# International Private Law in Scotland, With Special

Reference to the Choice of Law.

R.R. TAYLOR

#### ·Vol.I

The Law of a Country and Lenvoi

Classification, Selection, and Re-Classification

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### THE LAW OF A COUNTRY AND RENVOI

In the principles which follow, the law of a country, e.g. the law of the domicile, means the law which the Courts of that country would apply in the case in question, including both its internal rules of law and its rules for choice of law, and does not mean the law which the Courts of that country would have applied in the case of a person having his domicile and nationality there, in respect of a transaction occurring there. / Collier v. Rivaz 1841 2 Curt. 855; Maltass v. Maltass 1844 1 Robertson 67 per Dr. Lushington at p. 72; Frère v. Frère 1847 5 Notes of Cases 593; Connel's Trs. v. Connel 1872 10 M. 627; In the Goods of Lacroix 1877 2 P. 94; In re Trufort 1887 36 Ch. D. 600; In re Queensland Mercantile & Agency Co. 1892 1 Ch. 219; In re Johnson 1903 1 Ch. 821; Armitage v. Attorney-General 1906 P. 135; Casdagli v. Casdagli 1918 P. 89 per Scrutton L.J. at p. 111; Approved 1919 A.C. 145; In re Annesley 1926 1 Ch. 692; In re Achillopoulos 1928 1 Ch. at p. 443; In re Ross 1930 1 Ch. 377; In re Askew 1930 2 Ch. 259; Collins v. Attorney-General 1931 145 L.T. 551; In re O'Keefe 1940 1 Ch. 124; Jaber Elias Kotia v. Katr Bint Jiryes Nahas 1941 A.C. 403; Dicey pp. 60 et sequ; A.B. Keith 1942 Jo. Comp. Leg. 69; Westlake chap. II; Rabel, i, pp. 70 et sequ; Bentwich, "Domicile & Succession" chap. 8; W.J. Brown 1909 L.Q.R. 145; 1941 LIII J.R.; Breslauer, 'International Private Law of Succession' p. 15; Griswold, 'Renvoi Revisited' 1938 51 Harvard Law Rev. 1165. Bremer v. Freeman 1857 10 Moo. P.C. 306 and Hamilton v. Dallas 1875 1 Ch. D. 257 have been claimed as authority for this proposition, (<u>In re Ross</u>, supra) and as authority which the law of a country means the internal law of that country, (J.D. Falconbridge XLVI L.Q.R. 465, Cheshire pp. 48, 66; E.H. Abbott 1908 XXIV L.Q.R. 133; Wolff p. 194) but the cases are in inconclusive). Thus when a Lebanese subject, domiciled/

domiciled there, died leaving land in Palestine; and the question of succession to the land came to be considered in the Palestine Courts, where the appropriate rule of International Private Law was that the succession was to be governed by the national law of the deceased; this meant, not the law which the courts of the nationality would have applied in the case of its own national, domiciled in its own country with regard to property in its own country, but the law which the Courts of that country would apply to the particular case of the propositus, having regard to what, in their view, was his domicile, (if they considered that to be relevant) and having regard to the situation of the land in question, (if they considered that to be relevant). / Jaber Elias Kotia v. Katr Bint Jiryes Nahas, supra.  $\overline{7}$  According to the evidence, the Courts of the Lebanon, in the case of a Lebanese subject domiciled there who died intestate owning land in Palestine, would have applied the law of the situs of the land, the law of Palestine as applicable to a Palestinian citizen, and this accordingly was applied. When our Courts are referred by our principles for the choice of law to the law of Belgium they must decide the question as the Courts of Belgium would decide it.  $\angle$  Collier v. Rivaz, supra, at pp. 859, 862 $\angle$ 7

There are two other views of the meaning of the law of a country.

In the United States it is held to mean the internal law of the country, exclusive of its rules for choice of law; i.e. the law which would have been applied by the Courts of the country referred to in a case arising there which did not involve a conflict of laws.  $\angle$  Lorenzen, 1910 10 Col. Law Rev. 190; American Restatement of the Law: Conflict of Laws § 7; Beale i, p. 55; Goodrich 'Conflict of Laws' § 7; <u>Re Tallmadge</u> N.Y. Law Jour. Oct. 17, 1919. / 17, 1919. The wider meaning of 'law of a country' may exceptionally be ascribed, e.g. in title to land and the validity of a decree of divorce - Restatement 8; W.W. Cook, Logical and Legal Bases of the Conflict of Laws, pp. 19-21, 239-283; J.D. Falconbridge 1937 LIII L.Q.R. 559-567. Contra <u>University of Chicago</u> v. <u>Dater</u> 1936, 277 Mich. 658, 270 N.W. 175 (referred to by Griswold, 51 Harv. Law Rev. 1207)\_7

The effect of Erie Railroad Co. v. Tompkins [1938 304 U.S. 64] and Klaxon Co. v. Stentor Electric Manufacturing Co. [1941 313 U.S. 487 ] will be to confirm the United States in their view. These cases decided that there was no federal general common law Z as had been believed to be the case since Swift v. Tyson 1842 U.S. 16 Pet. 17 but that it is the duty of the federal Courts to apply the law of the State in which they are sitting and of the Supreme Court to apply the law of the State from which the appeal comes, and that this applies to the conflict of laws as well as municipal rules. There are thus as many systems of International Private Law in the United States as there are systems of law, and not, as had formerly been believed, simply a number of inter-:pretations of what was theoretically the one system. United States Courts will be compelled therefore to regard the law of a country as meaning its internal law, for if they took our view, they would be involved in the circulus inextricabilis which must arise when more than one Court adopts this view. \_ see post\_7

The third view, which is adopted in some countries,  $\angle$  E.g. Germany, Poland, Sweden, Hungary, China, Japan, Liechtenstein, and Palestine - Rabel i, 81, 1943 S.L.R.168; and France - In re Annesley 1926 1 Ch. 692\_7 is the doctrime of renvoi. If the question of the capacity of a Scotsman domiciled in France is adjudicated upon<sup>in</sup><sub>A</sub> the French Courts, they find themselves referred by their system of Inter: national/ International Private Law to the law of the nationality of the propositus, i.e. Scots law. Scots law however says that the law of the domicile of the propositus, namely French law, should apply. When this reference back is made by the foreign law referred to, the French Courts, in order to prevent a circulus inextricabilis, accept it, and apply the internal law of France, i.e. the law which would have been applied in the French Courts in the case of a subject of France domiciled there. Some of the countries which recognise renvoi, or reference back, also recognise transmission, or reference to a third system of law. Thus if an English testator died domiciled in Germany leaving immoveables in Georgia, U.S.A., the German rule refers to English law, which refers to the lex situs, so the German Courts would apply the statute of distribution of Georgia. [Rabel, i, 78. Note that an effect similar to transmission can occur from our view - In re Achillopoulos 1928 1 Ch. at p. 443; In re Trufort 1887 36 Ch. D. 600; Armitage v. Attorney-General 1906 P. 135 - but the peculiarity of the Continental view is they stop at the internal law to which they are transmitted by the first law referred to. 7 This doctrine of "renvoi" or "transmission" is not recognised by our Courts. Our Courts determine the matter as the Courts of the country referred to would have done. In doing so our Courts may have to apply the doctrine of renvoi or transmission recognised by the foreign law, but that is the only way in which our Courts are concerned with renvoi or transmission. Thus when an Englishwoman died domiciled in France, and the question arose in the English Courts as to how her estate should be divided, the principle was that the law of her domicile, France, should govern. According to the law of France applicable to her case it was the law of her nationality, English law, which governed; which referred back to French law. The English Courts held, on the evidence of the French lawyers, that the French Courts/

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Courts would have accepted this renvoi and applied French internal law, and accordingly that was applied.

<u>[In re Annesley</u> 1926 1 Ch. 692\_7\_\_\_\_

But when an Englishwoman died domiciled in Italy and the same rule came to be applied in the English Courts, namely that the law of her domicile should govern, and it was found that the law of Italy applicable to her case was that the law of her nationality should govern, it was held on the evidence of the Italian lawyers that the Italian Courts did not recognise the doctrine of renvoi, and that they would have applied the internal law of England,  $tmat^{Mich}$ was therefore applied.  $\sum In re Ross 1930 1 \text{ Ch. } 377 \sum$ " .... an English Court can never have anything to do with it (renvoi), except so far as foreign experts may expound the doctrine as being part of the lex domicilii."  $\sum In re Askew 1930 2 \text{ Ch. } 259, per Maugham J. at p. 268 \sum$ 

The first view, which our Courts adopt, has the advantage that the same substantive rules of law will be applied to the decision of the question whether the case is Litigated in our Courts or in the foreign Courts. It secures the object for which International Private Law was designed. This however may be an inlogical result, for since the systems of International Private Law of the two countries differ, the actual rules of law which are applied should differ according to the forum in which the cause is litigated. Since the first view has been authoritatively approved by the Privy Council, [ Jaber Elias Kotia v. Katr Bint Jiryes Nahas, supra\_7 it would be fruitless to criticize it at any length. This has already been done in a large number of books and articles. [Bate, "Notes on the Doctrine of Renvoi in Private International Law"; E.H. Abbott 1908 XXIV L.Q.R. 133; Baty, "Polarized Law" pp. 115 et sequ; Pollock, 1915 XXI L.g.R. 106, and 1920 XXXVI L.Q.R. 91; XLII L.Q.R. 435; J.D. Falconbridge XLVI L.Q.R. 465, and XLVII L.Q.R. 271; Mendelssohn-Bartholdy, "Renvoi in Modern English Law"; J.H.C. Morris 1937 18 B.Y.I.L

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32; Cheshire pp. 45 et sequ; LVI L.Q.R. 144; J.H.C. Morris and Cheshire in 1940 L. R. 333; to detail only some which have been published in England.JBriefly the criticisms are these: First, "A rule for the choice of law has already been applied, namely our own. To proceed to adopt a foreign rule is to decide the same question twice over." [ Baty, Polarized Law p. 116] Secondly, our rules for the choice of law are abandoned merely because a foreign country has a different rule. This however may be begging the question of what is our rule: if our rule for the choice of law is that the matter should be decided exactly as the Courts of the foreign country would have decided it, to act accordingly is not to abandon our rule for choice of law but to apply it. Cp. Griswold, 'Renvoi Revisited' 1938 51 Harv. Law Rev. 1177,8 7 Thirdly, that the law of country meant the internal law of that country has tacitly been assumed to be the rule in hundreds of cases where the matter has not been raised. [Mendelssohn-Bartholdy, 'Renvoi in Modern English Law' examines some of these cases pp. 44 et sequ\_ The narrow meaning of the law of a country was the one on which our rules for the choice of law wire evolved and there is no justification in principle or reason for many of our rules except on the premise that the law of a country means the internal law of that country. Thus it has been said that "it is peculiarly illogical to construe a reference to the lex loci celebrationis as meaning anything but the local law, because the reason of the locus regit actum rule, historically and practically, is that it permits a person to use the forms which are immediately available or familiar to him at the place where he is, or as to which he can readily procure professional advice there." [J.D. Falconbridge, XLVI L.Q.R. 483] But nevertheless, when a British subject died domiciled in France/

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France leaving a will executed in France, which was valid by English internal law, but not by French internal law, it was held to be valid because Lord Kingsdown's Act said that a will is valid if valid by the law of the place where made, and the evidence of French law was that the will of a British subject made in France would be valid if it was in the form required by the law of England to give validity to wills executed by Englishmen in England. / In the Goods of Lacroix 1877 2 P. 94; Cp. Connel's Trs. v. Connel 1872 10 M. 627  $\overline{\mathcal{J}}$  . However this criticism is not so strong if the reason for the locus regit actum rule is that the deed obtains its validity from the force of the law of the country in which it is made. In Re O'Keefe / 1940 1 Ch.1247 a British subject died intestate domiciled in Italy where she had lived continuously for forty-seven years. Her father had been born in Ireland, but she was born in British India, and had lived in England, France, and Spain, before settling down in Italy. In applying Italian law as the law of the domicile, the English Court heard the evidence of Italian lawyers to the effect that Italian law gave effect to the law of the nationality; Italian law however was silent as to what law was indicated when the nationality was British; Italian lawyers said that the law of the country to which she belonged would be applied and the Court held this to be the law of the British country in which she had her domicile of origin, namely Eire, which was therefore held to govern the distribution of her estate. She had only visited Ireland, on a short visit with her father, and she could not be a citizen of Eire by Art. 3 of the First Schedule to the Constitution of the Irish Free State Act 1922 [Criticised in LVI L.Q.R. 144] Now the reason for applying the law of the domicile is that every person must be presumed to have had in mind that if he made no will his estate would devolve in a certain way, and the way in which he would think that it would devolve, would be according to the law with which/

which he was familiar, which would be the law of the place where he was domiciled; to give effect therefore to the lex domicilii is to divide the estate in accordance with what is presumed to be the deceased's intention. The meaning of the lex domicilii which was taken in Re O'Keefe resulted in the application of a law with which the deceased had hardly any connection at all. If it is correct to say that the reason for applying the law of the domicile is the presumed intention of the deceased, the meaning which was ascribed to the law of the domicile in Re O'Keefe must be wrong, and the correct meaning must be the internal law of the domicile. However it is possible to reply that this objection begs the question of what was the deceased's intention. In Re Askew Maugham J. reasons thus: "John Doe, by acquiring a permanent home in Utopia, has attracted to himself the system of personal law which Utopia would apply to him, and it may be added that this would be in accordance with his presumed intention". / 1930 2 Ch. at p. 266\_7

Fourthly, the view adopted by our Courts involves a different decision according to whether the law of the country referred to does not recognise renvoi. The estate of an Englishwoman domiciled in France was distributed according to French internal law and that of an Englishwoman domiciled in Italy according to English internal law, simply because the French Courts recognised and the Italian Courts did not recognise the doctrine of renvoi. <u>In re Annesley</u>, and <u>In re Ross</u>, supra\_7 This is the more unsatisfactory because either the Italian or the French view of renvoi must be wrong.

-----Fifthly, litigants are abandoned to the uncertainty which exists in foreign systems of law on the question of renvoi. The evidence of foreign jurists as to whether this is a part of their law will usually be conflicting, since this is one of the most disputed points of International Private Law.

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Sixthly, our view contains no provision for the case when the Courts of the law referred to would have dis-:claimed jurisdiction. Suppose a person dies domiciled in the U.S.S.R. leaving moveable property in Scotland, and our Courts come to apply the law of the domicile in a question of the succession to this property. Our Courts have to decide the matter exactly as the Soviet Courts would have done. But the Soviet view is that every case of succession to assets situated within the U.S.S.R. is governed by Soviet law, and Soviet law and the Soviet Courts disclaim any authority over devolution of assets situated abroad, irrespective of the domicile or nationality of the deceased. Our Courts therefore cannot decide the matter exactly as the Soviet Courts would have decided the same matter, since the Soviet Courts would have refused to decide it. It has been suggested that in such a dilemma our Courts would apply the Soviet internal law, i.e. the Soviet law which would have been applicable if the goods had been situated in the U.S.S.R. [S. Dobrin, 1934, 15 B.Y.I.L. 36] There is however no logical necessity for this. It is difficult to hold that Soviet law has a wider application than it claims to have. Our Courts might well decide the matter according to our own internal law on the ground that that is what the Soviet Courts would expect to happen. [In re Trufort 1887 36 Ch. D. 600 at p. 611. Cp. Griswold, 'Renvoi Revisited' LI Harv. Law Rev. 1173\_7

The last, and greatest difficulty of all is that if another country adopted the same view as our Courts, namely that a question should be decided exactly as the other Courts would have decided it, the <u>circulus</u> <u>inextricabilis</u> which our theory is said to avoid, would arise. Our view could land us now in a <u>circulus</u> <u>inextricabilis</u> within the British Empire. Suppose a British subject with an English domicile of origin dies leaving/ leaving land in Palestine and the succession to it is disputed in the English Courts. The English Courts say that the <u>lex situs</u>, the law of Palestine, applies, and they have to determine the matter exactly as a Court in Palestine would determine the question. The law of Palestine says by statute that the law of the nationality of the deceased applies and this means that the Palestine Court have to determine the matter exactly as the English Court would have determined that matter. <u>Jaber Elias</u> <u>hotia</u> v. <u>Katr pint piryes Nahas</u> 1941 A.C. 403\_7 It is impossible to forecast what solution will be given to this problem when it arises. Ferhaps the Court seised of the case would accept the renvoi. <u>Cp</u>. Wolff p. 205\_7 This might then be called the "Advanced Renvoi Doctrine".

The doctrine of renvoi, and our interpretation of "the law of a country" may be regarded as a means of resolving the conflict between differing systems of International Private Law. There are three levels: (1) internal systems of law, each of which is very different from the others (2) systems of International Private Law for resolving the conflicts of internal systems of law; there are slight differences between systems of International Private Law. (3) Renvoi and 'Law of a Country' doctrines for resolving the conflict between systems of International Private Law. Our view of the 'law of a country' is certainly an excellent method of resolving conflicts between systems of International Private Law by applying our own system only where it agrees with the foreign system, and always deferring to the foreign system when ours disagrees with it.

It must be admitted that this meaning of "the law of a country" has only been held to be the correct meaning in two instances, namely "the law of the domicile" in the rule about succession / All the cases cited at the commencement, except <u>Connel's Trs</u>. v. <u>Connel</u> 1872 10 M.627, and/ and In the Goods of Lacroix 1877 2 P. 94\_7and the lex loci actus in the rule about the formal validity of deeds. [Connel's Trs., and In the Goods of Lacroix, supra] Professor W.W. Cook / Logical and Legal Bases of the Conflict of Laws", pp. 239 - 251 7 makes a case for defining the word 'law' separately in each rule of the conflict of laws so as to carry out the purpose of the rule in question. This course however would result in too much uncertainty and confusion, and since the two instances in which the broad meaning of the law of a country has been adopted are the most unfavourable for that meaning which could have been picked, [See the third criticism, above] there does not seem to be any room for doubt.  $\angle$  Contra Wolff pp. 193,198 $\angle$ There is much more e.g. to be said for taking the lex situs, in the rule about immoveables being governed by the lexsitus, to mean the whole of the law of the situs.

