In re Piercy*,9 which I must state somewhat more fully. It appears from the headnote that an English testator who owned some land in Sardinia by his will gave all his real and personal estate upon trust for sale, and to hold the same until conversion and the proceeds of sale after conversion upon trusts for his children for their respective lives with remainder to their issue. These trusts were to a great extent invalid under Italian law as regarded land in Italy with the result that the tenants for life took their shares absolutely. But part of the land in Sardinia had been sold. In the result it was held that the trustees having power under Italian law to sell the land must hold the proceeds upon the trusts of the will, but that the rents of the unsold land until sale would devolve according to Italian law. I quote one passage from the judgment of North J.9a: "Then the next question is, as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian

5 (1802) 7 Ves. 137a.

6 (1873) L.R. 16 Eq. 461.

7 [1908] 2 Ch. 235, 239.

8 (1875) Ir.R. 9 Eq. 541.

9 [1895] 1 Ch. 83; 11 T.L.R. 21.

9a [1895] 1 Ch. 83, 88.

law relates to the land: it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds

of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law."

As in *In re Moses*10 the rights of the widow were governed, regulated or determined by South African law in respect of an immovable situate in that country, so in *In re Piercy*11 the rights of the persons interested were governed, regulated or determined by Italian law just so long as the trust property was an immovable situate in Sardinia. So also in the case before us the rights of all persons claiming under the testator's will are, so far as the land in South Africa is concerned, regulated by the law of that country as long as the land is unsold. It made no difference in *In re Piercy*,11 and it makes no difference in this case, that a trust is created. The validity of the trust itself is a matter to be determined by South African law. Assume it to be valid, its existence cannot affect the fact that the land itself remains subject to the same law. I come then to the clear conclusion that South African law "regulates" the disposition under or by reason of which the property passed on the death of the deceased. It is of some significance that the claim for duty is made in respect of the land itself: it is that which is said to "pass" and it is that upon which (since it does not pass to the executors as such) the statutory charge would, if the claim is well founded, fasten. I should hesitate to adopt a view of the section which would have a result so strange and contrary to international comity. The fact that the charge would not be enforceable does not make it more likely that the legislature intended to impose it.

I have so far, my Lords, tried to understand and interpret the positive enactment of section 28 (2), and, though there are some difficulties which are not easily resolved, they do not touch the main question. I am clearly of opinion that while foreign land is foreign land its disposition and its devolution are regulated by the law of the country where it is situate. But it is said that I must not come to this conclusion because in doing so I ignore the opening or negative part of the subsection. My Lords, I concede, as I said at the opening of this opinion, that I must look at the whole subsection before coming to a final conclusion. I will do

10 [1908] 2 Ch. 235.

11 [1895] 1 Ch. 83.

so. The opening words of section 28 (2) are: "As respects property passing on the death of a person dying after the commencement of this Part of this Act, subsection (2) of section 2 of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and section 24 of the Finance Act, 1936 (which restricts the exemption conferred by the said subsection (2)), shall not have effect." Then follows the enactment that I have already read which established a new criterion for the exigibility of duty. The argument is, first, that if the test of exigibility under the earlier and now repealed law were applied, duty would be exigible in the present case, because succession duty would have been exigible; and, secondly, that it is not to be supposed that the legislature intended by substituting a new criterion to alter the area of tax.

My Lords, I am not impressed by this argument. I see no reason to suppose that the legislature did not intend to alter the area and incidence of tax. At any rate, it is so speculative an argument that, unless the new enactment was much less plain than I consider it to be, I should not be deflected

from what I otherwise should consider its meaning. And I am the less disposed to give weight to the argument when I find, as I do, that it must be a matter at least of grave doubt whether, if the question was raised in your Lordships' House, it would be held that under the old law succession duty and therefore estate duty would have been payable upon the South African property on the death of the deceased. Your Lordships will remember that the generality of the language of the Succession Duty Act, which would have made duty payable upon any succession arising out of any disposition whatsoever, required that some limit should be implied, and that in *Wallace v. Attorney-General*12 that limitation was supplied by Lord Cranworth in words that have been often quoted "that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." These words were used by Lord Cranworth in reference to the facts of the case before him, in which a testator had died domiciled in France and the Crown had claimed duty in respect of his personal property situate in England at his death. But they have been applied generally, though not without criticism, to other cases where the condition was not satisfied that the beneficiaries "became entitled by virtue of the

12 (1865) L.R. 1 Ch. 1, 9.