That the law of a country includes any law which the Courts of that country would apply to the case in question is true whether the law referred to is the law of a foreign · country or the law of the forum. When the law of the forum is referred to, of course, the rule means that it is the internal law of the forum which has to be applied. This is not an exception to the rule as to the meaning of the law of a country, but an application of it. Unless it is kept in view, that the law of the forum means the internal law of the forum, it is only too easy to slip into meaningless processes of reasoning like this excerpt from a judgement of Lord Justice Lindley in a case about a bill of exchange: "The contract on the part of the acceptor was to pay the bill to the lawful holder. That is said to mean, the lawful holder according to the law of England. I agree. But we must not ignore what took place in Norway ..... If the mode and circumstances under which he got it (the bill) were such as to give him a title in Norway, not only to the bill but to the benefit of the contract, then Köpmansbank/

Kopmansbank are the lawful holders by the law of England, and there would be no defence to an action."  $\angle Alcock$  v. Smith 1892 1 Ch. at p. 264 7 To start with the proposition that the contract of the acceptor in certain circumstances is to pay the bill to the holder according to the law of England and then to ascribe the wide meaning to the phrase the law of England, is to state a meaningless truism, for the contract of the acceptor in every case is to pay to the holder according to the law of England in that sense. But this form of language is not uncommon. / Cp. The language of the Lord Ordinary, Lord Justice Clerk Inglis and Lord Cowan in Purvis' Trs. v. Purvis' Exrs. 1861 23 D. 812; Hirschfield v. Smith 1866 L.R. 1 C.P. 340; N.V. Kwik Hoo Tong Handel Maatschaapij v. James Finlay & Co. 1927 A.C. 604 per Viscount Finlay at p. 608; Vita Food Products v. Unus Shipping Co. 1939 A.C. at p. 291 (criticised by J.H.C. Morris and Cheshire in 1940 L.g.R. 333. But they go too far for they do not accept the view that a reference to a foreign law means the whole law of the country referred to.)7

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A provision in an Act of Parliament that the law of a country should apply, prima facie means the whole law of that country, whether the law referred to is the law of the forum or a foreign law, <u>Connel's Trs. v. Connel</u> 1872 10 m. In the Goods of Lacroix 1877 2 P. 94; Jaber Elias 627; Kotia v. Katr Bint Jiryes Nahas 1941 A.C. 403 / subject to rebuttal if an intention to the contrary appears from the construction of the statute as a whole. Thus The Titles to Land Consolidation Act 1868 sec. 20 which dispensed with the necessity of a <u>de praesenti</u> conveyance for the settle-:ment of Scottish heritage provided that a will of Scottish heritage should be valid "if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland". By the internal law of Scotland a will was invalid, but was valid by the law of England,

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where it was executed. The Court held that since it was part of the law of Scotland that a will was validly executed if executed according to the lex loci actus, the will was valid under the Act. In short, 'the law of Scotland' was given the wide meaning. An example of the rebuttal of the presumption is to be found in the Rules of the Supreme Court in England, Order XI r. 1 (e) (iii), which provide that service of a writ out of the jurisdiction may be allowed by the Court whenever the action is in respect of a contract "by its terms or by implication to be governed by English law." This can only mean English law in the narrow sense, for every contract considered by the English Courts is governed by English law in the wide sense. Z But see the language of Viscount Dunedin in N.V. Kwik Hoo Tong Handel Maatschaapij v. James Finlay & Co. 1927 A.C. 604, at p. 608/

The Earl of Stair V. Head, a decision of the whole Court, / 1844 6 D. 904 / appears to be an exception to the rule that the law of a country means the whole law of that country applicable to the case, but on examination this will be found not to be the case. By an antenuptial marriage contract, made by two Scots persons who were then domiciled in England, it provided that on the predecease of the wife without issue, part of the estate should, on the death of her husband, be paid to her heirs, executors, and assignees whomsoever, and it was also provided generally that the import and effect of the contract should be construed and regulated by the law of Scotland. The wife predeceased, intestate, and without issue, while the spouses were domiciled in England. It was held that her next of kin by the internal law of Scotland and not by the internal law of England was entitled to the part of her estate destined to her heirs, executors, and assignees whomso ever. The minority judges [ Lords Fullerton, Jerrfey, and Cockburn Z argued that the funds should go to the persons who/

who were the deceased's heirs by the law of Scotland, and that the law of Scotland is that a person's heirs are determined by the law of the domicile, namely English law. In the later case of Lister's J.F. v. Syme [ 1914 3.C.204] a similar destination occurred in a marriage contract, and the law of Scotland was held to be applicable, not because of any stipulation in the contract, but because the whole circumstances surrounding the contract pointed to Scotland. and again the deceased died domiciled in England. The argument which had been advanced by the minority judges in Earl of Stair v. Head was again advanced, and was supported in the Inner House by Lord Johnston. In Lister's J.F. V. Syme the destination was expressly treated as a testa-:mentary disposition. / Contrast Lord Justice Clerk Hope in Harl of Stair v. Head, who thought that the question was the construction of a contractual stipulation  $\overline{7}$  . The majority of the judges in both cases however elected to apply the internal law of Scotland, and at first sight this appears to be an authority for the proposition that a declaration that a contract is to be governed by the law of A means the internal law of X.

The decision however is consistent with the rule that a reference to the law of a country means the whole law of that country that is applicable to the case in question and that the Courts seised of the matter must decide the question just as a Court sitting in the country referred to would have decided it, because, firstly, the case was decided by the Courts of the country the law of which was referred to, and therefore it is impossible to say that the case was not decided as the Courts of the country referred to would have decided it, and secondly because of this consideration: if a testator declares that his will is to be construed according to the law of i and dies domiciled in X, that does not mean that his will is to be construed by the internal law of X, as being the law of the domicile, by which the law/ law of Y consider that testaments should be governed: a reference to the law of Y means the whole law of Y applicable to the exact case in question, i.e. the law which the Courts of Y would have applied to a will which said that the law of Y was to govern, not the law which the Courts of Y would have applied to the will if the will had contained no clause to the effect that the law of Y should govern.

Suppose the parties to a contract provide that it is to be governed by the law of X. The fact that the contract has only a tenuous connection with X will not, according to our system of International Private Law, prevent the law of X being applicable to both the interpretation and the essential validity of the contract.  $\angle Vita$  Food Products v. Unus Shipping Co. 1939 A.C. 277 $\angle$  But the law of X may not recognise the same 'autonomy' of the parties as to choice of law, and may say that where a certain law is stipulated for, which is not the law with which the contract has most connection, the stipulation is to be disregarded, and the true proper law applied. In such a case our Courts would apply whatever law the Courts of X would have regarded as applicable.

"The Incidental Question" Z This is the name given by Wolff, p. 206. It has usually been called "The Preliminary Question" 7

Once the Court seised of the case has decided which system of internal law is applicable, i.e. after it has applied its rule for choice of law, then considered itself as sitting in the foreign country referred to and considered renvoi, and found itself finally referred to certain municipal rules of law, an "incidental question" may arise which can be illustrated by a slight alteration of the facts of <u>In re Goodman Trusts</u> :-  $\sqrt{-1881}$  17 Ch. D. 266. The alteration is in taking an initial reference to a foreign law, instead of to the law of the forum, as there. $\sqrt{-1}$ A person dies intestate domiciled in a foreign country X.

The rule is that the law of his domicile, X, governs the succession to his moveable estate. After full consideration of the 'law of a country' it is decided that the internal law of X has to apply. Now according to the internal law of X the estate is divisible equally among the deceased's legitimate children, and there is a dispute as to which of the children are legitimate. The rules of International Private Law of X might say that the legitimacy of children is governed by the law of A, while our rules of International Private Law would have said that their Legitimacy was to be governed by the law of B. which system for choice of law has to be followed? Thesame problem arises when a will has to be interpreted according to the law of Y and a question arises as to whether a person is truly the wife of another, and so a beneficiary under the will. Will our rules of Inter-:national Private Law for determining the validity of marriages be applied, or those of Y? Wolff gives another example, of a case of adoption, when our Courts are referred by our rules for choice of law to the law of the adopter's domicile. If that law is the law of France or Germany and it is the internal law of either of those countries which has to be applied, our Courts will be faced by their rule that an adoption is only valid if the adopter has no legitimate children. If the incidental question arises as to whether a certain child of the adopter is legitimate, will that be decided according to our rules for choice of law or those of the domicile of the adopter? Zp. 208. Some of Wolff's examples, it is submitted, (do not really raise the incidental question particularly examples (a) and (c, pp. 207,  $8_{-}$ 

It is the rules for choice of law of that legal system which governs the principal question, and not our own rules for choice of law which have to govern these incidental questions,  $\angle$  Wolff pp. 206 - 212; A.H. Robertson, 1939/

1939 LV L.Q.R. 571, 'Characterization in the Conflict of Laws' pp. 135 - 156. Breslauer, "Frivate Internation Law of Succession pp. 18 - 21, and pp. 61 et sequ. submits that a general answer can not be given. Shaw v. Gould 1860 L.R. 3 H.L. 55 is not an authority contrary to this proposition as Wolff appears to think. There are no precedents of our Courts in point. 7 otherwise our Courts would not be deciding the matter exactly as the foreign Court would have decided it. The result of this may be that when a man dies domiciled in X leaving land in Y, and our two rules for choice of law come to be applied, namely (i) the law of the domicile of the deceased governs the succession to his moveables, and (ii) the law of the situs governs the succession to immoveables, that his children might be considered as illegitimate for the purpose of succeeding to moveables (because they are illegitimate according to the International Private Law of X) and legitimate for the purpose of succeeding to his land (because they are legitimate according to the International Private Law of Y ). There is nothing objectionable in this. Z Cp. Robertson, 1939 LV L.Q.R. at p. 5727

There are no precedents of our Courts to support the view that the incidental question is governed by the International Private Law of that foreign country, the law of which governs the principal question. A.H. Robertson cites <u>In re Stirling</u>; / 1908 2 Ch. 344\_7 where the English Court had to determine who was entitled to certain Scotch land. This in turn involved the legitimacy of a child born of his mother's second marriage, the first having been dissolved by a decree of divorce of the Courts of worth Dakota when neither of the parties were domiciled there (the divorce consequently being invalid). The Scots doctrine of putative marriage was relied on and considered, namely that a child is legitimate even although the marriage

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of his parents is invalid, if one parent bona fide pelieved the marriage to be valid. Now the English did not, as Robertson says,  $\angle$  Characterization in the Conflict of Laws" p. 149; 1939 LV L. Q.R. 578 7 examine and apply the Scots conflicts rules on putative marriage, for the Scots conflicts rules on putative marriage are the same as the English, namely that the doctrine of putative marriage is enforced if it is part of the law of the domicile of the parent who is in bona fide ignorance. Z See 'Legitimacy' What the English Court did was to consider the internal law of Scotland on putative marriage without having decided what was the domicile of the parents, (it probably was Canadian) and consequently without knowing whether the rule for choice of law which is common to both England and Scotland, would have referred to the internal law of Scotland. The case seems to have been decided on a wrong ratio, being inconsistent with In re Goodman's Trusts, / 1881 17 Ch. D. 266 / but in any event it is not an authority on the 'incidental guestion'.

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# CLASSIFICATION, SELECTION, and RE-CLASSIFICATION

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In applying the rules for choice of law, difficulty occurs in determining into what legal category the issue between the parties falls. Different rules of Interinational Frivate Law may be applicable according as the juridical question which is in issue is classified as relating to succession or matrimonial property, to formal validity or capacity, to substance or procedure. The law of the forum may classify the juridical question in one way and the laws of the other countries which may be applicable may classify it in another. Which classification is to be adopted? Further, 'domicile', <u>lex loci contractus</u>, <u>lex loci solutionis</u> etc., have different meanings in different systems of International Frivate Law.

Thus in the application of the rule that the law of the domicile of the deceased governs intestate succession to moveables, it may transpire that the deceased is, according to our law, domiciled in X, but according to the law of X is not domiciled there but domiciled in this country. Where then is X domiciled? Or in applying the rule that in the interpretation of a contract it is presumed that the parties intended that the <u>lex loci</u> <u>contractus</u> should govern, it may be that of the two systems of law, X and Y, with which the contract has a connection, the law of X says that the contract is made in X because that is where the letter of acceptance was posted, while the law of Y says that the contract is made in Y because that is where the letter of acceptance was delivered. Which then is the <u>lex loci</u> contractus?

These problems have given rise to an immense amount of logomachy. So far from being agreed on a solution, jurists are not even agreed on what the problem truly is. Two views on what the problem is have gained sufficient currency to make it necessary to criticise them.

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The problem has been said to be one of the inter-:pretation of the terms in a rule for choice of law. [Rabel, i, pp. 49 et sequ; Lorenzen, 20 Col. Law Rev. 247]

It is true that the problem can always be stated in this way. (A.H. Robertson "Characterization in the Conflict of Laws" p. 12\_7 The problem of what meaning should be ascribed to "domicile" and lex loci contractus is obviously the interpretation of these words in our rule for choice of law. And it can be said that, in deciding whether a plea brought on a foreign law raises a question of capacity or formalities, is simply the interpretation of the word'capacity'in the rule that capacity is governed by the <u>lex domicilii</u>, and 'formality' in the rule that formalities are governed by the lex loci actus. But it is far more helpful in deciding whether a plea based on a foreign law raises a question of capacity or formalities, to approach the matter as the classification of the right claimed and the law on which it is based, into the one category or the other.

The second doctrine which it is desired to criticise is that advanced by Cheshire,  $\langle pp. 24 - 45 \rangle$  A.H. Robertson,  $\langle$  "Characterization in the Conflict of Laws" 7 and Joseph Unger. 7 1957 Bell Yard 3 7 These writers distinguish three stages. Robertson says that the first stage is when the judge is called on to characterize the factual situation, or question presented to the Court, in a certain way, as being for example contract, tort, matrimonial property, or succession. This is allotting the question to its correct legal category. Cheshire calls this primary classification  $\langle pp. 30-37 \rangle$  and Unger "legal characterization of the circumstances of the case". [1937 Bell Yard at pp. 16 et sequ\_7 Primary characterization or classification is in their view performed whenever it is impossible to choose the/

the appropriate law until the true character of the issue raised, and consequently the appropriate rule for choice of law, has been determined. The second stage, according to Ropertson, is that after the Judge has done the first step he is referred by a rule of International Private Law to a certain law by a 'connecting factor' such as "the law of the domicile" or the lex loci contractus; and he has to decide by what law to determine the meaning of the connecting factor. Cheshire calls this "Classification ('interpretation' would be better) of a rule of Private International Law itself", / pp.29,30 7 and Unger "localisation of the elements of introduction". [1937 Bell Yard at p. 4] The third stage, according to Robertson, arises after performing 1 and 2, when the judge is referred to the lex causae, and he has to decide how much of the foreign lex causae is referred to. Thus the judge may have decided that the question is one of contract and that in accordance with his rules for choice of law the law of France has to govern the substantial validity of the contract but the lex fori has still to govern evidence. In deciding whether a certain rule of French law raises a question of substance or evidence, and so whether it is to be applied as part of the lex causae or not, the judge is performing what Ropertson and Cheshire call "secondary" characterization or classification, [Cheshire pp. 37-45] and J. Unger calls "delimitation"  $\sum$  1937 19 Bell Yard 3 $\sum$  Robertson and Cheshire say that primary classification must of necessity be done according to the lex fori because at that stage the lex causae is not known, and secondary classification according to the lex causae, the law which has already been found by the judge to govern the cause.

It is submitted that the division of classification or characterization into primary and secondary is fallacious./

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fallacious. Robertson says that primary characterization is concerned with the allocation of a "factual situation" to its correct legal category. [loc. cit. pp. 59-66] International Private Law however is not concerned with "factual situations", but with disputed rights or duties or status. \_ Cp. Falconbridge, LIII L.Q.R. 556\_7 No right, duty, or status can exist unless it arises from a system of law, and it is impossible to divorce consideration of their nature from the system of law which gives rise to or is claimed to give rise to them. E.g. suppose a French couple marry in France without a marriage contract, so that according to French law their property is governed - by the rule of community of goods, by which on the predecease of the husband without children the wife is entitled to one half of the goods in communion; and the couple later acquire a domicile in England, where the husband predeceases, leaving a will which ignores the wife. This raises a question of what Robertson and Cheshire would call primary classification, for it is impossible to say what rule of International Private Law is applicable until it has been decided whether a question of matrimonial property or succession is involved. ZSee Cheshire p. 32; De Nicols v. Curlier 1900 A.C. 121; Lashley v. Hog, 1792 3 Pat. 247; Baty, "Polarized Law" p. 102 7 But how is it possible to classify the factual situation here as one of succession or matrimonial property? The factual situation is that the parties are French, married in France, and later settled in England where the husband predeceased leaving a will, and that the widow wants half of his estate. This cannot be classified. It is the widow's legal claim which is classified, and this involves consideration of the rules of French law on which it is based. It is only by considering the nature of the French law of community

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of goods that the question can be classified as one involving succession or matrimonial property. Now this is exactly the process which is carried on in what Cheshire and Robertson call secondary classification.

Cheshire gives several examples of secondary classification. The first example is an action in the English Courts for breach of a contract between A and B, and the Court has decided that French law is the lex\_ causae, i.e. that all matters in issue between the parties except those relating to procedure, are to be governed by the law of France. B pleads that he is a partner, and that by a rule of French law he cannot be sued separately until proceedings have been taken against the partnership property. This raises a problem of classification, as to whether the rule relied on relates to substance or procedure, and, says Cheshire, it is a problem of secondary classification because the lex causae has already been ascertained; consequently classification has to be carried out by the lex causae. Now the issue between the parties is whether or not B can be sued servarately, and it is impossible to choose the appropriate law for this issue (lex causae) until it has been decided whether the question is one of procedure or substance. Therefore this truly raises a question of primary classification. All the other examples which Cheshire gives, [pp.37-45] can also be stated as problems of 'primary classification' as he understands the term. The distinction between primary and secondary classification is a distinction without a difference.

Robertson says that the determination whether a rule of law relates to capacity or formality should be included in secondary classification, but that classification of property into moveable and immoveable should be treated as primary classification, ---- "because different rules relate to moveables and immoveables, and it is impossible for the judge to know which rule to apply until he has made this determination "/

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determination."  $\sum p.58$  But it is just as impossible for the judge to know which rule to apply until he has decided whether the question is one of capacity or formality.

The flaw in Cheshire's description of the situation out of which secondary classification arises is that the judge, in his example, has not decided "the" lex causae, but has decided two proper laws, namely that the law to govern substance is French law, and that to govern procedure is English law. Robertson admits this. Zpp. 56 et sequ.7 Now in deciding whether a rule of law relates to evidence or to substance there is no particular reason why it should be decided by "the" lex causae, meaning presumably the lex causae as to substance, instead of the lex causae as to evidence. When the judge has performed the process which Cheshire describes as primary classification, namely saying that this is a question of contract, one might say that he chooses four proper laws, namely the lex fori to govern evidence, the proper law of the contract to govern interpretation, the lex loci contractus to govern formal validity, and the lex domicilii to govern capacity. [Assuming for the sake of argument that these systems of law do govern these matters. 7 One can not say that the judge is any nearer to knowing "the lex causae which makes it so necessary that subsidiary classification between formal validity and capacity, Z Cheshire admitted y however calls classification between formal validity and capacity primary classification. But not so Robertson - p.119\_7 interpretation and evidence, should be decided by it.

It is submitted that there are three stages, namely: (1) Classification (2) Selection (3) Re-classification. / These stages are described by Falconbridge, 1937 LIII
L.Q.R. 235, continued ibid 537, as (1) Characterization
(2) Selection (3) Application. Falconbridge however, like
most of the other writers on classification who have been
referred to, did not accept the meaning of the 'law of a
country'/ country' (see Falconbridge in XLVI L.Q.R. 465, and XLVII 271) which is now binding on us as a result of the Privy Council's decision in Jaber Elias Kotia v. Katr Bint Jiryes Nahas 1941 A.C. 403, and so his remarks on the three stages are only correct, for our purposes, as regards his clear exposition of the process, and not as regards his conclusions. (1) Classification is the process of determining the juridical nature of the question. This is the same problem which Beckett describes as the characterization of internal rules of the forum or of a foreign law, [1934 XV B.Y.I.L.46] and includes both the "primary" and "secondary" classification of Cheshire and Robertson, which are really the same process. (2) is selection of the law indicated by the appropriate rule for choice of law, and in this process the judge has to determine the meaning to ascribe to 'domicile', lex loci contractus etc. (and also has to determine the mixed question of law and fact of where the person is domiciled) Beckett called this characterization not involving any characterization of a rule or institution of internal law. It is what other writers have described as the interpretation of these terms in a rule for choice of law. [See Cheshire pp. 29, 30] Under (3) comes the re-classification which is necessary because of the meaning which our Courts ascribe to the 'law of a country'. This stage has not been noticed much by writers on classification, possibly because they did not accept the curious meaning which our Courts ascribe to the 'law of a country'. If 'the law of a country' is taken to mean the internal law of that country, this stage is not necessary.

## (1) Classification

It has been variously argued that classification should be performed according to the law governing the legal relationship in question (<u>lex causae</u>); / Despagnet: "Des conflits de lois relatifs à la qualification des rapports juridiques" 1898 Jour.du dr. inter. privé 253; Wolff pp. 155 et sequ.; Cheshire/ Cheshire pp. 37-45, and Robertson, loc. cit., apply this law in "secondary" classification. 7 according to the <u>lex</u> <u>fori</u>; 7 Bartin: "De l'impossibilité d'arriver à la suppression définitive des conflits des lois" 1897 Jour. du dr. inter. privé American Restatement §7; Beale i 55; Dicey p. 44; Lorenzen 1920 20 Col. Law Rev. 247; Cheshire p. 34 and Robertson pp. 66-80 for"primary" classification; Unger 1937 Bell Yard at p. 6; Breslauer, 'Private Inter-:national Law of Succession' pp. 10-14\_7 and by the general principles of analytical jurisprudence and comparative law. 7 Beckett, 1934 XV B.Y.I.L. 46; Rabel, 1, pp. 49 et sequ. 7

Any opinion that the proper law or <u>lex causae</u> of a legal relation should govern its classification may be rejected on the ground that it is impossible to determine what the <u>lex causae</u> is until one classifies, <u>CBeckett</u>, 1934 XV B.Y.I.L. 51<u>7</u> and that where the forum has to apply one of two foreign laws which conflict on classification, there is no reason why the forum should choose the classification of one in preference to the other. <u>CBeckett</u>, ibid <u>7</u>

The proponets of the <u>lex causae</u> view often fail to distinguish between classification according to the lex causae and classification of a rule of law according to the legal system to which it belongs. For example, Robertson says: - "secondary characterization should be performed by the proper law already chosen as applicable to the question which has to be characterized. Thus if the substantive rights of a contract are to be governed by French law, and the procedure for enforcing those rights by English law, then the question whether a French rule of prescription is substantive or procedural should be determined by French law, and the same question with regard to the English Statute of Limitations should be determined by English law".  $\sum pp. 130, 131_7$  The second sentence amounts to saying that a rule of law should be classified as the system of which it/

it forms part classifies it, and is a different method from that proposed in the first sentence. / Contrast also "secondary characterization by the proper law" (p. 133) . with "secondary characterization should be performed by the law of that legal system of which the rules to be characterized form a part." (p. 238) 7 Again, Wolff states that classification should be of a rule of law according to the legal system to which it belongs, Zp. 1557 but in illustrating how this principle should be applied, in one instance he classifies according to the lex causae contrary to the classification of the rule according to the legal system to which it belongs. [pp. 158, 9, example (d)] The proposition that a foreign rule of law should be classified according to the legal system to which it belongs, is just as impossible in practice as classification according to the lex causae, as can be demonstrated from the facts of 1945 CR.5 In Re Cohn: [1944 171 L.T. 377,] two ladies, a mother and daughter, both domiciled in Germany, were killed in a common calamity in London and it was uncertain who had survived the other. If the daughter survived her mother, she was entitled to property under her mother's will. A rule of English law, sec. 184 of the Law of Property Act 1925, provided that they should be presumed to have died in order of seniority, while the German Civil Code said that they were presumed to have died simultaneously. If the judge had classified each rule of law according to the law of which it was a part, he might conceivably have found that English law classified the English rule as matter of evidence, in which event the English rule should apply because the <u>lex fori</u> governs evidence, and that German law classified the German rule as matter of substance, in which event the German rule should apply because the lex domicilii governs the substance of rights of succession. This would have solved nothing. Alternatively, if English law had classified the English rule as relating to substance, and German law had classified the German rule as relating to evidence/

evidence.neither rule would have applied. A similar difficulty may arise from this method when the Court seised of an action on a debt is faced with two statutes of limitation, one of the proper law of the contract, and one of its own law, each of which provides that no action shall be brought on any debt which has not been enforced for 20 years.

If the proper law classifies its prescription as relating to procedure, and the law of the forum classifies its prescription as relating to substance, then classifi-:cation of a rule of law according to the system to which it belongs would give the curious result that both prescriptions were inapplicable. [Note that both prescriptions in the case figured are according to their terms of the same nature and effect. 7 The prescription of the proper law would be inapplicable because procedural and the lex fori governs procedure, while the prescription of the lex fori would be inapplicable because substantive and the proper law governs substance. Z See Wolff p. 161 and decision of the German Supreme Court, 1882, Offic. Collect. 7, 21, there referred to. Lorenzen, 1941 50 Yale L.J. at p. 549 7 Again, suppose a Court seised of an action on a delict classified its rule as to onus of proof as substantive, and suppose the lex loci delicti classified its rule as procedural, then the Court would have no rule for onus of proof, or if matters were the other way round it would have two rules for onus of proof. / Lorenzen, ibid. But see W.W. Cook, Logical and Legal Bases of the Conflict of Laws pp. 219 et sequ. 7

The <u>lex fori</u> has been said to be applicable on the principle of sovereignty. The argument is that our Courts apply a foreign law not because they must, but because they consider it just and voluntarily do so in cases chosen by them. To classify according to a foreign law would mean that the application of a foreign law would no longer depend on the will of the forum, but on the will of/ of the foreign law.  $\angle$  Bartin, 1897 Glunet, 225; Lorenzen 1920 Col. Law Rev. 259\_7 It can be redargued however that if a Court can voluntarily determine to apply foreign law in certain cases compatibly with its sovereignty, to determine to do so when that foreign law deems itself to be applicable is no greater abandonment of sovereignty. More recent writers have advocated the <u>lex fori</u> on the ground of practical necessity: some law must be applied, and there is no other law available at this initial stage of all, of classifying the issue.  $\angle$  Robertson, pp.66-80; Cheshire p. 34\_7

Beckett advocated classification according to the general principles of jurisprudence because classification is simply an application of the rules of International Private Law, which apply to all systems of law, and accordingly the conception of these rules must be of an entirely general character. The method has been criticised on the ground that it is idealistic, Lorenzen, 1920 20 Col. Law Rev. 269 7 and that in the science of jurisprudence at present the principles on which there is general agreement are not remarkable for their number. [Cheshire p. 28; Unger 1937 Bell Yard 8]

Many of the differences between lex fori view and the comparative jurisprudence view are purely verbal. In the first place Beckett does not deny that even analytical jurisprudence may have something of a national character, [Ibid. Cp. Falconbridge LIII L.J.R. 245] and that an English Court, being bound by precedents of superior Courts, must accept propositions of analytical jurisprudence which have been adopted as general principles in previous cases. 21934 B.Y.I.L. at p. 727 On the other hand, the law of the forum can not mean the internal law of the forum. If without consideration an English judge is confronted with an undertaking given  $_{\wedge}$ in country X, without consideration, where consideration is not essential for a binding contract, and is deciding whether/

whether to classify this as a case of contract or not, he can not say that it should not be classified as contract because it is not a contract according to English internal law since there had been no consideration, for that would be deciding the merits of the case (whether or not there was a binding contract) according to the law of the forum under the guise of classifying according to the law of the That method would result in the stultification forum. of all rules of International Private Law. ZW.W. Cook 'Logical and Legal Bases of the Conflict of Laws' pp.216,7\_7 There must be some generality about the principles which are applied as the law of the forum. Further, the laws of the forum have also to be classified for the purposes of International Law, and laws can not be classified according to themselves; they must be classified according to some extraneous principles of general jurisprudence. Beckett, 1934 XV B.Y.I.L. 59; Unger 1937 Bell Yard at p. 7;  $\overline{7}$  One of Beckett's objections to classification according to the lex fori is that it "would result in an English court, through classifying a French rule in a manner different from that in which it is classified in its country of origin, not merely refusing to apply French law when according to French ideas it should be applied, but also applying French law in cases where, according to French ideas, that law is not applicable at all."  $\angle$  1934 XV B.Y.I.L. at p. 54 7 Now the first contingency may occur, but not the second, owing to Re-classification  $2\overline{q} \cdot v \cdot J$ 

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It is submitted that the process of classification is the allocation of the issue to a category of the rules for choice of law of the forum. [Cp. the language of Robertson in describing primary characterization, p. 86; Beckett, 1934 XV B.Y.I.L. 46 \$1; and Unger 1937 Bell Yard 8.7 This entails the application of the notions of general jurisprudence of the forum, and might be described as classification according to the International Law of the forum. The/

The classification of a foreign rule of law or a foreign institution must be of that law or institution with all the qualifications which the foreign law attaches to it. [Falconbridge 1937 LIII L.Q.R. 251-256] For example, in classifying a foreign law requiring the consent of parents to marry, any procedure whereby the consent can be dispensed with which is part of the foreign law must be taken into account. This might result in cases like Simonin v. Mallac, [1860 2 Sw. & Tr. 67] and the Gretna Green cases Ze.g. Compton v. Bearcroft, 1769 2 hagg. Cons. 444 N $\vec{J}$  where the requirement of parental consent for marriage could have been dispensed with by adopting a certain procedure, being classified as relating to formalities, while cases like Ogden v. Ogden, [1908 P. 46]7 where the parental consent could not have been dispensed with, are classified as relating to capacity, instead of a general rule of thumb that the requirement of parental consent to marry relates to formality or to capacity. [Robertson pp. 239 -242; Cheshire pp. 231, 2; Baty, Journ. Comp. Leg. vii, 260, 1. Falconbridge considers that both the indispensable and the dispensable requirements of consent relate to capacity -LIII L.g.R. 254, and Keith, in Dicey, that both relate to formality - p. 966(n). We agree with Falconbridge but are more concerned with the method of approach than the result. 7 This might result in a curious situation :-Suppose a person domiciled in X, by the law of which the demicile consent of parents is required for marriage, but can be dispensed with by adopting certain procedure; marries in Y, by the law of which the consent of parents is also required for marriage, and can not be dispensed Suppose that by classifying according to the <u>lex</u> with. fori the rule of X as qualified by the law of X, it is considered to relate to formality, it will then not be applicable, because the law of Y governs formalities. Suppose/

Suppose further that by classifying according to the lex fori the rule of Y as qualified by the law of Y, it is considered to relate to capacity, then the rule of Y is not applicable because capacity is governed by the law Therefore although the laws of both countries of X. require the consent of parents, the parties can marry without such consent. But this is not an illegitimate conclusion. The rule of X. relates to formality, and therefore does not apply to marriage in Y, while the rule of  $Y_{\ell}$  relates to capacity, and therefore does not apply to a denizen of X, with the result that there is really no rule requiring consent of parents which is applicable to that marriage of the denizen of X in country Y. ------ However, in classifying a foreign law in this way, only the terms of the foreign law and other laws which modify it can be looked at. No account is to be taken of the position in which the law may be set forth in a Code, or of the foreign system's view of its law. [Falconbridge LIII L.Q.R. 254, 5]

The process of classification will now be examined in more detail, and illustrated. There are two situations.

The simple situation is where there is only one rule of law or institution to classify, being either of the law of the forum or of a foreign law. In <u>De Nicols</u> v. <u>Curlier</u>  $\angle$  1900 A.C. 121  $\angle$  the only institution which had to be considered and classified was the French rule of community of goods between spouses. In <u>Huntingdon v. Attrill</u>  $\angle$  1893 A.C. 150  $\angle$  too, the only law which had to be considered was the New York law. In the latter case an action had been brought in the Ontario Courts to enforce a judgement obtained in a New York Court by the creditor of a corporation against the directors of the corporation personally, under a provision of the New York Company Laws that if directors gave a false certificate they should be personally liable for the debts of the corporation. The question was whether the/

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the New York judgement and the law under which it had been obtained should be classified as penal in the sense of the rule of International Private Law that no Atate enforces the penal laws of another state. There were decisions of the New York Courts to the effect that the law was penal in the sense that it had to be strictly construed. The Privy Council held that the Courts of Ontario were not bound to pay absolute deference to any interpretation which might have been put on the New York law in the State of New York. "They had to construe and apply an inter-:national rule, which is a matter entirely within the cognizance of the foreign Court whose jurisdiction is involved." [at p. 155] Judicial decisions in the New York Courts were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration, and might be con-:clusive. The Court seised of the case must determine for itself the substance of the right sought to be enforced. Were any other principle to guide its decision, a Court might be enforcing a judgement in one case and denying effect in another, where the judgments were of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal. The opinion of the Judicial Committee of the Privy Council concluded with these words: "Being of opinion that the present action is not, in the sense of International Law penal, .... their Lordships will humbly advise Her Majesty to reverse the judgements appealed from ..... [p. 161. Cp. Societé\_etc. de Prayon v. Koppel The Times Newspaper Nov. 2nd 1933 where Rocke J. held that a German law of prescription related to remedy, although German law considered that it related to substance.\_7\_\_\_\_\_

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The second situation is where there are two rules of law on exactly the same point of two systems of law to be classified. Thus in Re Cohn  $\angle$  1944 171 L.T. 377  $\sqrt{2}$ there were prescriptions of both the lex fori and German law as to survivorship in the case of <u>commorientes</u>; or there may be prescriptions as to onus of proof of both the lex fori and the lex loci delicti; or rules requiring the consent of parents for marriage which cannot be dispensed with, of both the law of the domicile and the law of the place of celebration. In this situation the judge knows that he cannot classify one rule differently from the other, or he might be left with two conflicting prescriptions or rules for onus of proof, or alternatively none, and he can not classify the indispensable requirement of consent for marriage of the law of the domicile, as formality, while classifying the indispensable requirement of consent for marriage of the law of place of celebration, as capacity; for that would mean that the parties could marry without consent, which would not be a legitimate result; although it was considered that it might be a legitimate result where the requirement of consent was different in the two The judge has to classify the issue between countries. the parties rather than the laws of the two countries. Accordingly the judge can proceed in this way: if one of the rules is a rule of the forum, or if there is a corresponding rule of the forum, he may consider and classify it, when that classification will also apply to Thus in Re Cohn the Court could have the foreign rule. contented itself with examining and classifying the English rule as to presumption of survivorship. This was not how Uthwatt J. proceeded in Re Cohn. He classified first the English and then the German presumption as to survivorship with reference to the system of law of which it formed part. But it was only by holding that both

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the English and the German presumptions, when read in their contexts, related to substance, that he avoided the difficulty of having two conflicting presumptions applicable, or alternatively none: if he had classified the pre-:sumptions differently from each other he would have been in that difficulty. When there is no corresponding rule of the forum, but two rules on the same point of two foreign systems to be classified, the classification should not be of first one and then the other, but of that type of rule of law, and when the classification has been made it will apply to both rules. Thus the judge should say, how are presumptions of survivorship, or indispensable requirements of consent to marriage to be classified?

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In re Cohn, [ supra ] since the Court classified the English rule as relating to substance, and therefore should, on the view just submitted, have thereupon classified the issue between the parties as substantive, it would have been referred to the law of Germany as the law governing substance. Then the German view of how the issue between the parties should have been classified would have been given effect to, because of the meaning which our Courts assign to 'the law of Germany' and the consequent need for re-classification. [ see post\_7 Admittedly however, if the English Court had classified the English presumption as procedural, and consequently classified the issue as procedural, and applied the English presumption because it was the presumption of the lex fori, the view of German law as to whether their rule is procedural or substantive would have been consulted, and German law might have classified its rule as substantive. But that would only have left two conflicting rules to apply, and it would be absurd to say that we should not have applied our own in that situation. Further, to say that German law might have classified its rule as substantive, is not to say that German law would have classified the issue as substantive, or that if it would have, that it would have been correct in so doing. Certain/

Certain exceptions exist to the above formula for classification.

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The classification of property is governed by the law of the situs of the property. [Lorenzen, op. cit. Jour, du dr. inter. prive at p. 264; Bartin, 1897<sub>A</sub><del>Clunet</del> 251; Despagnet, 1898 Cheshire pp. 44, 409; Robertson pp. 76, Clunet 255; 190-217; Dicey Rule 149; Rabel, i, 52.

Convenience and commercial security demand that, when a person contracts with reference to property, that the nature of it, on which the extent of his rights will depend, should be known in advance, and should not depend on the forum in which some future litigation concerning the property may be brought. Further the law of the situs has effective power over the property.

assification The classification of property into moveable or moveable immoveable is governed by the law of the situs of the moveable property. / Macdonald v. Macdonald 1932 S.C. (H.L.) 79, and cases infra 7 But the classification must be according to the International Private Law of the situs, and not according to the internal law of the situs. The question is whether the situs regards the property as moveable or immoveable for the purposes of International Private Law, and not whether it regards the property as moveable or personal on the one hand, or heritable or real on the other, for the purposes of its internal law of succession. This is important because certain property which is immoveable for the purposes of International Law may be moveable in succession - e.g. Scotch heritable bonds, and land in many countries since the feudal rule of primo-:geniture was abolished; | As, e.g. in Canada - Macdonald v. <u>Macdonald</u> 1932 S.C. (H.L.) 79\_7 or In other words 'immoveable' is by no means synonymous with 'heritable' or 'real', nor is 'moveable' in International Private Law synonymous with 'moveable' in succession, or with 'personal'. -----This/

This principle was not clearly enunciated until the case of Macdonald v. Macdonald in 1932, [1932 S.C. (H.L.) 79 7 That was an action by a daughter for legitim out of her deceased father's estate, which included land in Canada. It was contended that the nature of the land in Canada had to be determined by the law of its situs, that by Canadian law land vested in the owner's personal representatives, and was dealt with and distributed among them in the same way as personal estate, and that therefore legitim was due from it. According to Canadian law however such land, although personal in succession, was immoveable, and it was held that it was the nature of the property as moveable or immoveable which had to be determined by the law of its situs, with a possible proviso that land must be immoveable; / per Lord Tomlin at p. 84, and Lord Thankerton at p. 887 and pointed out that the  $\perp$ rules of succession of the law of its situs were not the matters to which enquiry should be directed in this primary question of classification.

Before 1932 some curious decisions resulted from failure to realise the above principle. E.g. in Train v. Train's Executrix, [1899 2 F. 146] a domiciled Irishman died intestate possessed of a bond secured over heritage in Scotland. It was held that by the law of the situs of the bond, namely Scots law, the bond was heritable as regards terce, and therefore the lex rei sitae governed the succession to it and the widow obtained terce; but by the law of the situs, Scots law, the bond was moveable as regards the rest of the succession, and since the law of the deceased's domicile governs moveable succession, the widow also obtained half of the bond by the Irish law of intestate succession to moveables. Now the first question should have been whether the bond was moveable or immoveable by the law of the situs, Scots law, not whether it was moveable or heritable, and the answer would have been immoveable. Then/

Then the next step should have been to apply our rule of International Private Law that the <u>lex situs</u>, Scots law,

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governs the succession to immoveables. The third step should have been to apply the rule of succession in Scots law, namely that bonds are heritable in succession <u>quoad</u> the legal rights of spouses and children. Therefore the widow should have obtained terce and nothing else.