laws of this country." Taking these words at their face value I should have thought it impossible to hold that they covered the case of a succession to foreign land whether or not the disposition purported to create a trust. But undoubtedly in *Attorney-General v. Johnson*13 the contrary was decided. In that case it was, in effect, held that land in Assam, which was held upon trust for sale under the will of a domiciled Englishman but remained unsold, was liable to duty upon the death of certain persons who were entitled to shares of the surplus income. This decision was criticised by Lord Greene M.R. in *In re White*14 and, though it was apparently approved by the Court of Appeal in *Attorney-General v. Belilios*,15 it does not appear that the only reason that was given for the decision commended itself to the court. However, it is not necessary to adjudicate on the correctness of this decision. Succession duty has gone, estate duty exigible by reference to it has gone, and estate duty has been reimposed in words widely different from those which were introduced by Lord Cranworth into the statutory language of the Succession Duty Act. It is true that they are not in all respects easy to construe, but I have been able to give them a sufficiently clear meaning which at least accords with the principles upon which the courts (and the legislature) have purported to deal with foreign land. I see no reason why I should give it up in order that the new law may agree with what is very doubtfully thought to be the old.

I would allow this appeal with costs here and below, subject to a reservation as to costs which I will make when I come to put the questions to the House.

LORD REID. My Lords, this case turns on the proper interpretation of section 28 (2) of the Finance Act, 1949, which deals with exemption from estate duty of certain property situate out of Great Britain. Previously such exemption had involved reference to succession duty and the abolition of succession duty in 1949 made it necessary to enact new provisions for such exemption. Section 28 (2) deals with a wide variety of cases. The property may be movable or immovable and it may pass by intestate succession or by a variety of kinds of disposition - will,

13 [1907] 2 K.B. 885.

14 [1939] Ch. 131; 54 T.L.R. 838; [1938] 2 All E.R. 691, C.A.; [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787, H.L.

15 [1928] 1 K.B. 798; 44 T.L.R. 214, C.A.

inter vivos disposition or settlement or settlement based on contract. To find words equally appropriate for all such cases would be difficult if not impossible, and it does not surprise me that some of the words used by the draftsman are not entirely appropriate for the present case.

The first requirement for exemption is that "the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland." The expression "proper law" is not entirely appropriate for all cases covered by the subsection if it is read in the sense in which it is generally used. In the law of contract the expression is familiar as denoting the law which the parties have selected to govern their contract. But clearly there can be no selection by anyone of the law which is to apply on intestacy and I know of no authority to the effect that a testator can select the law which is to regulate the provisions of his will. He can, of course, "make his own dictionary." It may appear from the terms of his will that he is using some word or phrase in an unusual sense. But it appears to me that the law which regulates his disposition of movables must be the law of his domicile and the law which regulates his disposition of immovables must be the lex rei situs. In this case it is not disputed that a disposition by a testator of the legal estate of immovables abroad must be governed or regulated by the lex rei situs, whatever intention to the contrary he may have expressed in his will. But it was argued that effect can be given to the testator's intention where the passing of the property involves no change in the legal estate. In this case the legal estate in the testator's farm in the orange Free State vested in his trustees after his death: the property has now passed by reason of the death of a tenant for life, the legal estate remains in his trustees. and the beneficiary is now another tenant for life. It is argued that this passing is regulated by the "proper law" (in its ordinary sense) of the testator's will and that the proper law is the law of England by reason of the testator's having so provided in his will. I cannot read the subsection as introducing a new conception into the law of testamentary succession and I do not think that in such a case the "proper law" means any more than the law regulating the disposition under or by virtue of which the foreign immovable passes. What, then, is that law in this case? Is it the law of South Africa or the law of England ? If it is the former this appeal must be allowed, if it is the latter this appeal must be dismissed.

As I understood it the argument for the Crown was that any regulation by the law of South Africa was at an end when that law permitted the trustees to take the property, and that the regulation of the passing of the property on the death of the tenant for life was purely a matter of English law. I do not agree. The law of South Africa might for any reason prevent the succession of the new tenant for life. In that case the South African courts would determine who was to have the property. It is no answer that the trustees could operate their trust for sale and remove the price from South Africa because any sale to be effective must comply with the law of South Africa. Although there is a trust for sale it is not disputed that the property which passed was the land in South Africa, and that this must still be dealt with as an immovable within the meaning of the section so long as the land remains unsold. So it appears to me that the "disposition under or by reason of which" the land passed is equally regulated by the law of South Africa whether it contains a trust for sale or not.