Another curious decision is Monteith v. Monteith's Trustees, [ 1862 9 R. 982 ] where a domiciled Scotsman died possessed of mortgages over land in England. By the law of their situs these were personal, and so they were taken into account in computing legitim, notwithstanding the fact that, as Lord Young pointed out, by the law of Scotland mortgages over land are not taken into account when computing legitim, / Titles to Land Consolidation Act 1868 Sec. 117/ while by the law of England the mortgages are not subject to legitim because legitim is not known in England; so that by both of the laws concerned the mortgages should have been free from legitim, yet by jumbling them together they were made subject to legitim. The first question should have been, are mortgages over land in England moveable or inmoveable by the law of England, not are they real or personal by the law of England, and the answer would have been that they are immoveable.  $\sum$  macdonald v. Macdonald, supra 7-

Other Scottish decisions where it was held that the nature of the property as moveable or heritable should be determined by the law of the situs of the property,
<u>Campbell</u> v. Bourehier March 5th 1805 F.C.; Ross v. Ross's Trs. July 4th 1809 F.C.; Mead v. Anderson 1830 4 W. & S.328;
<u>Clark</u> v. Newmarsh 1836 14 S 488; Newlands v. Chalmers Trs.
1832 11 S. 65; Downie v. Downie's Trs. 1866 4 M. 1067;
Marquess of Breadalbane v. Marchioness of Breadalbane's Trs.
1843 15 J. 389; Moss's Trs. v. Moss (0.H.) 1916 2 S.L.T.31\_7 should be corrected in the light of Macdonald v. Macdonald: the/

the question is whether the property is moveable or immoveable for the purposes of International Law by the law of the situs.

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It has been held in England that where a person domiciled in a foreign country dies intestate, leaving an interest in the proceeds of sale of English land held under a trust for sale, so that by the doctrine of constructive conversion the land is personal in succession, that land is nevertheless immoveable in International Private Law and succession to it is governed by the lex situs / In re Berchtold 1923 1 Ch. 192. Cp. Murray v. Champernowne 1901 2 I.R. 232. 7 "The doctrine of conversion is that real estate is treated as personal estate or personal estate is treated as real estate; not that immoveables are turned into movables, or movables into immovables" / In re Berchtold per Russell J. at p. 2067 --- One should imagine that the converse would also apply, but in another case English real estate, included in a settledment under an English will, was sold under the Settled Land Act 1882 which provided that capital money arising under the Act, should for all purposes of disposition transmission and devolution, be considered as land; the proceeds of sale having been invested in stock, it was held that the stock was an immovable. / In re Cutliffe's Will Trusts 1940 1 Ch. 565 7 The second decision seems incon-:sistent with the first, in spite of Mr. Justice Morton's statement in the second case that it was not inconsistent. whether a person's right to property is real or ssification

<u>perty</u> proprietary on the one hand or personal or contractual <u>l or</u> al. on the other is also determinable by the law of the situs of the property, and by the law of the situs is again meant the International Private Law of that country. / Falconbridge, LIII L. R. 543\_7

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whether a person is a national of a country must be determined by the municipal law of that country. Mr. Justice Russell said, in an English case: [ Stoeck v. Fublic Trustee 1921 2 Ch. 67, at p. 82 7 "There remains for consideration the contention that the words "German national" in the Treaty of Peace Order (which he had held formed part of the municipal law of England) ... mean or include a German national according to English law. Ι confess I have difficulty in following this. Whether a person is a national of a country must be determined by the municipal law of that country ..... How could the municipal law of England determine that a person is a national of Germany? ..... In truth there is not and could not be such an individual as a German national according to English law."  $\angle C_P$ . Hague Convention on Conflict of Nationality Laws 1930, Art. 2. In re O'Keefe 1940 1 Ch. 124 (criticised in LVI L.Q.R. 144) does not seem to carry out this obvious principle\_/

It has been suggested that another exception might be made when the only two laws between which a choice of law lay were the foreign laws and classified in one way, which was different from the classification which would have been adopted by the forum: in that situation we should adopt the common foreign classification.  $\angle$  Lorenzen, 20 Col. Law Rev. at p. 281; Robertson p. 76; Cp. Beckett 1934 XV B.Y.I.L. at p. 62.7 It is unnecessary to discuss this since the foreign classification will be adopted in the end in any event as a result of the process of Re-classiification.  $\angle q.v. \angle$ 

## (2) Selection

The meaning to be given to "the connecting factor", namely 'domicile', <u>lex loci contractus</u>, <u>lex loci delicti</u> etc. is always that of the forum. <u>CROBERTSON p. 108;</u> Cheshire pp. 29, 30; Falconbridge LIII L.Q.R. 550 - 556; Beckett/ Beckett, 1934 XV B.Y.I.L. 59; Unger 1937 Bell Yard at p. 4; F.A. Mann 1937 XVIII B.Y.I.L. at p. 1027 — The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of our law as to domicile, Areference to whether the person has or has not acquired a domicile in the foreign country in the eyes of the law of that country.  $\angle$  In re Martin: Loustalan v. Loustalan (1900) P. 211; In re Annesley 1926 Ch. 692; Dicey pp. 55, 567

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Similarly the <u>lex loci</u> contractus and the lex loci delicti etc. are determined by our law only. / Cheshire, p. 30; F.A. Mann 1937 XVIII B.Y.I.L. 1027 This is necessary because at this stage the lex causae has not been selected and its interpretation of these terms accordingly could not be used. There is at this stage no other law to gloss these terms. / Pollock in 1926 XLII L. G.R. 435 7 Further, "The choice of the connecting factor is of the essence of the system of conflict of laws of the forum, .... it is essential, in order to give effect to the conflict rule of the forum, that the connecting factor specified in that rule should bear the meaning assigned to it by the lex fori and not the meaning assigned to it by some foreign law." [Falcon-:bridge LIII 1.4.R. 551, 2\_7 All the presumptions for determining the proper law of a contract are connecting factors, and there is no doubt that is only our rules in this respect which are applied. ----- The meanings which are given by our law to "domicile," lex loci contractus, lex loci delicti etc. are considered in detail infra.

### (3) <u>Re-classification</u>

Once the judge has classified and then selected, he finds himself referred to a foreign system of law and has to apply the law of that country. But our Courts take 'the law of a country' (-q.v.) to mean the whole law/ Beckett, 1934 XV B.Y.I.L. 59; Unger 1937 Bell Yard at p. 4; F.A. Mann 1937 XVIII B.Y.I.L. at p. 102\_7 — The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of our law as to domicile, Areference to whether the person has or has not acquired a domicile in the foreign country in the eyes of the law of that country. <u>In re Martin</u>: Loustalan v. Loustalan (1900) P. 211; <u>In re Annesley</u> 1926 Ch. 692; Dicey pp. 55, 56\_7

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law of that country, including its rules of International Private Law, and decide the question in issue exactly as the Courts of the country referred to would have decided that question. The result is that if the country referred to is a foreign country, and if it adopts different classification from ours we have to re-classify according to their conceptions and be referred anew to a system of law. Re-classification has to be done both of the result already arrived at in (1) Classification, and also of that arrived at in (2) Selection.

If our Courts are seised of a case involving the assification validity of a marriage celebrated in country X, by a woman domiciled in Y, and it is doubtful whether a certain rule of the law of Y against the woman marrying relates to capacity, (in which case the disability would be given effect to, since the law of the domicile governs capacity) or relates to formalities (in which case it would not be given effect to, since the Len loci celebrationis governs formalities) the judge may have classified the issue, in accordance with the principles expounded in (1) Classification, as one of formality. The judge is there-:fore referred by his rule that the lex loci celebrationis governs formalities to the law of X. But if the Courts of X would have classified the issue as one of capacity, and applied the law of Y as the law of the domicile, or the law of Z as the law of the nationality, the judge must reclassify to come into line with what the foreign Court would have decided, since he must decide the case exactly as the foreign Court referred to would have decided that case. [See "The Law of a Country."]

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#### DOMICILE.

The status of a person in regard to many legal questions, and questions of succession, are governed by the personal law This might mean either the law of his of the propositus. nationality or the law of his domicile. Nationality and domicile are quite different conceptions [Udney v. Udney 1869 7 M(H.L.)89 per Lord Westbury at p. 99): a French national is a subject of France, owing allegiance to its sovereign; a person domiciled in France is one whose per-:manent home is there, and who may or may not be a subject of France. The British countries, and the United States, refer Denmark, Norway, Iceland, and some South American states refer questions governed by the personal law to the law of the domicile, while most Continental countries refer it to the [ Rabel i, pp. 110, 111, 113, 114] law of the nationality. Why this ia 80 -roquires -a-brief historical explanation

The primary test in the Roman Empire, as we have seen, <u>erige</u> or was citizenship, equivalent to nationality. But the idea of domicile was defined and developed [Code 10,39,7; Dig. 50,1,27].

In Mediaeval Europe the test was domicile. This is to be attributed to the fact that conflicts of law arose in Italy, France, Germany and the Netherlands within the boundaries of one nation, among the various provinces of it, and not between nations, and in these circumstances the test of nationality would have solved nothing. The unification of law within these states, and the enthusiasm

for nationalism which arose in the nineteenth century changed the test from domicile to nationality. France led with a declaration in theCode Napoleon in 1803 that the rules contained in it concerning status and capacity should still govern Frenchmen even though residing in foreign countries/ countries, and the French Courts have reciprocally applied to questions involving a foreigner's status the law of his nationality. The test of nationality is accepted in most Continental countries.

Domicile continues to be the test in the British countries and the United States because the conditions which enabled it to be displaced on the Continent, namely the unification of the laws within each nation, do not yet The Uhited States has forty eight different apply. systems of law, one for each State, and the British Common-:wealth has as many systems as there are Dominions and There is only one United States nationality colonies. and only one British nationality, and therefore nationality is useless to us as a guide to the appropriate personal law. Some of the countries that accept the test of nation-:ality, however, are not without this difficulty too, e.g. Poland, within which various provinces hade different systems of law. See article by Kazimierz Niec in 1943 S.L.R. p.123. The difficulty was solved there by regarding nationality as only a preliminary test. After the primary connection had been made with a particular political unit, a further subsidiary test allocated the propositus to the law of the province to which he was attached by registration, every Polish national, even though born and resident abroad, being attached by registration to a district in his own country (Cheshire p. 162).

The great advantage of nationality as a test is the simplicity and the certainty with which the nationality of the prospositus is ascertained. A simple rule of law settles the question, E.g. he is a national of the country where he was born, (the "ims soli") or of which his father was a national, (the "ims sangiunis". Some countries adopt one rule; some the other; some, like ourselves, apply a combination/

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combination of both. For nationality to be a perfectly satisfactory test all countries should proceed on the same basis. At present a person can be a national of two

basis. At present a person can be a national of two In such situations countries which apply the law of the nationality usually rely on countries or of noned. But to ascertain where a person as the determining intended to make his permanent home, involving, as it factor — Rabeli, pp. does, the very difficult question of the intention perhaps 120-122 of one of the litigants, who is interested to misrepresent it, or of a dead man, who cannot expound it, often leads to prolonged and expensive litigation. As so much depends on the judge's view of the evidence, lawyers often cannot say with certainty where a person is domiciled.

The great advantage of domicile as a test is that it ensures that a person's status and succession shall be governed by those laws within the jurisdiction of which the propositus hast freely settled, whereas the test of nationality often means that a law is applied with which the propositus hast long ceased to have any connection, or even with which he has never been connected. In short "nationality yields a predictable but frequently an inappropriate law, domicile yields an appropriate but frequently an unpredictable law" [Cheshire pp. 163,4].

The Domicile Act 1861 24 and 25 Vict.c.121 was an attempt to cure the test of domicile of its disadvantage The Crowh was empowered to make a convenof uncertainty. :tion with any foreign state that no British subject resident in that state, and no subject of that state resi-:dent in Britain, should be deemed, for the purpose of succession to moveables, to have changed his domicile, un-:less he should have been resident there for a year before his death and made a declaration in writing of his intention This Act has the serious fault that it applies so to do. It should apply to all questions of only to succession. But the idea is excellent. status and capacity also. Unfortunately no conventions have been made under it and it is/ a dead letter.

is a dead letter. An amended Act and a vigorous drive to secure international consent to a universal convention on the subject, could result in the following simple rules:-A person's personal law is that of the country where he is born, unless he shall have changed it by residence for a fixed time in another country, plus a declaration in writing of his wish to change duly registered in that country.

The ideal for which all students of International Political Law hope, is the recognition throughout the world of one system of International Political Law, the greatest obstacle to which is the different attitude of the British and American countires on the one hand and the Continental countries on the other, to the question of what is the appropriate personal law. That obstacle could be re-:moved by a compromise like that suggested above.

The hisotyry of domicile in Scotland is short. Succession was at first considered to be regulated, not by the lex domicilii, but by the law of the situs of the goods in question Davidson v. Elcherson 1778 Mor. 4613; Henderson v. McLean 1778 Mor. 4615; Morris v. Wright 1785 Mor. 4616. Shortly after the rule was changed and the modern view adopted that the <u>lex</u> <u>domicilii</u> governs succession: <u>Bruces</u> v. Bruce 1790 3 Pat.163; Hog v. Hog 1791 Mor. 4619 and 1792 3 Pat.247; Durie v. Coutts 1791 Mor. 4624; Macdonald v. Laing 1794 Mor.4627, and the ground of jurisdiction in divorce, was, even in the nineteenth century, uncertain, and it was believed to be possible to found jurisdiction on other elements than domicile (see infra p. . Domicile. to begin with, was a conception of little importance, and therefore little developed. Its chief function was to indicate the place at which the executors of a defunct should obtain confirmation Stair 5,8,81). The Institutional writers paid little attention to it. Erskine stated/

stated that the <u>lex domicilii</u> must govern intestate succession, [Inst. 3,9,4<sup>‡</sup> citing <u>Brown v. Brown</u> 1744 Mor. 4604] but, as we have seen, his view was not followed until 1790 [<u>Bruce's v. Bruce</u> supra]. As to the early cases, the rather loose description of a person as "a Scotsman" is used, instead of "a person domiciled in Scotland" or "a subject of Scotland", and when the Court laconically decides that the law of Scotland or of England should be applied to the question it is often impossible to say whether it is being applied as the <u>lex domicilii</u> or the <u>lex patriae</u> [See <u>Purves v. Chisholm</u> 1611 Mor. 4494].

The test of domicile has prevailed here in succession since 1790 (Bruce's v. Bruce supra) and in matrimonial jurisdiction since the middle of the nineteenth century. [At first the conception of domicile was very far from the modern one. See e.g. <u>Macdonald v. Laing</u> 1794 Mor. 4627; <u>Ommaney v. Bingham</u> 1796 3 Pat.448].

PRELIMINARY RULES ABOUT DOMICILE.

1. Every person must have a domicile.

"It is clear that by our law a man must have some domicile" [Lord Chancellor (Hatherley) in <u>Udny v. Udny</u> 1869 7 M(H.L.)at p. 95. Similarly Lords Chelmsford and Westbury at pp. 97 and 99 respectively. Contrary to the Roman rule, Savingy p. 107] A person may in fact be homeless, [see <u>Vincent v. Earl of Buchan</u> 1889 16 R.637] or a "rolling-:stone", [McLelland v. McLelland 1942 S.C.502] but a domicile will then be ascribed by a rule of law. The fiction of a "domicile of origin" is used. "To secure this result (that no man shall be without a domicile) the law attributes to every individual as soon as he is born the domicile of the father if the child be legitimate, or the domicile of the mother if illegitimate". [Udny v. Udny per Lord Westbury at p. 99]. This domicile persists until

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a different "derived domicile" or "domicile of choice" is acquired. If a person in fact abandons his domicile of origin and does not immediately acquire a domicile of choice, until he does acquire a domicile of choicehis domicile will be held to be his domicile of origin Kennedy v. Bell 1863 1 M. 1127 and 1868 6M (H.L.) 69]. And if a party abandons her domicile of origin and resolves to have no permanent home anywhere, her domicile will beheld to be her domicile of origin  $\int \underline{Vincent v}$ . Earl of Buchan 1889 16 R. 637 . If a person acquires a domicile of choice by settling in a new country and then abandons that domicile without acquiring a fresh domicile of choice, his domicile of origin revives Udny v. Udny, supra. Arnott v. Arnott's Trustees (O.H) 1884 22 S.L.R.1.

2. And every person has only one domicile.

"It is clear that by our law a man must have some domicile and must have a single domicile [Lord Chancellor (Hatherley) in <u>Udny v. Udny</u> at p. 95. Fraser p. 1252. Contrary to the Roman rule: Dig. 50,1; **1**.5, **1**.6,<sup>§</sup>2, and **1**.27 §2. Savingy p. 107.Story p.48].

This rule is self-evident if it only means that every person can only have one domicile for one purpose. Obviously it could not be held that a man was domiciled both in England and Scotland for the purpose of succession, for how then would his estate be divided? But the rule means more. It means that a man has only one domicile for all purposes, for determining the succession to his estate after his death, for determining which country has jurisdiction in his divorce, or for determininghis capacity. This has not always been the view in Scotland, where itwis believed that the "matrimonial domicile" or domicile of the married pair, that gave jurisdiction in consistorial actions, might be different from the husband's domicile for succession, and that this 'matrimonial/

'matrimonial domicile' was founded by the spouses residing within the jurisdiction. \_ The doctrine was laid down by a decision of the whole Court in 1862, Jack v. Jack 24 D. 467. This doctrine is now

discredited. See "Jurisdiction in Divorce" 7

79.79,80

The Domicile Act, 1861 [24 and 25 Vict. c. 121] empowers the Crown to make a convention with a foreign state that no British subject resident in that state and no subject of that state resident in Britain, shall be deemed for the purpose of succession to moveables, to have changed his domicile unless he shall have been resident for a year before his death and made a declaration in writing of his intention so to do. This Act applies only to domicile for the purposes of succession to moveables and not for other purposes, e.g. jurisdiction in divorce. Accordingly if any convention/

convention had been made under the Act, a British subject resident in the other country who had not made a declar-:ation, might be held to have a domicile for divorce in the forcian state, and a domicile for succession here. But no convention has been made under the Act.

A person can have more than one "commercial domicile," [The Jonge Klassina (1804)5 6. Rob. 297] "forensic domicile," (Ersk. 1,2,16; Duncan and Dykes p. 32] or "domicile of citation". If domicile is allowed to a juristic person it may have very many domiciles. Since it is subject to jurisdiction by carrying on buiness, it may have a dozen "domiciles of citation" (Aberdeen Railway Company v. Ferrier 1854 46D.422]; if its "reaidence" for the purposes of the Income Tax Acts is called "domicile" it can have more than one of these (Swedish Central Railway Company v. Thompson (1925)A.C. 495]; and the "domicile" that determines the situs of the shares of a limited company need not be where its "residence" is for Income Tax purposes (Baelz v. Public Trustee 1926 Ch. 863].

3. The acquisition of a domicile is determined by our law only.

The question whether a person is or is not domiciled in a foreign country is to be determined in accordance with the requirements of our law as to domicile, irrespective of the question whether the person has or has not acquired a domicile in the foreign country in the eyes of the law of that country [In re Martin: Loustalan v. Lonstalan (1900)P.(C.A.)211; In re Annesley (1926)Ch.692]. Thus when an Englishwoman resided in France for a number of years in circumstances that, in the eyes of English law, gave her a domicile of choice there, but did not take the steps required by article 13 of the French Civil Code for the acquisition of a French domicile, and consequently was not, in the eyes

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eyes of French law, domiciled in France, she was never-:theless held by the English Court to have acquired a domicile of choice in France <u>[In re Annesley</u>, supra]. Full effect will be given in England to a domicile acquired by our law, even though the law of the nationality of the person asserts that his status and the effects are still governed by it [Westlake sec. 255. In re Martin, supra].

This is necessary, [XLII L.Q.R. 435] because until the question of domicile is determined, the Court cannot tell what law has to be updiffed . . . . . . domicile is a preliminary question that can only be settled by the <u>lex fori</u>, because at the initial stage no other law is known that can settle it. All primary classification is done according to the <u>lex fori</u>.