I must notice two other arguments for the respondents. First, it is said that, if the passing of immovable property in another country is held always to be regulated by the law of that country, the requirement which I have quoted from the section is redundant and it would have been sufficient merely to enact paragraph (*c*) of the subsection "that the property so situate is by the law of the country in which it is situate immovable property." I am not entirely satisfied of this but, even if that is so, I do not regard it as a strong argument in this case. The section deals with three matters, devolution in intestacy, disposition of movable property and disposition of immovable property. In the first case there is redundancy on any view, in the second case there is redundancy also, and in the third case admittedly there is redundancy where there is a disposition of the legal estate. In so complicated a matter I do not think that the presumption that provisions are not redundant is at all strong.

Finally, it is said that before 1949 estate duty would have been payable in this case and in the circumstances one ought not to hold that the previous law has been altered. There would be some force in this if the previous law had been clearly established, but the only authority cited was *Attorney-General v. Johnson*.16 That is an unsatisfactory case in that admittedly the grounds of judgment of Bray J. cannot be supported. Even if the language

16 [1907] 2 K.B. 885.

of section 28 (2) were more ambiguous than I think it is, I would attach little weight to this argument. So, in my opinion, this appeal should be allowed.

LORD RADCLIFFE. My Lords, we have here a case of some undivided shares of land in South Africa being held upon trust for sale under the will of a testator who died many years ago, having settled the resulting proceeds of sale as part of his residuary estate upon successive life tenants with ultimate remainders over. On September 23, 1954, the life tenant in possession died and the settled fund still represented by the unconverted land passed to a successor, again for his life. The testator was domiciled in England, he declared it to be his wish and intention that his will should be construed and operate as far as the case should admit according to the law of England, his residuary estate was settled so as to devolve with a family property in Sussex, and his trustees were and are English residents. So far as the adjective is of any importance in this case, the settlement created by his will was "English." I think that those are all the facts that need record.

The Commissioners of Inland Revenue have claimed estate duty on these shares as property passing on the death in 1954. I shall have to consider later whether their true claim, the claim that is consistent with the arguments on which they rely, is correctly expressed as arising in respect of the land itself, a subject which they admit to be immovable property both by our law and by the law of South Africa. At any rate, the answer which the appellants make is that the land, being property situate out of Great Britain, is exempt from duty under section 28 (2) of the Finance Act, 1949, because the "proper law regulating the ... disposition" under or by virtue of which it passed was not the law of England or Scotland and also the property is immovable property by the law of the country in which it is situate.

This answer depends upon the acceptance of one simple proposition, that in the case of an immovable the "proper law" intended by section 28 (2) is necessarily the law of the country in which it is situate. To my mind, the fact that this is a simple proposition tells neither for nor against its acceptance: but at the same time, if the argument is right, I can see no meaning in the word "proper" at all.

In my opinion, "proper law" does not have this meaning in this context. As it appears to me, there are three main reflections upon such a construction which are bound to occur to anyone who sets out to read the section as a whole and as a contribution to the existing corpus of estate duty legislation. All of them tell against the proposition which is thus advanced.

First, such a reading involves the conclusion that the section is intended to change the law about exemption of foreign property from duty in a not unimportant respect. Up to its passing the general chargeability of property situate abroad had been governed by the test imposed by section 2 (2) of the Finance Act, 1894: if legacy or succession duty was payable "in respect thereof" it was also to be charged with estate duty. Neither immovable property nor real property was exempt eo nomine: nor was personal property situate abroad constructively brought within the conception of property situate within the United Kingdom by the principle "mobilia sequuntur personam." It was early appreciated that this principle could not be applied to estate duty: see *Winans v. Attorney-General*.17 Indeed, in the case of settled property there was no scope for applying it, since the property that passed was not within the ownership of the "persona" whose death was the occasion of the passing.

There are certain obvious difficulties attendant upon the idea of adopting as the test of liability to estate duty the same test as had previously been applied to legacy or succession duty, since the latter duties were commonly regarded as being charged on interests or successions in or to property rather than on property itself. I am not sure that in the case of settled property the difficulty was of any practical importance. In any event, the test was imposed by the statute and judges have had to make the best of it. From 1894 to 1949 no relevant amendment had been made that affected the applicability of the test, except for section 24 of the Finance Act, 1936, which, while not touching "immovable property" (the first time, I believe, that this phrase was used in estate duty legislation), brought in for other foreign property a new condition of liability depending on the domicile of the person whose death caused the passing.

So long as the provisions of section 2 (2) were operative, I think that it would have been impossible to say that in no circumstances could real property abroad attract a claim to estate duty if a passing took place, since there were known cases in

17 [1910] A.C. 27; 26 T.L.R. 133, H.L.

which legacy or succession duty were exacted in respect of it. The circumstances which permitted such a claim were special and I shall have to consider them in more detail later. In effect, they came down to cases where foreign land formed part of the capital of an English partnership and to cases where foreign land was held upon an effective trust for sale under an English settlement.

The latter point was, of course, the subject of the decision in *Attorney-General v. Johnson*,18 which covered both succession duty and estate duty. I am myself of opinion that that case was rightly decided and was in accordance with a number of earlier authorities which led up to it. But, putting my own opinion aside, I am quite satisfied that in 1949 *Attorney-General v. Johnson*18 stood as established law; which is the immediate point. What are the facts with regard to it? It had never been overruled. It had twice been noticed in Court of

Appeal decisions without disapproval: by Sargant L.J. and Lawrence L.J. in *Attorney-General v. Belilios*,19 and by Lord Greene M.R. in *In re White*.20 In each case the decision was explained as attributable to the existence of the trust for sale which converted the realty in Assam into English personalty. As it did in fact depend upon that principle, this is not a very damaging criticism. It was followed in 1935 in the Chancery Division by Luxmoore J. in *In re Duff's Settlement Trusts*.21 It is noticed and treated as constituting an effective rule of the law in all the textbooks on death duty which were current in 1949 - see Hanson on Death Duties, 9th ed. (1946), Green on Death Duties, 2nd ed. (1947), Dymond on Death Duties, 10th ed. (1946). In none of them is there any suggestion that *Attorney-General v. Johnson*22 is to be regarded with dubiety or that there is any practice on the part of the revenue to make concessions in its application.

I think it an unexceptionable statement, therefore, to say that if section 28 (2) of the Finance Act, 1949, does exempt foreign land from duty in all cases by virtue of this phrase about "proper law," it has brought about a change in the existing law. So it may have done, if its true construction so requires. But the occasion of introducing this new section was the abolition of the legacy and succession duties by the immediately preceding section of the same Act and the consequent destruction of the existing statutory test. There is nothing to suggest that a substantive change in the law is about to take place; least of all that a simple

18 [1907] K.B. 885.

19 [1928] 1 K.B. 798.

20 [1939] Ch. 131.

21 (1935) Unreported.

22 [1907] 2 K.B. 885.

new rule, all foreign land to be exempt, is concealed within the texture of the elaborate formulae laid down.

This leads on to the second reflection that forces itself upon the reader. The drafting of the section does not read at all like an attempt to say that no immovable situate outside England and Scotland is to be liable to duty. The point can be put in more than one way, but, however put, I do not see how it can be brushed away as unimportant. It is not a question of tautology, which in itself is of little significance: it is rather that the whole structure of the section runs counter to the idea that it is meant to convey what it must mean according to the argument of the appellants. In the Court of Appeal, the Master of the Rolls expressed this point as follows23: "The difficulty, to my mind, of accepting Mr. Plowman's argument is that the consequence of its acceptance must be that in every case of a disposition by will or settlement of a foreign immovable, the proper law regulating the disposition must always be the lex situs But the conclusion seems to me to render futile the obvious and apparent intention of the subsection. ..." I agree with that comment; but I think too that the same point might be put in another way without less cogency. I find it impossible to read the section without inferring that it does contemplate the contingency that property situate abroad, even though immovable, might still not be exempt from duty if the proper law of the disposition under which it passed was English or

Scottish. If the appellants are right, that could never be, unless, conceivably, there was some conflict of doctrine between the two jurisdictions as to what was an immovable. I do not think that that can be what proviso (*c*) is directed to.

Thirdly, there is the difficulty of finding any certain meaning for this strange phrase, "proper law regulating the devolution ... or the disposition." While it is indeed true that the effectiveness of any disposition which purports to dispose of the title to land or whatever ranks as an immovable is governed by the lex situs (see, for instance, *In re Moses*,24 *In re Miller*25, I am not aware that the description "proper law" had ever been given to the law in this relation. Nor would it occur to me as an apt description when used in connection with the disposition itself, a word which I take to refer to the instrument, will or inter vivos settlement,

23 [1960] Ch. 313, 326; [1960] 2 W.L.R. 32; [1959] 3 All E.R. 879, C.A.