# THE LAW OF DOMICILE.

There are three kinds of domicile: (1) Domicile of origin: (2) Derived domicile: (3) Domicile of Choice [Story p.54. Fraser Husband and Wife 2nd Ed. p.1251. Cheshire p.169].

# (1) " DOMICILE of ORIGIN."

The law ascribes to every person at birtha domicile of origin, which continues to be that person's domicile unless or until a different "derived domicile" or "domicile of choice" is acquired.

The domicile of origin of a legitimate child whose father is alive at the child's birth, is the domicile of the father at the time of the birth <u>[Udny v. Udny</u> 1869 7 M (H.L.)89; <u>Fairbairn v. Neville</u> 1897 25R.192. Fraser p.1252].

The domicile of origin of a posthumous [Dicey p.80; Currie on Confirmation p.9] or illegitimate [Udny v.Udny per/

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per Lord Westbury at p. 99 . L.A. v. Lamont 1837 19D. 779; McLaren p.5; Story p.49; Fraser p.1253) child is the domicile of the mother at the time of the birth.

The domicile of origin of a foundling is the country where the child was born, if known. and if not, the country where the child was found. [Westlake 7th Ed. p.244].

Children of a putative marriage, i.e. where there was an impediment to marriage, but one of the parents <u>bona</u> <u>fide</u> believed that they were married, although legitimate, take their domicile of origin from the mother if she is the spouse who is in <u>bona fides</u> <u>(Kirkclady Parish Council v. Traquair Parish Council</u> (0.H.) 1915 S.C. 1124; <u>Smijth v. Smijth</u> (0.H.)1918 1 S.L.T. 156].

In all cases, except that of a foundling, the place of birth is irrelevant in determining where the domicile of origin is. It is the domicile of the father, or mother, that counts. Thus a child born in Scotland, whose father at the time of the birth was domiciled in England, has an English domicile of origin Wylie v. Laye 1834 125. 927; Armitage's Trustees v. Armitage (0.H.) 1904 441 S.L.R. 504; Udny v. Udny 1869 7M.(H.L.) 89; Grant v. Grant 1931 S.C.238]. Similarly irrelevant are the place of residence of the father at the time of the birth, Wylie v. Laye and Udny v. Udny and the nationality of the father (or mother), which may be different from his (or her) domicile. Thus a child born in Belgium to a Frenchman resident in Peru but domiciled in Australia, has a domicile of origin in Australia.

A person has been held to have a domicile of origin in Scotland who had never been in Scotland, but whose/

whose grandfather had a domicile of origin here which he never lost, which he transmitted to his son and which was never lost, and which was again transmitted to the grandson [Peddie 6 Dec. 1860.Currie on Confirm-:ation pp. 12 and 13. Grant v. Grant 1931 S.C.238].

# (2) "DERIVED DOMICILE".

The domicile of dependent persons, namely pupils and married women, changes in conformity with the domicile of the persons on whom they are dependent, <u>Pupils</u>. As we have seen, a legitimate child is held to have a domicile of origin in the country in which his father is domiciled at the time of his birth. If the father subsequently changes his domicile while the child is still a pupil, the domicile of the child will change in conformity <u>[Lowndes v. Douglas</u> 1862 24D.1391; <u>Chlamers v. Chalmers (O.H.) 1973 11 S.L.T.F8. Traser</u> p.1253].

After the father's death, during her viduity the during her viduity, mother's domicile, governs the domicile of her pupil children, so that if she changes her domicile the domicile of the children changes in conformity. Fraser Husband and Wife 2nd Ed. p. 1253; Arnott v. Groom 1846 9D. 142; Crumpton's J.F. v. Finch-Noyes 1918 S.C. The statement that Fraser makes, and which was 378. approved in Crumpton, was: "After thefather's death, if the child lives with the mother, and she acquire a new domicile, it is communicated to the child." This seems to imply that the mother does not impose her domicile on her children in consequence of an inescapable rule of law, as is the case with the father. Stirling Justice in In re Beaumont (1893) L.R. 3 Ch. \$.490 said: "The change in the domicile of a (fatherless) infant which may follow from a change of domicile on the part of the mother/

mother, is not to be regarded as the necessary consequence of the change of the mother's domicile, but as the exercise by her of a power vested in her for the welfare of the infants, which in their interests she may abstain from exercising, even when she changes her own domicile," But there is no reason to think that Scots law considers the power of the widowed mother to impart a derivative domicile to her children rests on a different principle from that of the father (though there are dicta to the effect that the domicile derived from the mother is more easily lost): the judges in Crumpton speak of "a domicile derivative from her". To hold that it did rest on a different principle would be an invidious perpetuation of sex inequality, and would be contrary to the view held in the United States, (Beale p.220) and the view that Dicey would have liked to hold had it not been for In re Beaumont (p.102).

The rule here proposed has the virtue of certainty: "Which in their interest she may abstain from exercising" has been rightly criticised (Dicey p.106); Can she refrain from changing their domicile at her discretion, even if they live with her in her new domicile?].

But if the widowed mother marries a second time and her domicile is changed in consequence of the marriage (because of the rule, aftermentioned, that the domicile of a wife follows that of her husband), the domicile which the acquires by the marriage is not conferred on the child, but the child's domicile continues to be that which the mother possessed previously to her second marriage <u>(McLaren p.6. Fraser ibid. Crumpton's J.F. v.</u> <u>Finch-Noyes</u> supra, where Fraser's statement was adopted. <u>Crumpton</u>, however, is not a perfect precedent for the rule, because when Mrs. Crumpton married again her child was/

was over puberty, and so could not have a "derived domicile" imparted to him. This was not noticed by the judges. Further the rule was not adopted in <u>In</u> <u>re Beaumont</u>, supra, where Stirling J., proceeding on the view already quoted, held that when a widow who had several infant children, all of whom had a Scottish domicile, married a domiciled Scotsman and shortly afterwards went with him to England where he acquired a domicile, taking the two eldest children with her, but leaving the youngest in Scotland in the charge of an aunt, the two eldest took her domicile in England and the youngest remained domiciled in Scotland.

It has been suggested that if the widow changes her domicile for the fraudulent purpose of obtaining an advantage by altering the rule of succession, her child's domicile will not follow hers, [Potinger v. Wightman (1817) 3 Merivale p.67] but this is very doubtful. [disapproved by Beale, p.220]. If the view expressed above is correct, namely that the mother's domicile governs that of her child because she is head of the family, on the same principle as the father's did, there is no room for the exception, because it is not admitted in the case of the father.

The domicile of illegitimate pupil children changes with that of their mother [Westlake sec.249; Beale p. 216; Dicey p.100; In re Luck's Settlement Trusts 1940 Ch. 864, per Smith Lord Justice at p. 887]. If the mother marries a person who is not the father of the child, the stepfather's domicile will not be conferred on the child, but the child's domicile will continue to be that which the mother possessed previously to her marriage. [On the analogy of the child of a widow who remarries.]

The domicile of the children of a putative marriage changes in conformity with the domicile of the mother if/

if she is the spouse who <u>bona fide</u> believes that they are married <u>Parish of Kirkaldy</u> v. <u>Parish of Traquair</u> (0.H.)1915 S.C.1124; <u>Smijth v. Smijth</u> (0.H.) 1918 1 S.L.T.156. Supra p.

The domicile of adopted children changes with that of the adopter. [Beale p. 217; Dicey p.100 There are no precedents, but the rule seems reasonable.]

A guardian, other than the father or mother, has, no power to change a child's domicile, which will therefore continue to be its domicile of origin or the last domicile derived from father or mother. There are no precedents but see Douglas v. Douglas 1871 XII Equ. 617 V - C. Wickens p. 625. If a guardian can change the domicile of his ward, it will only be a guardian having care of the person of the child who can do so, and not a tutor who merely has the superintendence of the pupil's property; the change in domicile will not be an automatic one but only if the child lives with him in the new country [The rule in In re Beaumont supra]; and it is certain that the exception will apply which was doubted in the case of the widowed mother, namely that the change must be bona fide and not for the purpose of securing an advantage at the expense of the child's estate. Ratinger v. Wightman (1817) 3 Mer. p. 67. But it is most unlikely that a guardian can change his ward's domicile.

If the parents are divorced, and the custody of the children are awarded to the mother, their domicile will change with hers during pupillarity, [not tp to sixteen] under the same conditions as if the father was dead. [Beale p. 215].

In the unlikely event of a pupil child not being in anyone's custody, the domicile of the child will be its domicile/

domicile of origin or last derived domicile.

Minno. When a girl attains twelve years of age, and a boy fourteen, their domicile no longer depends on that of their father or mother, and they can acquire a domicile of choice. [Fraser loc. cit. p. 1253; McLaren p.6; <u>Arnott v. Groom</u> 1846 9 D. 142; <u>Chalmers v. Chalmers</u> (O.H.) 1903 11 S.L.T. 68 - reacquisition by minor of domicile of origin].

If the rule given later is correct, that a person is are of cannot acquire a domicile of choice unless th age to do so both by the law of their existing domicile and by the law of the new country, the part of this rule which that minors may acquire a domicile of choice is not important, for the case must seldom arise of a Scots minor wishing to acquire a domicile in a foreign country where the age of majority is below twenty one, but the part of the rule that states that a minor's domicile does not depend on the father's or the mother's is-important. If a domiciled Scotsman settles in a new country leaving his minor child in Scotland, that minor child retains his Scots domicile. And even if the minor child goes with the father to the new country it by no means follows that the child's domicile changes The <u>gnimus</u> of the child must be considered, to also. determine whether the child has acquired a domicile of choice in the new country. Thus in Arnott v. Groom [1846 9 D. 142] a widow brought her pupil daughter to Scotland from India, where the domicile of origin of the child was, thus giving the child a derived domicile in Scotland. When the daughter was fifteen, she and her mother left Scotland, and they lived in furnished lodgings, in hotels, and with friends, in various places, mainly in England, until the daughter's death soon after reaching majority/

majority. It was held that the daughter was domiciled in Scotland, like the mother, but the Court considered the evidence of the intention of the daughter as distinct from that of her mother, and Lord Jeffrey ( who was dissenting, but on a specialty) says: "Her domicile was no longer necessarily that of her mother, which I rather think continued Scotch; and the two can no longer be looked on, as a mother having power to create a domicile for her daughter, They are now only like two friends voluntarily living together, but perfectly independent of one another; and there might consequently have been a radical diversity in the <u>gnimus</u> of each, as to the character of their residence in England" [at page 150].

In England children depend on their father, or mother, for domicile until twenty one, and cannot acquire a separate domicile of choice before that age. This rquises the interesting question whether a minor whose father is domiciled in England, can acquire a domicile of choice in Scotland by residing here <u>animo manendi</u>.

There are three possible views. One is that the age at which a child can acquire a domicile of choice is a question of capacity, which is governed by the law of the child's domicile, namely in this instance England. Both the Scottish and the English Courts would hold that the child cound not acquire a domicile of choice here. Both would hold that a minor, whose father was domiciled in Scotland but acquired a domicile in England leaving the child in Scotland, animo manendi, was domiciled in Scotland, and that a minor, whose father was domiciled in Scotland, who went to England animo manendi was domiciled in England. This view is logical and has the attractive feature that it would result in the same decision being arrived at no matter where the question But it is extremely unlikely that an was litigated.

English/

English Court would hold that a goottish minor could acquire a domicile in England.

The second view is that each country should decide the question according to its own law of domicile. Thus a minor whose father is domiciled in England and who resides here animo manendi, should be held by the Scottish Courts to have acquired a domicile of choice in Scotland, but by the English Courts still to retain the English domicile which he derives from his father. What authority there is on the topic is inclined to this view. I It is the one adopted in America -Beale p. 108 and cases there quoted; Dicey p.110; and there is the general rule, which, however, has not yet been applied to this type of case, that in deciding whether a domicile has been acquired a Court applies only the principles of its own law -Loustalan v. Loustalan 1900 P. 211, In re Annesley 1996 Ch.D. 692. The problem was debated, though not decided, in Urguart v. Eutterfield 1987 37 ChbD. 397 In Chalmers v. Chalmers (0.H.) 1903 11 S.L.T. 68 ) the Lord Ordinary unconsciously assumed that the second view was correct. The father, who was 'a domiciled Scotsman, left Scotland when his son was four and lived in the south of England on his fortune. It was not clear whether the father had acquired an English domicile, thus giving his son a derived domicile in England, but Lord Kincairney said that even if the son had a derived domicile in England, that domicile was lost and his domicile of origin was reacquired when he came to Edinburgh University at the age of nineteen. If the son was domiciled in England, he had, on the first view, no capacity to reacquire his domicile of origin while still a minor. The decision is also inconsistent with the third second view view. The disadvantage of thesattitude, however, is that for different countries to arrive at different decisions on the question of domicile merely perpetuates the conflict of laws instead of resolving it. It may be redargued, of course, that when the rules of International Private Law of states differ, decisions necessarily differ, and if they agreed that

would only show that one state was not applying its rules logically:

The third view is suggested by Bar in these words: "It is necessary that a person should have, in order to an independent and voluntary acquisition of a domicile, capacity to act, and that both by the law of the domicilewhich he has and by that of the country to which he intends to remove; the former that he may be unable to undo the tie that binds him to his native country; the latter that he may be in a positionto enter into the new allegiance." [Gillespie's translation 2nd ed. p.329] It is suggested that this should be the rule. It has the advantage that the same decision would be given no matter in what forum the questionwas litigated, without involving the Courts of a country holding that a person has acquired a domicile there who is under age by the municipal law.

The importance attached to domicile of origin has led to the question, which has not yet been been directly decided, whether "domicile of origin" can only mean the domicile that a person received at birth or whether it means the last derived domicile that a pupil received from his parent. Lord Robertson declared in Woodbury v. Sutherland's Trustees 1939 S.L.T. 93 in favour of the first view, that "domicile of origin" means only the domicile that a person receives at birth and does not include "derived domicile". In the Inner House the question was reserved [1939 S.N. 64] but there is so much reason for the first view that it can hardly be doubted. In addition to Lord Robertson's opinion it has the support of Chitty Justice (In re Craignish L.R. 1892 3 Ch. 180 at pp.184,5] Dicey [p. 79] and Currie [pp.9 and 10], and a distinction between "derived domicile" and "domi-:cile of origin" is at the basis of the undermoted cases:

Crumpton's J.F. v. Finch-Noyes 1918 S.C. 378; Arnott v. Groom 1346 9D. 142; Lowndes v. Douglas 1862 24D. 1391; Chalmers v. Chalmers (O.H.) 1903 11 S.L.T, 68; In re Macreight L.R. 1885 30 Ch.D. 165.]

To hold that a "derived domicile" could be the domicile of origin would be inconsistent with the statement that has often been made, that the derived domicile is less persistent than, the presumption in favour of it is less strong than in the case of the domiciles origin. Chalmers v. Chalmers. Crumptons J.F. v. Finch-Noyes supra, per Lords Johnston and Mackenzie; Arnott v. Groom supra, per Lord Jeffrey. In the last two cases however it was domicile derived from the mother, and the comment on its lack of tenacity may be due to that circumstance. There is little authority for the other view, Westlake Secs. 248 and 261, whose statement is contrary to the authority which he quotes, namely In re Craignish supra, and the ass-:umption on which Lopes Lerd Justice proceeded in Urguhart/

Urquhart v. Butterfield L.R. 1887 37 Ch.D. 357 at pp. 384,5].

The plea has been advanced that great inconven-:ience and hardship would be caused by holding that domicile of origin meant simply domicile at birth. E.g. if at the time of the birth of his child an Englishman is domiciled in France, but shortly afterwards, say within three months, the father returns permanently to England, reacquiring his domicile of origin, and continues there until the child is of age, it would be a great hardship on this English child to hold that throughout the rest of his life a French domicile of origin clung to him, ready to arise whenever he abandoned the English domicile or any subsequent domicile acquired by choice. But this case can be met with the parallel case of an Englishman domiciled in England at his child's birth retaining his domicile of origin in England until three months of the child reaching majority and then acquiring a domicile in France for the last three months of the child's infancy. To hold that this derived domicile in France was the child's domicile of origin would be equally hard. (In the judgment of Chitty Justice In re braignish).

The last derived domicile will persist until it has been abandoned <u>animo et facto</u>, whereupon if a domicile of choice has been acquired, that will be the domicile, but if not the domicile of origin will revive. <u>In re Macreight</u> L.R. 1885 30 Ch.D. 165].

There are two views as to the position of a legitimated child. One view is that when the child is legitimated by the subsequent marriage of its parents it takes its domicile from the father retro-:specively to its birth and that the father's domicile/

domicile at the time of the birth is the domicile of origin of the child. The other view is that the domicile which the child obtains from its father at the time of the marriage is a derive? domicile, and that the domicile of origin of the child remains the domicile of the mother at the time of the birth.

The first view, it is submitted, is the correct one when the effect of legitimation is to legitimize the child from birth; the child must then be regarded as having potentially a domicile with the father, though he has provisionally a domicile with the mother. | Beale p. 217, where he cites McNicoll v. Ives 301 N.P. 69 :- "Aperson born illegitimate, but afterwards legitimated by the subsequent marriage of his parents, stands in the position ( after legitimation ) that he would have occupied if he had been born legitimate. His domicile of origin is the country where his father was domiciled at the time of his birth! The Scots law of legitimation by subsequent marriage has this effect, because it rests on the fiction that the mother and father of the illegitimate child gave their consent to marry at the time of the conception and that the marriage tobis effect retrospectively to the time of conception, Kerr v. Fartin 1840 2 D. 752 is inconsistent with this fiction, but McNeill v. McGregor 1901 4 F. 123 is authority for the view that the fiction will be allowed its place if no interests of third parties\_are thereby endangered. Dicey, however holds the second view. There is support, too, for the second view in Shedden v.

Patrick (1854 17 D.(H.L.)18) where it was held that an illegitimate child, who was born in the United States of a British man and an American woman, was not made a British subject by the subsequent marriage of his parents, though he would have been a British subject from birth according to the statutes (if his parents had been married) because his father was a British subject. There is a parallel between nationality and domicile but the reason given for that decision does not apply here. The Lord Chancellor, Cranworth said that if a man before the marriage of his parents were an American, he might be made in invitum, a subject of Her Majesty. "In the event of war with America the appellant might lawfully take up arms against Her Majesty; but the subsequent marriage of his parents might make him a traitor - the existence of a state of the law so anomalous was never contem-:plated by the legislature." It is submitted therefore that the first view is the correct one.

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<u>Married Women</u>. The domicile of a married woman is always the same as that of her husband. At marriage her domicile changes to his, if his is different, and if he subsequently changes his domicile, hers will change in conformity <u>Crumpton's J.F. v. Finch-Noyes</u> 1918 S.C. 378. "Her abode and domicile follows his"\_\_\_\_\_\_ Stair 1.4.9; <u>Mackinnon's Trustees v. The Inland Revenue</u> 1919 S.C. 684 and 1920 S.C. (H.L.) 171; <u>Warrender v. Warrender</u> 1835 2 S. & McL. 154; <u>Low v. Low</u> 1891 19 R. 115; <u>Attorney General for Alberta v. Cook</u> 1926 A.C. 444].