24 [1908] 2 Ch. 235.

25 [1914] 1 Ch. 511.

which is the source of the passing. Under English law settlements can be created by will as well as by instrument inter vivos; and in connection with such settlements "proper law" is used, I think, as the equivalent of the adjectival "English," "Scottish" or "foreign" law. It was so used in the leading case *Duke of Marlborough v. Attorney-General*,26 which was decided only four years before the present enactment. So used, proper law denotes something which is not only not necessarily the same as the lex situs, where an immovable is concerned, but is also so far different in conception that the two systems may each have to be given effect to in respect of the same disposition. *In re Piercy*27 offers an illustration of this. In that case land in Sardinia was devised by the will of an English testator to trustees upon trust to sell and hold the net proceeds of sale upon successive interests for life tenants and remaindermen. By the Italian law operative in Sardinia the will was ineffective to limit the land over, the tenants for life being by that law converted into absolute owners of the land. If the lex situs had been the proper law that would have been the end of the matter; but despite this it was held by North J., in the Chancery Division, that the trustees were under a duty to carry out their trust for sale and, having obtained and invested the proceeds, to hold them upon the trusts of the settlement declared by the will, the tenants for life being thus reduced again to mere limited owners. On the other hand, the rents of the Sardinian land until sale would devolve according to Italian law. Curious as the case is, I think that if one were to ask what was the "proper law" of the settlement which affected this Sardinian land and its proceeds of sale, one would really be forced to answer that, so far as the phrase was appropriate at all, the proper law was English, not Italian. The Italian law, said the judge,27a "has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition" (the sale) "which is valid according to Italian law."

If, then, "proper law" in section 28 (2), when applied to disposition" were to have the sense of "English," "Scottish" or "foreign," the three alternatives offered, would this reading accord with any known rules about the incidence of legacy and succession duty, and so of estate duty, as they stood in 1949? In my opinion, it would reproduce the succession duty rules as

26 [1945] Ch. 78.

27 [1895] 1 Ch. 83.

27a Ibid. 88.

then understood. The following propositions are perhaps adequate to state what they were:

(1) Both succession duty and legacy duty were imposed ex facie in the widest possible terms. The Acts creating the respective charges were, apparently, unlimited in their ambit. It was left to the courts by interpretation to determine what their limits were. For the purposes of succession duty, the general test of its incidence was that laid down by Lord Cranworth L.C. in *Wallace v. Attorney-General*28: it taxed only those persons "who become entitled by the laws of this country."

(2) In ascertaining what persons became entitled within this category, the equitable rule that realty is converted into personalty as from the date when a trust for sale becomes effective (whether or not subject to a power to postpone) was applied without reservation. It was as much a binding principle for fiscal purposes as it was for the determination of beneficial rights inter partes, see *Attorney-General v. Dodd*,29 *Forbes v. Steven*.30

(3) Foreign land, though an immovable, was therefore not exempt from duty when a succession fell in if at that date it was held on a binding trust for sale under an "English" settlement, that is, a settlement the trusts of which were regarded as having for their natural forum the Court of Chancery in England. Although the land was unsold, the succession was treated as being essentially a succession to an "English" asset, the notional fund of personalty. In the words of Mathew J., in *Attorney-General v. Dodd*,31 "For all purposes, land converted into money is to be treated as money, either for the purpose of a settlement or for fiscal purposes, because equity, and now law following equity, regards the land as money."

(4) This principle, if esoteric, was well recognised and was regularly enforced in death duty cases. Thus, in *Forbes v. Steven*,32 a testator domiciled in England died leaving his share in a partnership which owned warehouses in Bombay. James V.-C. upheld a claim to legacy duty in respect of this asset. By the law regulating the partnership the land which formed part of its capital was regarded as held in trust for sale: and conversion for one purpose was conversion for all. In another case, *In re Stokes*,33 the rents and profits of real estate in New Zealand unconverted but held in trust for sale were treated as personalty

28 L.R. 1 Ch. 1.

29 [1894] 2 Q.B. 150; 10 T.L.R. 336.

30 (1870) L.R. 10 Eq. 178.

31 [1894] 2 Q.B. 150, 156.

32 L.R. 10 Eq. 178.

33 (1890) 62 L.T. 176; 6 T.L.R. 154.

and held to be liable to legacy duty. Mr. Vaughan Hawkins, whose arguments for the Crown in this and other cases seem to have formed no small part of the law on the subject, maintained 34: "The case of *Forbes v. Steven*35 cannot be distinguished. It has never been doubted, always followed in practice, and it is incontestably right in principle." North J. agreed or succumbed. He noticed the argument that the land in New Zealand was an immovable or real estate: but, he said36: "What is this interest? In my opinion it is personalty ... not an interest in land."

In 1898 came the case of *In re Smyth*.37 A testator domiciled in the United Kingdom died having created by his will a settlement of land in Jamaica. At a certain stage in the course of the successions under the settlement a trust for sale became effective. one of the remaindermen entitled to a vested interest in reversion in the resulting proceeds died before the trust for sale had become binding or any sale had been made. The learned judge (Romer J.) held, nevertheless, that probate duty was exigible in respect of this legatee's interest, on the explicit ground that the interest was of the nature of personalty, though the land remained unsold at the date of the legatee's death. It was an English asset, an English "equitable chose in action," and it was not to be treated as foreign by reason of the fact that the plantation in question was situate in Jamaica. Having regard to the trust for sale, the Jamaican land was to be considered merely as an investment of the personalty fund.

In the light of these decisions, to which there was no countervailing current of authority, I do not see what Bray J. could have done in *Attorney-General v. Johnson*38 except decide the case as he did. His reasoning is said to have been obscure: but the doctrines that he had to expound and apply do not admit of very simple exposition. It has been objected that the arguments as to succession duty are inextricably mixed with those bearing on estate duty: but section 2 (2) of the Finance Act, 1894, made that confusion inevitable, since it took liability to one as the test of liability to the other. It is a fair theoretical criticism of the learned judge's decision that he did not so much decide that the estate in Assam was liable to duty, though situate abroad, as that the property that passed was not situate abroad at all, being personalty arising under an English settlement. Nevertheless,

34 62 L.T. 176, 178.

35 L R. 10 Eq. 179.

36 62 L.T. 176, 178-179.

37 [1898] 1 Ch. 89; 14 T.L.R. 77.

38 [1907] 2 K.B. 885.

having regard to the principles laid down in the previous authorities and to the wording of the Finance Act, 1894, s. 2 (2) itself, I think that in this limited field of trusts for sale of foreign land a double-faced argument such as is here involved has to be accepted. I will return to this point before I finish.

(5) It was clearly appreciated that in determining the range of succession duty, foreign property, real or personal, was being brought within the scope of British taxation and, formally at any rate, subjected to the resulting charge. Nor were these cases in which the maxim "mobilia sequuntur personam" could assist or explain the predations of the Revenue even where only items of personal property in the most straightforward sense were involved. The two leading cases on this point are *In re Cigala's Settlement Trusts*39 and *Attorney-General v. Jewish Colonisation Association*,40 both concerned with claims to succession duty (and in the second case with a claim to estate duty) when life interests terminated in property situated abroad. In the former the trust fund under an English settlement included French rentes, inscribed in the Grand Livre in Paris, and shares in the Bank of France: in the latter the great part of the securities affected was choses in action situate abroad, as were the documents of title to them. The judgments of the Court of Appeal are, I think, peculiarly relevant to what is now before us, because they were unanimous in holding that the death duty charge was exigible, notwithstanding that the property was physically situated abroad and that the succession itself could only be effective if admitted by foreign law. It was not relevant, said A. L. Smith M.R.,41 that Austrian law, the law of the settlor's domicile, would govern questions of legitim in the property. "... it is quite immaterial," said Collins L.J.,42 "where the property is physically situated." He accepted that "it must depend on foreign law whether the property, the subject of the trust, could ever be brought under it": but that only meant that the succession might be defeated. Finally, Stirling L.J. explicitly rejected the argument43 that an English succession is affected by having to refer to foreign law to ascertain the capacity of the settlor or the validity of his acts.

It is, I think, necessarily involved in the appellant's argument that "the proper law of the disposition" must change according to the question whether or not there is a foreign immovable among

39 (1878) 7 Ch.D. 351.

40 [1901] 1 K.B. 123; 17 T.L.R. 106, C.A.

41 [1901] 1 K.B. 123, 133.

42 Ibid. 137.

43 Ibid. 141.

the trust investments at the date when any particular passing takes place under the settlement. Thus, if the land in South Africa had been sold and the proceeds invested in anything but other foreign land, the proper law in this case would not be anything but English. On the other hand, if a settlement starts off as English with investments in the United Kingdom and some or all of them are sold and invested in foreign land before a passing takes place, the proper law of the disposition, originally English, then becomes foreign qua that asset. I find it very hard to be content with such a method of construction under which the "proper law" sways to and fro; the more so because proviso (*a*) (i) to the section plainly contemplates that the proper law of a disposition is determined once and for all at one date, the date when it becomes effective.