Even when the spouses are living apart under a voluntary deed of separation, the wife cannot have a domicilo different from that of her husband [Warrender]

v./

Warrender v. Warrender 1835 2 S.&HcL. 154; Low v.Low 1891 19 ... 115 ; or when the husband has deserted his wife or lost the right to insiston her adhering by committing adultery \_\_ackinnon's Tra. v. The Inland Revenue 1919 S.C. 684, 1920 S.C.(H.L.)171 ; or even when the spouses are judicially separated, / Attorney General for Alberta v. Cook 1926 A.U. 444 the domicile of the wife follows that of her husband, for the rule does not rest on the duty of the wife to adhere to her husband, and the right of the husband to determine the family residence, inspite of early opinions to that effect, Adamson v. Barbour 1 Macq. 367; Parish of Kirkaldy v. Parish of Traquair \$0.H.) 1915 S.C. 1124; per Ld. Dewar at p.1126; Mclaren p. 14; Fraser p. Aqwtr but on the principle that husband and wife are one in law. Attorney General for Alberta v. Cook, supra Two further considerations which have led to the adoption of the hard and fast rule that the domicile of the wife is always that of her husbandare: firstly, great difficulty would be experienced in regard to jurisdiction for divorce if a wife were to be allowed to acquire a separate domicile - which Court would have power to grant divorce, that of the husband's domicile or that of the wifes? Attorney General for Alberta v. Cook, supra; Mackinnon's Trs. supra, per Ld Dunedin ] Secondly, it would make succession too uncertain, if, perhaps after the death of both spouses, it were possible to raise the question whether the husband had been unfaithful to the wife, thus allowing her to acquire her-t a separate domicile and the consequent question, what was that domicile. Mackinnon's Trs. supra ] There is no exception to the rule that her domicile follows his, and it applies until the marriage is brought to an end by divorce.

In the U.S. the rule is held to rest on the duty of adherence, and the wife can acquire a separate domicile if he deserts her or gives her cause for separation, and of course if there is a judicial separation. [ Beale pp. 201 et sequ. ]

action and those Courts alone have jurisdiction. There is no possibility of a conflict of jurisdiction. The Privy Council are correct in deciding that the Courts of Alberta hade no jurisdiction in a divorce action by Mrs. Cook, who was domiciled in Alberta. against her husband who was domiciled in Ontario, but they did not need to hold that she had the same domicile as her husband in order to decide that. It is a pity that the question of the separated wife's domicile arose in a case of jurisdiction in divorce. If it had arisen in a question of succession to the wife's estate, the Privy Council might have felt that the other view was correct, for it is considering the position in succession that the illogicality of the decision ismost apparent. The property of a wife who had obtained a decree of judicial separation against her husband passes on her death in intestacy to her heirs and representatives, as if her husband were then dead. (Conjugal Rights (Scotland) Act 1861 Sec.6.)

Yet the law of the domicile of her husband, who takes no part of her estate is to determine who are her heirs and representatives.

In conclusion it may be noticed that in the U.S. the rule that her domicile follows his ceases if he deserts her or gives her cause for separation, and of course if there is a judicial separation (Beale pp. 201 et sequ).

A void marriage can have no effect on the domi-:cile of the wife by operation of law <u>Smijth v.Smijth</u> 1918 l S.L.T. 154; <u>Parish of Kirkcaldy v. Parish of</u> <u>Traquair 1915 S.C. 1124</u>; <u>Mitford v. Mitford 1997 P.</u> 130 at p. 139; <u>White v. White 1937 P. 111</u>. But since she remains capable of changing her domicile, if she has in fact lived voluntarily with her supposed husband she may acquire a domicile of choice in the country/

<u>Leadran & Chakmarn</u> 1929 S.L.T. 96 per Lond Mackay at p. 97; country in which she has lived with him. <u>See</u> Beale p. 199 and American cases there quoted.] Where the marriage is not void <u>ab initio</u>, but merely voidable, e.g. on the ground of impotency, since a marriage has subsisted the wife takes her husband's domicile <u>Turner v. Thomson</u> 1988 13 P.D. 37].

Lunatics It is clear that the domicile of an adult who becomes insane cannot be changed by his custodiers Westlake sec. 251. Dicey p. 126]. He retains the domicile the possessed at the time he became insane [Not, as Dicey says, the domicile at the time when he came to be treated as insane (p.126). A person's juridical capacity ceases on becoming insane, even though he is not certified for some time later see Gloag on Contract 2nd Edition p. 92; Loudon v. Elder's Curator Bonis (0.H.) 1923 S.L.T. 226. It is true that in Crumptons J. F. v. Finch-Noyes 1918 S.C. 378, Lord Johnston said "His succession must be regulated by the law of his domicile at the date of his certification" but this probably is merely a lax use of words: there was no time lag in the case between insanity and certification . Thus Crumpton while residing in "offat, became insane at the age of 23. He was kept in an asylum in Dumfries until he died at 57. The Court held that he never lost the derived domicile which he had obtained from his mother when a pupil and that he died domiciled in Scotland. No attention was paid to the length of residence in the asylum in Dumfries nor to the fact that during lucid intervals he evinced an interest in Moffat. The tempus inspiciendum was the date of becoming insane Crumpton's J. F. v. Finch-Noyes 1918/

1918 S.C. 376; See also <u>Urguhart v. Butterfield</u> (1877) 37 Ch.D. (C.A.) 357.

The case of a person who has been incapax during pupillarity and who continues to live with and under the care of parents after majority, is to be assimilated to that of a pupil. He never acquires the capacity to choose a home for himself, so remains under permanent pupillarity, and, provided that he lives with his father or mother, and changes his residence when they do, his domicile changes with that of his father or mother until the end of his life. (Sharpe v. Crispin (1969) L.R. 1 P4D. 611 Westlakep. 346; Beale p. 227; Dicey pp. 104,5].

# (3)"<u>DOMICILE of CHOICE</u>". Acquisition of a domicile of choice.

"Every person's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of abandoning the domicile of origin. The change must be animo et facto . . . ". [Lord Wensleydale in Aikman v. Aikman 3 Macq. 854 . There are two elements in the acquisition of a domicile of choice, the fact of residence in the new country, and the animus or intention of making it the sole domicile and of abandoning the domicile of origin Story p. 47: Cheshire p. 169; Westlake Sec. 256; Dicey p.93. Neither element is sufficient without the other. Residence alone, however long continued will not constitute a domicile of choice. Thus although a man, whose domicile of origin was Scots, resided in Liver-:pool from the age of 45 till his death 37 years later, and never in that time set foot in Scotland, he was held not to have acquired a domicile in England, because no "animus" was proved of hi intention to acquiring an English domicile and abandoning his/

his Scottish one <u>Liverpool Royal Infirmary v. Ramsay</u> 1930 S.C. (H.L.) 83. Followed in <u>McLelland v. McLelland</u> 1942 S.C. 502]. Similarly, intention alone is not enough. [Domicilium re et facto transfertur, non nuda contestatione.Dig. 501,80]. Thus although person intends to make his permanent home in Canada, and to abandon his original domicile in Scotland, and although he makes all preparations for that end, he cannot acquire a domicile in Canada until he satisfies the requirement of "fact" by residing there. So that if he dies on the journey he has never lost his domicile of origin, [Westlake sec. 260; McLaren pp. 7,8; Fraser p. 1269].

(1) The element of residence.

The two elements are easily distinguished in theory, but not so easily in practice, because long residence, or residence of a particular kind, as well as being the required residence, may be evidence of the required intention.

In many cases the nature of the residence, i.e. whether it was in a house which the person owned or in furnished lodgings, and the duration of the residence, are considered, and often this point is decisive Kennedy v. Bell 1863 1 M. 1127 and 1868 6 M. (H.L.) 69, but all these discussions about the nature and duration of the residence relate to residence as an indication of intention and not to residence qua residence. If the required intention is sufficiently established from other indicia almost any kind of residence will satisfy the requirement of the fact of residence. "If you establish that there is a determination to live in Scotland and if the party goes and lives in an hotel, that is enough. He is there - that is the factum; and there is also the/

the animus; and the two unitedly constitute the domicile." [Lord Granworth in <u>Bell</u> v. <u>Kennedy</u> in House of Lords at p. 76]. "Residence, however short even for an hour - will be sufficient if the in-:tention to change exists ". <u>(Taylor v. Taylor 1887</u> 2 1 S.L.R. 18 per Lord Fraser, Ordinary]. It has been held that a domicile of choice has been acquired after four months residence in a leased house. [<u>Macphail v. Macphail's Trustees</u>(0.H.) 1906 14 S.L.T. 288].

To acquire a domicile of choice a party must reside within the territory of the law which thus becomes the law of his domicile, but it is not necessary that the party should have one fixed residence which can be pointed out as his home. "I cannot admit what Lord Fullerton assumes to be the rule; that, in order to make a domicile, it is necessary to have some particular spot within the territory of a law - that it is not enough that the party shall have an apparently continuous residence there, but shall actually have a particular spot, or remain fixed in some permanent establishment. In considering the indiciae of domicile these things are important; but they are not necessary as matter of general law, to constitute domicile. Many old bachelors never have a house they can call their own. They go from hotel to hotel and from watering place to watering place, careless of the comfort of more permanent residence, and unwilling to submit to the gene attendant on it . . If the purpose of remaining in the territory be clearly proved aliter a particular home is not necessary. Arnott v. Groom 1846 9 D. per Lord Jeffrey at p. 150.

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The residence must be within the territory of the law which becomes the law of his domicile, so membership of a privileged community within one country will not constitute a domicile in another country to which the members of that privileged community belong. In the past in China, Egypt and Turkey there existed a system of "capitulations" whereby Europeans resident in those countries, who were registered with their consulate, enjoyed certain privileges: they were not subject to the native law but to their own law And to their own Courts sitting in those countries. When a person having a Turkish domicile of origin settled in Cairo under British protection as a member of the privileged Pritish community, he did not acquire an English domicile of choice- that could only be acquired by residence in England Abd-ul-Messih v. Farra (1888)L.R. 13 A.C. 431). An English-:men who resided in Cairo as a member of the privi-:leged British community was not thereby prevented from acquiring a demicile of choice in Egypt. Casdagli v. Casdagli 1919 A.C. 145 There is no such thing as an Anglo-Chinese or Anglo-Egyptian domicile.

Connection with a community however may be important in a secondary manner if the sover**e**ign power of the country in which the domicile hag been acquired, recognises that different systems of law apply to different communities. Thus the Englishman who acquired a domicile in Egypt while the "capitul-:ations" force was not subject to the law appli-:cable to native Egyptians but to the law which the Egyptian/

108.

Egyptian sovereign recognised as applicable to him <u>(Casdagli v. Casdagli</u> supra). And a Hindu or Moslem settling in India and attaching himself to his own religious sect there, would acquire a domicile by virtue of which he would enjoy the civil status as to marriage, inheritance and the like accorded by the laws of British India to Hindus or Moslems and such civil status would differ materially from that of a European settling there and attaching himself to the British community. <u>(Chitty Justice In re Tootals Trusts</u> (1883) L.R. 23 Ch.D. at p. 539; Westlake p. 343]

The American doctrine that, for a soldier to acquire a domicile in the country in which he is stationed, he requires to establish his family or himself in a residence of his own, and that residence in his barracks is not enough, [Beale p. ] is not part of our law. Governor Trapaud acquired a domiicile of choice in Scotland while living in the governor's house (Clark v. Newmarsh 1836 F.C. 11, 395; Dyson v. Dyson (O.H.) 1909 2 S.L.T. 404]. But the American view might be correct in the case of a prisoner (post. p. ].

The fact of residence can only be established by the party himself taking up residence in the new not country and by his wife and family doing so. [Beale p. To allow such a result would be pressing too far the doctrine that the Privy Council insisted on in <u>Attorney General for Alberta v. Cook</u> (1926 A.C. 444) that husband and wife are one in law.

(2)/

### (2) The element of intention.

The intention must be (a) to make the new country the sole domicile and (b) to abandon the domicile of origin. The intention of the person whose domicile is in question is a pure question of fact. [A. Farnsworth 1943 LIX L.Q.F. 219]7 The Court refused to determine in a special case whether, upon facts stated, a man had abandoned <u>animo</u>, his domicile of origin, that being an inference, not in law, but in fact, upon which the parties in a special case must be agreed. [Lawson's Trustees v. Lawson 1883 10 R. 1278 7

(a) Intention to make the new country the sole domicile.

This means to make the new country the principal residence and the centre of one's business, with the intention of permanence.

The Loman definition of "domicile" admirably expresses this requirement:

"There is no coubt that each person has his domicile in that place where he has established his family residence (larem) and the headquarters of his business and estate (rerum ac fortunarum suarum summam); from which he will not depart unless some business requires; when he has left which he seems to be abroad; and if he has returned to it he has already ceased to journey! / Code 10, 39, 77

"Principal Pesidence". A person may have a double residence, one in the country of his original domicile and one in another country <u>Procks</u> v. <u>Brooks</u> 1902 4 F. 1014 and 1905 8F. (H.L.) 4; <u>Boss v. Poss</u> 1926 S.C. 1038 and 1930 S.C. (H.L.) 1; <u>Aikman v. Aikman</u> 1859 2 1 D. 757 and 3 McQ. 854; <u>Mackenzie's</u> <u>Trustees v. Mackenzie & Others</u> (O.H.) 1894 2 S.L.T. 88; <u>Hunter</u> v. <u>Hunter</u> (O.H.) 1893 30 S.L.F. 915; <u>Donaldson v. McClure</u> 1857 20 D. 307 and 1860 22 D. (H.L.) 7; <u>Hunter v. Hunter</u> (O.H.) 1893 30 S.L.R. 915\_7 To acquire a domicile of choice the principal residence must be in the new country. Unless that is so the person has not adopted the new country as his domicile. The question of double residence also affects the abandonment of the domicile of origin.<u></u>q.v.\_7

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he centre of one's business. It is not enough if a person make Scotland his principal residence if the greater part of his pro-:perty and business is still in the country of origin, England, for although his larem is in Scotland, his rerum as fortunarum suarum summam is still in England Brooks v. Brooks 1902 4 F. 1014, per Lord Kinnear at p. 1038. Affd as Marchioness of Huntly v. Gaskell 1905 8 F. (H.L.) 4.

> A commoner case is that of a man making a new country the centre of his business, when the question arises whether he has acquired a domicile of choice in it. That a person carries on business in a different country or is employed there usually means that he will reside there with a certain degree of permanence. This is a circumstance favourable to the acquisition of a domicile of choice in the new country Brown v. Brown 1928 S.C. 542 . But it is conclusive of it, and the question must be, whether he has adopted the new country as the sole domicile and abandoned his domicile of origin. "In the case of public servants, just as in the case of professional men or traders, the nature, or the tenure, or the prospects of the occupation form only an element of evidence in the question of intention . . . . If the conditions of public employment or of private employment lead a man to resolve permanently to settle in the country where he holds his appointment, it is not the reason of his decision, but his decision, that determines his domicile." Fairbairn v. Neville 1879 25 R. 192 per Lord President Robertson at p. 203. Thus a Scotsman was held not to have lost his domicile of origin in Scotland by residing with his wife and family in various places/

places in England for eleven years in order to work as a jobbing engineer, he deponing that if he got as good a wage in Scotland as in England, he would come here to work <u>(Hood v. Hood</u> 1897 24 R. 973]. And a sailor, who lived ashore at Liverpool, which was convenient for his service, was held, because of various indicia, not to have lost his Scotch domicile of origin <u>[Kerr</u> <u>v. Richardson's Trustees</u> (0.H.) 1898 6 S.L.T. 244].

The question whether he has the animus revertendi or intention of returning to the home country after he has made his fortune or when he retires, will give a adopted the new useful indication as to whether he has abandoned the country as his sole domicily demicile of origin, [Fairbairn v. Neville 1897 25 R. 192; L.A. v. Brown's Trustees 1907 S.C. 333 . This is not an infallible test in all cases. It is often said that if a man resides in a country with the animus manendi, or without the animus revertendi to the domicile of origin, he has a domicile of choice [see the definitions and dicta criticised but this is not an infallible test in all cases. The there, but this, test is not applicable to cases of later invalids who are compelled to go abroad for their health and who reside in the foreign country without any hope of being able to return, They reside without the animus revertendi, yet do not acquire a domicile of choice in the foreign country (see later). It is also inapplicable to a case like Ramsay v. Liverpool Royal Infirmary [1930 S.C. (H.L.) 83) where a Scotsman aged forty five went to Liverpool to be near other members of his family; he lived there for thirty seven years till his death, remaining after the death of the last survivor of his relatives, apparently from lethargy and disinclination to change. He resided in Liverpool without any animus revertendi but he did not acquirea domicile of choice in England: a/

a positive kind of animus is required, namely to adopt the new country as the sole domicile. However the test, whether the man has the <u>animus revertendi</u> is useful in cases of persons going abroad for the purpose of trade or employment.

The climate of the new country may be weighty factor. If it is tropical or uncomfortable or un-:healthy, there is a presumption of fact against a white man acquiring a domicile of choice in it. Thus the plea that a Scottish business man had acquired a domicile of choice in Burmah was rejected with the comment that no man in his senses ever goes to Burmah sine animo revertendi Steel v. Steel 1898 15 R. 896 . But the presumption is not irrebutable, and in a later case where there were strong indications that he did not intend to return to Scotland, a Scotland was held to have acquired a domicile of choice in Ceylon L.A. v. Brown's Trustees 1907 S.C.333 . On the other hand if the new country is one of the Dominions or temperthat :ate colonies which is a circumstance favourable to the acquisition of a domicile of choice, because "the majority of migrants to the British colonies go there with the intention of establishing a permanent home, and that raises a presumption of fact" [L.A. v. Brown's Trustees per Lord McLaren at page 340 . "The infer-:ence . . . is not much weaker in the case of the United States considering the number of our people who have gone there" Brown v. Brown 1928 S.C. 542 per the Lord Ord. Fleming]. And of course it is easier to find that a Scotsman has acquired a domicile of choice in England than in a country under a different sovereign where a strange language is spoken. Whicker v./

v. <u>Hume</u> (1858) 7 H.L.C. 124 per Lord Cranworth at p. 159. Approved by Lord Chelmsford in <u>Moorhouse</u> v. <u>Lord</u> (1863) 10 H.L.C. 272 at p. 287; <u>Corbridge</u> v. <u>Somerville</u> 1914 1 S.I.T. per Lord Mackenzie at p. 307. <u>Macphail</u> v. Macphail's Trustees (0.H.) 1906 14 S.L.T. 388 7

It is not necessary for the acquisition of a domicile of choice in an eastern country that the person shall have associated himself with the natives and lived f like one; settling permanently in the white community in the country suffices. <u>Casdagli</u> v. <u>Casdagli</u> 1919 A.C. 145\_7

"<u>With the intention of permanence</u>". "It (residence) must be residence fixed, not for any defined period or particular purpose, but general and indefinite in its future duration" <u>Udny</u> v. <u>Udby</u> 1869 7 M. (H.L.) 89 per Lord Westbury at p. 99. See <u>Bell</u> v. <u>Kennedy</u> 1868 6 M. (H.L.) 69. Fraser p. 1257\_7

(b) To abandon the original domicile. [The Lauderdale Peerage Case 1885 10 A.C. 692]

"The animus or intention to abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confers on the denizens of the country in their purchases and sales and other business transactions - in/ in their political or municipal status - and in their daily affairs of common life: but also the laws by which succession to property is regulated after death"  $\left[\frac{\text{Donaldson v. McLure } 1857 \ 20 \ \text{D. } 307 \ \text{per Lord Ivory at } 220, \ \text{p. } 321, \ \text{Affd. } 1860, \ (\text{H.L.}) \ 7\right].$ 

Dicta in many cases and most of the accepted definitions of domicile may give the impression that this particular element of the animus is not required, and that it is sufficient to have residence plus the <u>animus manendi</u>. For example —

In <u>Udney v. Udney</u> [1869 7 M. (H.L.) 89] Lord Westbury said: "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with the unlimited intention of continuing to reside there." [Adopted by Lord Craighill in <u>Carswell v. Carswell</u> 1881 8 R. 901 at p. 912, by Lord President Strathclyde in <u>Crumpton's Judicial</u> <u>Factor v. Finch-Noyes</u> 1918 S.C. 378, and Lord Kincairney in <u>Armitage's Trustees v. Armitage</u> (0.H.) 1904 11 S.L.T. 697].