My Lords, I have come to the conclusion that section 28 (2) of the Finance Act, 1949, must be interpreted in the light of all this previous authority. Having regard to it I do not believe that the words "proper law regulating the ... disposition" can be read as meaning no more than that system of law without whose sanction the terms of the disposition would not be effective. So to read it attributes no significance at all to the adjective "proper." It might as well not be there. I hope that I am not being peremptory in saying that: but I do not think that any other of your Lordships has succeeded in finding any significance for it, if that reading were to be accepted. That seems to me an unsatisfactory method of construction, if another and certainly no less plausible meaning is to hand. "Proper law governing the devolution" can be read as a simple description of the effective law, but in my opinion, in the case of a will or settlement, "the proper law" means the system of law by which trusts created under it are to be taken as governed, and in an English settlement of the proceeds of sale of foreign land that proper law is English. I do not think, therefore, that in the present case the conditions of exemption have been made out.

I would dismiss the appeal. We have, if I may say so, three excellent judgments before us, from Upjohn J. (as he then was) in the High Court, and from the Master of the Rolls and Harman L.J. in the Court of Appeal. They are all very familiar with this field of death duties, and the judgments on each side show how well balanced the arguments are. I do not believe that either side can present a wholly satisfactory case or one that does not leave certain difficulties unanswered. I can only say that for

the reasons which I have set out, I think the views of Upjohn J. and the Master of the Rolls are the more convincing.

There is only one further point to mention. The claim to estate duty has been expressly made in respect of the immovable property consisting of the seven one-eighth undivided shares in Steenbokspan farm. That is the property situate abroad which is treated as passing. Is it consistent with the tenor of the argument which can alone sustain the charge of duty that the claim should be made in respect of the land itself, or does the claim, when analysed, really amount to an assertion that, apart from the passing of the land, there was also a passing of the equitable interest in the fund of personalty created by the will? I have found this a troublesome, because it is rather a metaphysical, question. I think, however, that the Revenue's claim is rightly directed to the immovable itself. It might have been wiser policy to formulate it, as in *Attorney-General v. Johnson*,44 in the shape of a claim upon "so much of the residuary estate as was attributable to" the land in South Africa, but there is not, I think, any ultimate difference between the two ways of putting it. Estate duty

is charged in respect of actual property: and, although the trusts affecting that property, if they turn it into personalty in the eyes of the law and so into an English asset, may afford a test of whether it is chargeable or not, they do not create money or investments where no money or investments yet exist. What exists is the land forming part of the residuary estate and, in my opinion, it is that asset which falls within the charge imposed by section 1 of the Finance Act, 1894.

LORD TUCKER. My Lords, I agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD DENNING. My Lords, it is clear to my mind that when section 28 (2) speaks of the "devolution" of property, it means a devolution by operation of law, such as heirship or kinship. When it speaks of a "disposition," it means a disposition by instrument, such as a will. And when it speaks of "the disposition under or by reason of which" property passes, it means the particular devise or bequest under which it passes. The disposition with which your Lordships are concerned is a gift in the will of Sir Frederic Philipson-Stow, the first baronet.

44 [1907] 2 K,B. 885.

He devised his residuary estate to trustees who, under the direction in the will, received the income and paid it to his widow during her life. After she died they paid it to his son, Sir Elliot Philipson-Stow, the second baronet. When Sir Elliot died, the trustees were bound by the will to pay the income to his son, Sir Frederic, the third baronet. It is this disposition - this gift over in the will to the present Sir Frederic - with which this case is concerned.

The Crown claim estate duty on the property which passed on Sir Elliot's death. The trustees have, of course, to pay estate duty on much of it but they claim to be exempt from estate duty on a farm at Steenbokspan in South Africa which they still hold. It is part of the residuary estate which they hold under a trust for sale, but they are at liberty to postpone the sale. They have postponed the sale and still hold the property although 52 years have passed since the testator's death.

It is admitted that all the conditions necessary to give exemption are fulfilled in respect of the South African land except this one on which the whole question arises. What is the proper law regulating the disposition? The Crown say that, in order to ascertain the proper law, you must look at the intention of the testator: just as in the case of a contract you look at the intention of the parties (quoting *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd*.45, and likewise in the case of a marriage settlement (quoting the *Marlborough* case46 this applies, say the Crown, even though the contract deals with land abroad (quoting *British South Africa Co. v. De Beers Consolidated Mines Ltd*.47.

My Lords, I cannot accept the Crown's contention on this point. I do not even accept all that the Crown say about the case of a contract. Only a little while ago this House declared that, in the absence of an express clause, the proper law is to be found by asking with what country has the transaction the closest and most real connection: see *Tomkinson v. First Pennsylvania Banking and Trust Co*. *(In re United Railways of Havana and Regla Warehouses Ltd*.48. But we are not dealing here with a contract. We are dealing with a will: and, whilst I would agree that the construction of a will depends on the intention of the

45 [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206, P.C.

46 [1945] Ch. 28, 88.

47 [1910] 2 Ch. 502, 513; 26 T.L.R. 591, C.A.

48 [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.

testator, I would say that in no other respect does his intention determine the law applicable to it.

Let me take first the case where there is a disposition of *movable* property by will. There is no doubt that the proper law regulating the disposition of *movables* is the law of the domicile of the testator at the time of his death. In the leading case on this subject Lord Cranworth used the word "regulate" in this very connection. When a person dies domiciled abroad, he said, in every case the succession to personal property will be *regulated* not according to the law of this country, but to that of his "domicile": see *Enohin v. Wylie*.49 There is perhaps an exception in regard to the *construction* of his will: for if a question arises as to the interpretation of the will and it should appear that the testator has changed his domicile between making his will and his death, his will may fall to be *construed* according to the law of his domicile at the time he made it: though in all other respects it would be governed by the law of his domicile at the date of his death.

Take next the case where there is a disposition of *immovable* property by will by means of a direct devise and not a trust for sale. There is no doubt that the proper law regulating the disposition is the law of the country where the property is situate and not the law of the testator's domicile: see *Freke v. Lord Carbery*,50 *In re Maces*.51 There is, perhaps, again an exception in regard to the construction of his will: for if a question should arise as to the interpretation of the will, it will normally fall to be construed according to the law of his domicile at the time when he made his will. But this interpretation would itself be subject to the overriding requirement that it must in no way conflict with the law of the country in which the property is situate: for if the disposition is not one which is permitted or recognised by the lex situs, it cannot be given effect: see *Earl Nelson v. Lord Bridport*,52 *In re Miller*.53

The so-called exceptions to what I have referred - about the construction of a will - are not really exceptions at all: for in construing a will, so as to see what a testator meant, every civilised country looks to see what he intended - and for this purpose you may legitimately look at the law he had in mind - but you only do this as a guide to find his meaning. You do not

49 (1862) 10 H.L.C. 1, 19, H.L.

50 L.R. 16 Eq. 461.

51 [1908] 2 Ch. 235.

52 (1846) 8 Beav. 547, 570.

53 [1914] 1 Ch. 511.

do it so as to find out the law which regulates his dispositions. He has no choice about that. Apart from this one question of construction, the succession to movables is regulated by the law of his domicile: and the succession to immovables is regulated by the lex situs.

Now does a trust for sale make any difference to this proposition? It was not disputed that a trust for sale does not alter the quality of property. If it is land, then so long as the land has not been sold, the interest of the beneficiary remained immovable property: see in *In re Berchtold*.54 It follows that when the life tenant dies and the right to the income passes from him to his successor, the disposition under which it passes is regulated by the lex situs just as if it were a direct devise.

I was for some time impressed by the argument that if the law regulating the disposition of immovables by will is always the lex situs why add clause 28 (2) (*c*)? But I do not think it should prevail. The draftsman, I think, was concerned to deal comprehensively with movable and immovable property passing under a will or on intestacy. And it was natural enough to frame the section in the way he has, even though the conditions of exemption involve a good deal of overlapping.

I was also impressed by the argument that in 1949 the decision in *Attorney-General v. Johnson*55 held the field and the legislature cannot have intended to open a new door for exemption. But the decision is admitted by the Crown to have been based on wrong reasons. And I prefer not to suppose that the legislature intended to perpetuate a wrong decision.

I would therefore allow this appeal.

Appeal allowed.

[The House ordered that the respondents do pay to the appellants their costs here and in the Court of Appeal, and that the respondents do pay to the appellants half their costs in the Chancery Division.]

Solicitors: Norton, Rose, Botterell & Roche; Solicitor of Inland Revenue.

F. C.

54 [1923] 1 Ch. 192.

55 [1907] 2 K.B. 885.