Acounting to Story "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom" (p. 47. Adopted, without acknowledgement, by Lord President Strathclyde in <u>Corbridge v. Somerville</u> 1914 1 S.L.T. 305, and by Chitty Justice in <u>Craignish v. Craignish</u> 1892 3 Ch. 180, at p. 192. How misleading this defin-:ition is can be seen from <u>Stavert v. Stavert</u> 1882 9 R. 520 where the Lord Ordinary applied it with ridiculous results. An American definition of domicile is dangerous, becuase the Americans do not put so much emphasis/

emphasis as we do on domicile of origin and loyalty to the home country. "In America the British loyalty to one's place of birth is little felt. The immigrant who identifies himself with his new country, or the Easterner who goes west and identifies himself with his new part of the country, is a common figure. To refer such a man, while in the course of moving from one place in his new country to another, to a forgotten or half-forgotten domicile of origin, would be unreal (Beale p. 184,5) "The American doctrine is very naturally more liberal in allowing change of domicile that the English" (p. 148). Thus in the United States there is no stronger presumption against change from a domicile of origin than there is against other changes of domicile (p. 129) and when a domicile of choice is abandoned in fact without the acquisition of a new domicile of choice, the domicile of origin does not revive, but the last domicile of choice is retained until a new one is acquired.

Dicey defines domicile as the country which is considered by English law to be a man's'permanent home' (p. 65) and explains 'permanent home' as meaning that country either (i) in which he, in fact, resides with the <u>animus manendi</u> or (ii) in which, having so resided he continues actually to reside though no longer retaining the <u>animus manendi</u> or (iii) with regard to which, having so resided there he retains the <u>animus</u> <u>manendi</u> though he in fact no longer resides there.

Phillimore defines domicile as "A residence at a particular place, accompanied with . . . an intention to remain there for an unlimited time;" Vattel as " an habitation fixed in some place with the intention of remaining there always".

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In <u>Bell v. Kennedy</u> Lord Cairns said: "The question that I ask your Lordships to consider in the present case is in substance this: whether the appellant has determined to make and has made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?" [6 M. (H.L.) 69 at p. 71].

Now, Lord Westbury's dictum in Udney emphasises that the residence must be voluntary, a virtue which the others do not have, but all are unsatisfactory because they imply that residence plus the animus manendi are sufficient for the acquisition of a domicile of choice Other definitions are considered and criticised later, in an attempt to evolve a true definition Brooks v. Brooks Trustees [1902 4 F. 1014. Affd. Marchioness of Huntly v. Gaskell 1905 8 F. (H.L.)4, shows how misleading that conception is. An English banker, and Member of Parliament for a Cheshire constituency who had large landed estates in Lanca-:shire and Cheshire, retired from active management of his bank at the age of fifty, and for the remaining thirty years of his life lived principally on estates which hepurchased on Deeside, where he kept his He preferred his Scottish residence, establishment. though he retained houses in London and Manchester for Parliamentary and business duties, and he intended to live the remainder of his life in Scotland, which, in fact, he did, leaving instructions that he was to buried at his Scottish residence. Now, on the definitions cited above one would hold that he had acquired a domicile of choice in Scotland, But it is clear that the Courts correctly held, which they did/

did unanimously, that he had not lost his domicile of origin and that he died domiciled in England. During his lifetime Brooks was concerned about the question of domicile. On three occasions he asked his Manchester solicitor if he was a domiciled Scot (which would have limited his testamentary powers) and was apparently satisfied by the assurance that he was not. The Courts inferred from this that he did not intend to abandon his English domicile of origin, and they held that it was a necessary part of the required animus that he The Lord President Kinross said: "A new should. domicile can only be acquired animo et facto, the animus being to surrender the domicile which the per-:son holds at the time and to acquire another domicile elsewhere" (1902 4 F. at p. 1037). In The House of Lords the Earl of Halsbury quoted with approval the passage from one of Lord Ivory's judgements which begins this sub-chapter See also Mackenzie's Trustees v. Mackenzie and Others (0.H.) 1894 2 S.L.T. 88

The requirement has been expressed in these words: "The domicile of origin is to prevail, until the party has not only acquired another but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile. [Somerville 5 Vesey 786. Approved in many cases, e.g. <u>Munro v. Munro 1 Rob. 492. Brooks</u>, supra]

Lord Cranworth went as far as to say that "In order to acquire a new domicile a man must intend <u>quaternus in illo exuere patriam</u>" [Whicker v. Hume (1858) 7 H.L.C. 124 at p. 159; <u>Moorhouse v. Lord</u> (1863) 10 H.L.C. 272 at p. 283] which Lord President Inglis [quoting with approval in <u>Steel v. Steel</u> 1898 15 R. 896] translated as meaning that he must have a fixed/

fixed intention to strip himself of his nationality, or in other words to renounce his birthright in the place of his original domicile. (This was adopted by the Earl of Halsbury in Marchioness of Huntly v. Gaskell supra . These words are perhaps a little extravagant, and have been criticised by modern writers, Dicey p. 89; Beale pp.99,100; Fraser p. 1264,5; relying on Lord Westbury's dissent from the test in Udney V. Udney 1869 7 M. (H.L.) 89 at p.100. But the test was applied in the later cases of Steel supra, Marchioness of Huntly v. Gaskell supra, and Wahl v. Attorney General (1932) 147 L.T. 382 per Lord Dunedin at p. 383 but provided quatenus is borne in mind, and the phrase is not applied too literally, it is probably still a useful and not unfair test, particularly when the question is whether a Scotsman has acquired a domicile in a completely foreign country like France As was the case in Moorhouse v. Lord supral. It cannot be maintained that the cases in which the test was applied were decided wrongly. Of course nationality and domicile are two distinct things (Udny v. Udny supra, per Lord Westbury at p. 99 : a man may change his domicile without losing his nationality (Boldrini v. Boldrini (1932) P.9; Bradfield v. Swanton (1931) Ir. R. 446; may change his nationality without losing his domicile Wahl v. Attorney General (1932) 147 L.T. 382. But change of nationality is a very strong indi-:cation of the animus required for change of domicile; and the fact that an alien, who was living in England was subject under the Aliens Order 1920 to deportation for misbehaviour did not prevent him from acquiring an Guk. Guk. Guk 194562 TLRIGMay v. May 169 L.T. 42 English domicile of choice. Boldrini v. Boldrini supra

While the person retains and makes use of a residence in the domicile of origin it will be difficult/

While the person retains and makes use of a residence in the domicile of origin it will be difficult to hold that he has abandoned his domicile of origin. Thus residence in Scotland where his "principal residence was\*, for thirty years, was not sufficient for an Englishman to lose his domicile of origin, because inter alia, he retained two residences in England, one in Manchester and one in London, which he used when transacting business, and for Parliamentary duties. Brooks v. Brooks 1902 4 F. 1014, and 1905 8 F. (H.L.)4; See also Ross v. Ross 1926 S.C. 1038 and 1930 S.C. (H.L.) 1; Aikman v. Aikman 1859 21 D. 757 and 3 McQ. 354; Mackenzie's Trustees v. Mackenzie and Others (O.H.) 1894 2 S.L.T. 88; Hunter v. Hunter (O.H.) 1893 30 S.L.R. 9157. It would be going too far however to say that he could not lose his domicile of origin while retaining a residence in it. An Englishman obtained a permanent civil service post in Edinburgh, and he lived in his own house in Portobello with his family. He inherited a property worth £100 per annum in Westmoreland, where he spent his annual leave, and the house on which he allowed his sisters to occupy provided that he could come and go as he pleased, He acquired a domicile of choice in Scotland Fairbairn v. Neville 1897 25 R. 192 .

When the question is the adoption of a domicile of choice in a foreign country by a Scotsman, the establish-:ment or maintenance of relations with England is of some value in negativing the suggestion that the domicile of origin has been abandoned [Grant v. Grant 1931 S.C. 238, per Lord Sands].

Abandonment of the domicile of origin need not be a conscious act - most persons neither think about domicile nor appreciate its significance - and may be/

be inferred from the fact that the person has settled for a long time in the new country, with evidence that he intended to adopt it as his permanent home, and that for a long period he maintained no substantial connection with the domicile of origin. <u>Pobinson v. Hobinson's</u> <u>Trustees</u> (0.H.) 1934 S.L.T. 183; <u>Corbridge v. Somerville</u> 1914 1 S.L.T. 305. In <u>Donaldson v. McClure</u> 1860 22 D. (H.L.) 7, and <u>Marchioness of Huntly v. Gaskell</u> 1905 8 1. (F.L.) 4 a substantial connection was maintained with the former domicile.7

If abandonment of the domicile of origin appears from other facts, a declaration in a will that the testator wished to retain the domicile of origin, will be ineffective to prevent the acquisition of a domicile of choice in the new country. <u>Pobinson v.</u> <u>Pobinson's Trustees</u>, supra. Compare <u>In re Annesley</u> (1926) L.P. Ch.D. 692, and <u>In re Steer</u> 1858 3 H. & N. 598\_7

In <u>Robinson</u> v. <u>Robinson's Trustees</u> (0.H.) 1934 S.L.T. 183 7 the Court/

Court was not going to permit a man who had in fact abandoned his domicile of origin and acquired a domicile of choice here to escape from the consequences, namely limitation of his testamentary power, by a declaration in his will.

There is English authority for the proposition that a man is not prevented from acquiring a domicile of choice merely by a wistful intention to return to his domicile of origin on the occurrence of an event, which may not happen for a long time, or at all. A Frenchman lived for twenty seven years in England, and married successively two Englishwomen, who were Protestants, though he was a Roman Catholic. He had his children brought up as Protestants, His will was in English form and he lefthis property in a manner inconsistent with French law. Numerous witnesses deponed that he intended to return to France when he made his fortune. It was also proved that he always refused to be naturalized in England and would not lease a house for more than threeyears. He was held to have acquired a domicile in England Doucet v. Geoghegan 1878 L.R. 19 Ch. 441]. But this may not be a faultless authority Cp. Winans v. Attorney-General 1904 A.C. (H.L.) 287]. There is a tendency in some of the English cases to be less strict about the requirements of the animus than the Scottish cases demand See Douglas v. Douglas (1871) L.R. 12 Equ. 617 and particularly V-C Wicken's comment at p. 644). If some of the English decisions are truly irrecon-:cileable with the Scottish ones, the Scottish lawyer can console himself with the obvious tendency of the House of Lords in the later cases to lay more emphasis on intention and be stricter in its requirements of this/

this element. See e.g. <u>Marchioness of Huntly V. Gaskell</u> 1905 8 F. (H.L.) 4; <u>Liverpool Royal Infirmary V. Ramsay</u> 1930 S.C. (H.L.) 83

The tendency to pay more attention to animus has received judicial recognition. "Broadly speaking, it is much more difficult to satisfy a Court sitting to-day that a domicile of origin has been replaced by a domicile of choice than it was in 1788; the fact of residence used to bulk more than intention, intention or anymus now bulks more than residence. In themselves legal principles are immutable, but the weight attributed to the various circumstances that call for their application inevitably varies with the changing conditions of human life. Increased mobility alone has wrought a great change in our ideas of the permance of a foreign residence, and a Scotsman who leaves his home and kindred in this country to spend the best years of  $his_{\mathbf{A}}$  in the pursuit of a profession abroad need never think of exiting himself from his native country" [Lord President Clyde in Grant v. Grant 1931 S.C. at p. 250% . In view of this tendency some of the older cases, e.g. Lowndes v. Douglas 1362 24 D. 1391 where Lord Neaves said: "I do not think it is the law that the acquisition of a domicile will be prevented by the circumstance that the individual on going to a colony has an intention of returning ultimately, or in a certain number ofyears, more or less, when he shall be able to do so". (at and dicta of The older jurists, [e.g. Story p. 51] page 1402). must be regarded as inapplicable now.

### FREEDOM of CHOICE.

The person must have voluntarily chosen the new country as the sole domicile [Savingy p. 99; Story p. 51]. This might almost be added as a third requirement for the acquisition of a domicile of choice/

see opiaion of lyton in <u>Bosvill</u>e <u>adenald</u>, 4th June

iled in Appendix 115' 'Macdonald of choice [Cp. Lord Sands in <u>Ross v. Ross</u> 1926 S.C. at p. 1054: "The acquisition of a domicile of choice requires three things: Choice, Intention, and Residence"]

"There must be residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors or the relief of illness." [Lord Westbury in <u>Udnv v. Udny</u> 1869 7 M. (H.L.) 89].

(i) <u>The duties of office.</u>(a) <u>Service in the armed forces.</u>

The domicile of a member of the armed forces is not changed merely by his being stationed in a foreign country Wylie v. Laye 1834 125. 927; Campbell v. Campbell 1861 23D. 256; Low v. Low 1891 19R. 115; Sellars v. Sellars 1942 S.C. 206; Peddie, 6th. December 1860 - Currie on Confirmation pp. 12,13. The theory of this was admirably expressed by Lord Fullerton in these words: "Officers . . . do not acquire a legal domicile in the quarters to which they may be sent, and in which they may remain in the performance of their duty. But the principle of that exception I take to be, not that the Crown has the power to recall them, but the more important consideration, that the Crown has the power of sending them there, and that they presumably are there only in obedience to that power. The inference of this is supposed to be, that however long their mere corpor-:eal residence may be in any particular place, that residence is to be ascribed, not to any animus of theirs, but to the animus of their military superiors, to which, so long as they continue in that profession, they are bound to yield obedience". [Commissioners of Inland Revenue v. Gordon's Executors 1850 12 D.657]. A soldier is under two disabilities (1) that he has not chosen/

chosen his station; (2) he has no control over the length of his stay there. It is because of (1) that a soldier does not normally acquire a domicile of choice at the place at which he is stationed. But a retired naval officer, living in the West Indies on half-pay, who was liable to be recalled for service at any time on six months notice, was only under disability (?) and was not prevented from acquiring a domicile of choice in the West Indies Commissioners of Inland Revenue v. Gordon's Executors supral and an alien resident here, although liable under the Aliens Order 1920 to be deported for misbehaviour, could acquire a domicile of choice here Boldr Cruh v Cruh 1945 67 T.L.R. 16; May v. May 169 L.T. 42 Boldrini v. Boldrini (1932)P.9/ The point may be of importance if a person undertook a military appointment knowing that his service in the appointment had to be in a particular spot. He would then have chosen his station and his position would be similar to the person who secures civil employment in a foreign country and goes to reside there; such a person might well have acquired a domicile of choice in the

But although the domicile of a member of the armed forces is not changed merely by his being stationed in a foreign country, it is not impossible for the soldier to choose to acquire a domicile in the country in which he is stationed, and if there is an evident intention to make the country his permanent home he may be held to have acquired a domicile of <u>[The Lauderdale Reeroge Case</u> 1825 A.C. per Ear(.fSelberne at p.739] choice there. A Trapaud, an English military officer, was appointed governor of Fort Augustus, Scotland, in 1746, and resided there in the Governor's house till his death fifty years later. He acted as a Justice of the Peace, possessed a farm, and married

country where he was stationed.

a /

a Scotswoman. He was held to have acquired a Scottish domicile Clark v. Newmarsh 1836 F.C. 11, 395; Also Dyson v. Dyson (0.H.) 1909 2 S.L.T. 404 Dicey's statement therefore "That a soldier does not, and in fact, cannot, acquire a domicile in the place where he is stationed" [5th ed. p. 131; Cp. Beale p. 155 is too sweeping. His statement was criticised in the most recent Scottish case on the domicile of members of the armed forces. An Englishman, a chief stoker in the Royal Navy, was sent to Clydebank in September 1939 to await the building of a ship of which he was to be one of the crew. The ship was not completed till August, 1941, and during the interval he lived with Clydebank people called Watson. -

They gave him a key to the house. He joined the Masonic Lodge in Clydebank. Giving evidence, he said that he came to regard the Watson's as his home and that Mrs. Watson regarded him as an adopted Since August 1941 he had been aboard the ship son. and has been back on three occasions to the Watson's house when on shore leave. He professed an intention to make Scotland his home, to end his days here and to give up his English domicile. He was held not to have acquired a Scottish domicile. Sellars v. Sellars 1942 S.C. 206 Lord Moncrieff summed up the law thus: "To establish choice of residence there must be evidence of a voluntary act upon the part of the person whose domicile is asserted to be changed and the more fact of his being stationed on service within any particular area will never per se avail to establish such a choice. Per contra, if there be adduced sufficient evidence of a voluntary act of choice, the act will not be defeated or refused effect merely because the area of choice happens to coincide/

coincide with an area of service . . . the purchase or permanent occupation of a house, the transfer to the new area of wife and family, the succession to a landed estate, would, any one of them, be a concurring circumstance which might be relevant to support the claim" <u>Sellars</u> supra, per Lord Moncrieff at pa 213]. Chief Stoker Sellar's only voluntary acts that could show that he had adopted Scotland as his domicile were the joining of the Masonic Lodge and the raising of an action of divorce in Scotland when he could have done so in England. This was not regarded as sufficient.

There is no reason why a soldier cannot change his domicile during the period of his service to a country other than the one in which he is stationed. A soldier domiciled in England, could while serving abroad, purchase a house in Scotland, establish his family there, go to visit them during his leaves and abandon all connection with England. In those circumstances it might be held that he had acquired a domicile of choice in Scotland This possibility was admitted by McNeill v. McNeill (O.H.) 1919 2 S.L.T. 127, though the facts were not so strong as in the hypothetical instance given, and it was held that domicile had not been changed . A soldier however could not change his domicile merely by moving his wife and family. His personal presence is required for the fact of residence [see under "The requirement of the fact of residence" supra .

(b) Employment in the civil service of the Crown which necesitates residence abroad.

There is no peculiarity about this employment, and the civil servant is in exactly the same position as/

as any employee who has to live abroad to perform his job Fairbairn v. Neville 1897 25R. 192. He usually knows where he will have to reside if he accepts a civil appointment from the Crown, so there is freedom of choice, and unlike the soldier he can resign at any time. It is a question then whether he has or has not adopted the new country as his sole domicile, and abandoned his domicile of origin. When a retired naval officer was appointed a Stipendiary Magistrate in the West Indies and resided there with his wife and undertook public office so as to show that he had adopted the island ashis home, he was held to have acquired a domicile of choice there Commissioners of Inland Revenue v. Gordon's Executors 1850 12 D. 657 But a Scotsman who, though he acted as a consul in Italy for thirty nine years, yetmaintained a connection with his domicile of origin, being the next heir of entail of Scotch estates, corresponding frequently with his brother who was proprietor, buying adjoining lands, and sendinghis wife and children home for the sake of the children's education, did not acquire a domicile in Italy Udny v. Udny 1869 7 M. (H.L.) 89. These appointments usually carry a pension, and the question whether the civil servant intended to return to his home country when he retired is a useful indication as to whether he had abandoned his domicile of origin Fairbairn v. Neville supra. (c) Anglo-Indian domicile.

Before 1858 The East India Company was both a trading corporation and the ruler of British India. A special view was taken as to the domicile of persons in its employment and was known as the doctrine of Anglo-Indian domicile. This doctrine was as follows:-Residence/

Fesidence in India, in the service of the East India Company created a new domicile, and this no matter what the domicile of origin of the employee was, or what the animus of the employee was as to returning to his native country when his service was at the end; with the result that if the employee died in India or died before he had established himself anywhere else, succession to his property would be regulated according to English law, being the law of his domicile in India. <u>Munroe v. Douglas</u> (1820) 5 Madd. 379 per V.C. Leach at p. 404; <u>Craigie v. Lewin</u> (1843) 3 Curt. 435; <u>Forbes v. Forbes</u> (1854) Kay, 341 - where the deceased was a Scottish landowner; <u>Moorhouse v. Lord</u> (1863) 10 H.L.C. 272; <u>Wauchope v. Wauchope 4 F. 945 7</u>

In England the doctrine is now discredited, See <u>Irevon v. Drevon 34 L.J., Ch. 129; Jopp v. Wood 4 De G.J.</u> & S. 616; <u>Ex parte Cunningham</u>, <u>In re Mitchell</u> (1884) 13 Q.B.D. 418; <u>Peal v. Peal</u> (1930) 46 T.J.P. 645\_7 while in Scotland it has recently been held never to have been part of the law. <u>Grant v. Grant</u> 1931 S.C. 238\_7

Further, the Succession Act of 1865, a statute of the India Council, declared that a man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's Civil or Military Service, or in the exercise of any profession or calling.

### (ii) The demands of creditors.

If a man's residence in a new country is dictated by the necessity of avoiding his creditors, and is not a free choice, he does not acquire a domicile in the new country. Thus when pecuniary embarrassment forced Colonel Udny to leave London for Boulogne in 1845 he did not acquire a domicile of choice in France <u>Udny</u> v. <u>Udny</u> 1867 7 M. (H.L.) 89\_7 In another case the younger son of an English peer fell so much into debt that he sold his commission in the Plues and, by/ by consent, left his wife(with whom however be had not lived openly) and resided at first with friends on shoots in Lewis and Harris. He revisited England occasionally for a week or two to see his mother. using an assumed name to avoid his creditors. Later. on an allowance from a brother, he took the sub-let of a shoot in Scotland and lived openly under his own name, kept an establishment of servants and visited the local gentry, but he still schemed to put an end to his financial difficulties in order to return to It was held that this six years residence England. in Scotland was not sufficient to disturb his English domicile of origin Pitt v. Pitt 1862 14. 108 and 1864 2N. (H.L.) 28. See also Orde v. Orde 1829 95. 49; and <u>Wilson v. Wilson 1972 10 V. 573</u>. But there is no reason why a person who retires to a foreign country to avoid creditors cannot chose. to make that country his permanent home and sole domicile and chose to abandon his domicile of origin and if he does so he will be held to have acquired a domicile of choice in the new country. The fleeing creditor is in no worse position than the soldier for the acquisition of a domicile of choice and indeed is in a better one because there is more than one country in which he could seek sanctuary, so there will always be a certain amount of choice.

The fugitive from justice is in the same position as the fleeing creditor  $\int In re Martin:$ Loustalan (1900) P. (C.A.) SII.

## (iii) The relief of illness.

In cases where a person is compelled to live abroad on account of bad health, the rule that a domicile of choice is not acquired unless the new country is freely chosen is logically followed out. The case of an invalid going to Trance for a definite period/ period, say six months, for the benefit of his health, presents no problem. His residence in France is only for a temporary purpose and does not affect his domicile. The difficulty arises when a person goes abroad permanently or indefinitely for the sake of his health, when he would have preferred to live at home. There are two possible cases.

1st Case. He is advised to go abroad against his will because his life would be endangered if he stayed. In this case he does not acquire a domicile of choice in the new country, even though he goes abroad for the remainder of his life which may be either a short or a long period. Nor does it matter that he appreciates when he leaves that he will end his days in the new country: his going abroad was a matter of compulsion, not choice. Also under this heading comes the case of the invalid suffering from a mortal disease, from which there is no hope of recovery either here or abroad, but for which he will find some relief in his last few months in a different climate. / Moorhouse v. Lord 1863 10 H.I.C. per Lord Kingsdown at p. 292. See also Lord Campbell in Johnstone v. Beattie 1843 10 Cl. and F. at p. 139; Lauderdale Peerage Case 1885 10 A.C. 692 7

2nd Case. Finding that his health suffers from the Scottish climate he goes to Italy to reside there permanently or indefinitely, hoping that the different air will be better suited to his constitution. If he maintains no substantial connection with this country he will acquire a domicile of choice in Italy even though he would prefer to live in Scotland if he was well.

"That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile may well be admitted. Such is the case put by Lord Campbell in/ in <u>Beattie</u> v. <u>Johnson</u> [Supra 7 But such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other it is decided by choice". [Turner L.J. in <u>Hoskins</u> v. <u>Mathews</u> 8 De G.M. & G. at pp. 28, 29]7 Cases coming under heading 1 are a further illustration/

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illustration of the misleading nature of the test that has already been criticised  $\begin{bmatrix} \sup n & j \end{bmatrix}$  but which is so often applied, namely that a domicile of choice is acquired when there is present residence plus the <u>animus manendi</u> (or no <u>animus revertendi</u>).

"I can well imagine a case", says Lord Kingsdown in the judgment quoted from above, "in which a man leaves England with no intention whatever of returning, and not only with no intention of returning, but with a determination and a certainty that he will not return (and yet does not toge his domicile)".

There are few Scottish cases on the topic [see however Low v. Low 1891 19 R. 115; Ross v. Ross 1926 S.C. at p. 1,054 (Lord Sands)].

If a person goes abroad indefinitely with a wife or child who is compelled to go abroad for the sake of health, that person probably acquires a domicile of choice abroad, because he is not compelled but chooses to stand by his family (The judges seem to incline to the opposite view in Donaldson v. McClure 1860 22D (H.L.) 7, but it does not raise this This brings about the seemingly clear issue). paradoxical position that if a single woman is compelled to live on the Riviera she does not lose her domicile but if a married woman is similarly compelled and her husband goes with her she will lose her domicile, but this is because the intention of a married woman does not affect her domicile and only the husband's intention matters.

(IV) Other circumstances which restrict the freedom of choice.

Prisoners. The domicile of a prisoner will not be affected by his being imprisoned in a foreign country [Orde v. Orde 1829 95. 49]. Convicts/

Convicts. A person who is transported, either for a term or for life, is probably in the same position as a prisoner, namely that his domicile is not changed thereby, with this distinction that he might choose the place of transportation as his domicile, as many convicts did in Australia, and so acquire a domicile of choice there. A prisoner could not do this, because even if he formed the intention of acquiring a domicile in the country in which he was imprisoned, he could not, while in prison, satisfy the requirement of the fact of residence. An alien who was deported and forbidden to return would not lose his domicile here, even if it was only a domicile of choice, if he did not intend to change his domicile. <u>Veitch</u> v. <u>Veitch</u> (1929) 73 S.J. 235 7 Exiles, Pefugees, Emigres. These are by law or political necessity prevented from staying in their own country. But they have a freedom of choice as to what other country they will settle in, and there is no reason why they should not acquire a domicile elsewhere if they have the required animus. / De Bonneval v. De Bonneval (1838) 1 Curt. 856 7 If they have not the animus required for a change of domicile they retain their domicile of origin De Bonneval v. De Bonneval supra 7, last derived domicile, / In re The Luchess D'Orleans 1 Sw. & Tr. 253 7 or domicile of choice, / Veitch v. Veitch supra 7 in the country from which they are exiled. / Lord Westbury's dictum in Udny v. Udny 1869 7 M. (H.L.) at pp. 99, 100, is therefore inaccurate: "The domicile of origin may be extinguished by act of law, as, for example, by sentence of death, exile, and perhaps outlawry." 7 A refugee who came to this country as a trainee on condition that he would emigrate on completion of his training, but, who was allowed to remain, subject to the pleasure of the Home Secretary, was able to acquire a domicile of choice here. / May v. May 169 L.T. 42; Cp.

Boldrini v. Boldrini 1932 P. 9; Cruk v. Cruk 1945 T.L.P.16

A man sentenced to death will require a domicile to determine how his estate is to be divided. He is possibly right, however, about outlaws). Students. Contrary to the Roman rule (Savingy p. there is neither a disability nor presumption against a student acquiring a domicile in the place of his study (Chalmers v. Chalmers (0.H.) 1903 11 S.L.T. 68. Contrast Lord. Ordinary in Munro v. Munro. 1 Rolin 475 at p 501 The question is simply whether he went there temporarily for the purpose of studying only, or whether he intended to remain permanently. The mere fact of being a student affords no presumption one way or another: the other circumstances must decide. DomiciLE OFCHOICE (Continued) The loss of a domicile of choice.

Just as a domicile of choice can only be acquired animo et facto, so it can only be abandoned animo et facto. The animus alone is not enough. Mrs. Raffenel who had obtained a derived domicile in France through marrying a French officer, determined, on his death, to return to her domicile of origin, England. She boarded the packet at Calais, but before it left the harbour she was, through illness, She never recovered sufficient obliged to land. strength to resume the journey and died in France She did not lose her French eight months later. domicile (In re Raffenel 3 Sw. & Tr. 49). Not is it sufficient for the person to leave the country in fact, if there is no intention to give up the domicile of choice (Donaldson v. McLure 1860 22 D. If a person abandon the domicile of (H.L.) 7). choice animo et facto and die in itinere to the domicile of origin that person has died, in the country of origin In re Bianchi 1852 3 Sw. & Tr. 16 Story/

Story pp. 523]: but this is simply the rule laid down in <u>Udny v. Udny</u> that if a person has abandoned a domicile of choice and has not acquired another domicile of choice his domicile is his domicile of origin, and Westlake's statement [Sec. 260] that in the event of death <u>in itinere</u> from one domicile of choice to another domicile of choice the domicile of the deceased is the domicile of choice to which the person is journeying, is contrary to that principal [Cp. Foote p. 10].

While he retaingd and makes use of a residence in the domicile of choice it will be difficult to hold that he has, animo, abandoned that domicile of choice. It was an element in favour of the retention of Donaldson's domicile of choice in England and against the revival of his Scots domicile of origin that when he went to his larger Scottish residence and moved his establishment there, he retained a smaller house in Wigan, which he visited. [Donaldson v. McClure 1857 20 D. 307 & 1860 22 D. (H.L.)7. Hunter v. Hunter (O.H.) 1893 30 S.L.R. 915. But, "I cannot accede to the doctrine that if a man has lost his original domicile by acquiring a domicile in a foreign country, he cannot recover his original domicile while he retains any place of residence in the foreign country. The Animus must determine the effect of the residence being retained." Aikman v. Aikman 1859 21 D. 757, 3 McQ. 854. And slighter connection with the country of the original domicile will keep the domicile of origin alive than would preserve a domicile of choice (particularly when it is a question as it was in Donaldson v. McLure of reviving the domicile of origin).

There/

There is a difference between the loss of a domicile of origin and the loss of a domicile of choice. The former requires not only abandonment <u>animo</u> et <u>facto</u> but the acquisition of a new domicile of choice <u>Bell v. Kennedy</u> 1863 1 M. 1127 & 1868 6 M. (H.L.) 69 whereas a domicile of choice is lost merely by abandonment animo et facto. <u>Udny v. Udny</u> 1869 7 M. (H.L.) 89. See above p. **L**. Contragt the U.S. where every domicile continues until a fresh domicile has been acquired.] The loss of a derived domicile.

The same principles apply here as in the case of a domicile of choice (In re Raffenel supra. A derived domicile is equivalent to a domicile of choice - Crumpton's Judicial Factor v. Finch-Noyes 1918 S.C. per Lord Mackenzie at pp. 390,1%. The combination of the animus and the fact is sufficient for the abandonment of a derived domicile as it is for a domicile of choice, and the acquisition of a new domicile is not necessary, for if no new domicile is acquired the domicile of origin revives. In re Macreight (1885) L.R. 30 Ch.D. 165. But see dis-:cussion as to whether domicile of origin includes derived domicile - p. The onus of proof of domicile.

If a litigant considers it necessary for his case to aver that a certain domicile existed at a certain time the onus is on him to prove it did. <u>(Kennedy v. Bell</u> 1859 22 D. 269. This is obvious) If the domicile of origin is established it is derived domicile presumed to continue until a different **arkginite EXIMPLY SERVICE** of choice has been proved, <u>(Aikman v. Aikman 3 Macq. 854 per Lord Wensleydale</u> at p. 15.) and the fact that the person died in a different/ different country does not affect this [Vincent v. Earl of Buchan 1889 16 R. 637]. But if the domicile of origin is unknown, in the absence of other evidence on the subject, he will be presumed to be domiciled where he resides or where he had died [Bell <u>v. Kennedy</u> 1868 6 M. (H.L.) 69 per Lord Cranworth at p. 75] If a different domicile from the domicile of origin is proved to have been acquired that domicile will be presumed to continue until proved to have been abandoned. [This is obvious, see e.g. <u>Donaldson v. McClure</u> supra. <u>Crumpton's Judicial Factor</u> <u>v. Finch-Noyes</u> 1918 S.C. 378] The tenacity of the three types of domicile.

The domicile of origin is the most tenacious and the most difficult to displace. It is not so difficult to change a domicile of choice (<u>Winans v. Attorney General</u> 1904 A.C. (H.L.) 287 per Lord Macnaughten at p. 290] or a derived domicile (<u>Chalmers v. Chalmers</u> (O.H.) 1903 11 S.L.T. 68]. It has been said that a domicile derived from the widowed mother is the easiest of all to be lost. (<u>Crumpton's Judicial Factor v. Finch Noyes</u> 1918 S.C. 378 per Lord Johnston at p. 389. <u>Arnott v. Groom</u> 1846 9 D. 142 per Lord Jeffrey.)

Within these general considerations the tenacity of the various types of domicile may vary according to circumstances. If a child, whose domicile of origin is Jamaica, is sent here for his education, which gives him an attachment to Scotland, and returng& to Jamaica, it is obvious that if the question of his acquiring a domicile of choice here arises in later years, it will be more easily inferred than if he had not been brought up here. The tenacity of domicile of origin is based on the presumed/ presumed affection that a man has for the country of his birth and upbringing, but if he is not in fact brought up in his domicile of origin, that must be kept in view in determining the factual question whether it was his intention to abandon his domicile of origin and acquire a domicile of choice here. <u>Bell v. Kennedy</u> 1863 1 M. per Lord Lowan at p. 1135; <u>Lowndes v. Dourlas</u> 1862 24 D. 1391 and particularly L.J.C. Inglis at p. 1406 7

"It is a received principle that the reacquisition of a domicile may be inferred from circumstances which would not be sufficient to infer the loss of the original domicile", <u>L.A.</u> v. <u>Lamont</u> 1857 19 D. 779 per Lord Fresident McNeill at p. 783; <u>Donaldson v. McClure</u> 1857 20 D. 307 per Lord President at p. 315\_7 but the inference is not so strong when the person is returning from England as it would be in returning from a tropical country where he had made his fortune. <u>Fonaldson v. McClure</u> ibid\_7 It has been held that in considering the evidence as to whether an Englishman came to Scotland <u>animo remanendi</u>, the fact that he had previously been in Scotland for 13 years made it easier to accept his statement that he came with the intention of remaining. <u>Wenyon v. Wenyon</u> (0.H.) 1900 8 S.L.T. 323\_7

## Evidence of Intention.

What facts are relevant and admissible to prove intention?

An enquiry into domicile usually starts with the question, where was his domicile of origin, for if that is established the onus of proof is thrown on the person seeking to set up a different domicile of choice. But since his domicile of origin depends on the domicile of his father or mother at the time of his birth and that domicile may not be known, the father's domicile [ as in Udny v. Udny 1869 7 M. (H.L.) 89] or even the grandfather's domicile may have to be proved. [ Grant v. Grant 1931 S.C. 238; Peddie 6 Dec. 1860 Currie pp. 12, 13.]

Some/

Some of the facts and circumstances of person's lives that have been used to prove intention are now given. Some are more important than others and none is conclusive. The weight attributed to a fact is one set of circumstances may, of course, be quite different from the weight that is allowed in other circumstances.

The residence. We are dealing now with residence as an indication of intention and not with the element of residence which is one of the two requirements in change of domicile. The very highest importance is attached to the character of the residence.

Firstly, if the domicile of origin is unknown a person will in the absence of other evidence on the subject be presumed to be domiciled where he resides, or where he has died. [Bell v. Kennedy 1868 6 M. (H.L.) 69 per Lord Cranworth at p. 75. Savinghy p. 132 "But that is easily rebutted, because undoubtedly the first enquiry as to the domicile of anybody is, what is the domicile of origin?" (Ibid) This rule has been criticised. Dicey formulated it thus: "APerson's presence in a country is presumptive evidence of domicile". Lord Moncreiff said that would require to be modified because he could not accept" that the single fact of residence, no matter what its conditions, character, quality or colour may be, is per se sufficient to shift the onus of proof by affording in all cases without distinction even a prime facie presumption of a change of domicile". Admittedly the fact that a person lived, or died ina country is not per se sufficient to relieve the person who hag to prove that the domicile of origin has been changed, of the onus on him; but that is not what 18/

is maintained here, or, although he is not clear, what Dicey is stating. The proposition is, that if the domicile of origin is unknown the place where he is, is presumed to be his domicile. Lord Thurlow's statement in <u>Bruces v. Bruce</u> [ 1790 3 Pat. 163 ] was rightly criticised (<u>McLelland v. McLelland</u> supra) that "A person being at a place is <u>prima facie</u> evidence that he is domiciled at that place; and it lies on those who say otherwise to rebut that evidence",  $\bigwedge$ because Major Bruce's domicile of origin was known. But the rule here stated is not only unexceptionable, but necessary in an <u>extreme</u> case to ensure that a person hag a domicile. Further, the place where a man is born is, in the absence of knowledge of the father's domicile, presumed to be his domicile of

Secondly, Long continued residence. If the residence is colourless, and no ties are formed with the place of residence, that residence is only the fact, and the animus remains unproved and it was so held in <u>Liverpool Royal Infirmary v. Ramsay</u> [1930 S.C.(H.L.) 83] even when the residence continued for thirty seven years until the person's death. "It is a settled rule in the constitution of a domicile that it is not formed or proved by the mere fact of residence, however long continued, without the animus or purpose of permanent domiciliation ".[<u>Munro v</u>. Munro 1840 1 Robin 492 at p. 522].

origin. It is on this principle that the domicile of

origin of a foundling proceeds.

The decision in <u>Liverpool Royal Infirmary</u> v. <u>Ramsay</u> have been criticised [E.g. Cheshin pp.174,175; ] but it is logical and in accordance with previous decisions. If it makes practitioners uncertain as to where persons are domiciled, that is a fault of using domicile as the test of personal status/ status, not a wrong statement of the law by the House of Lords. The factsware unusual, and in the normal case residence for such a long period will be coloured, by attachments which the person made to the place of residence, such as the purchase of his house, friendships which he formed, membership of a Caurch or of Clubs; and in the normal case where the residence is so coloured, the duration of it will be a powerful factor. "Long continued residence in a place may in certain circumstances show that the domicile is changed" [per Lord Buckmaster at p. 87] See

Thirdly, the nature of the residence i.e. whether it is in furnished rooms or in house that the party owns, is of the highest importance. That the person owned the house in which he lived is far stronger evidence of intentionto settle there permanently than that he merely leased the house or rented furnished rooms. A man abandoned his domicile of origin in Jamaica and came to Scotland intending to make his home somewhere in the United Kingdom. He lived in a furnished house in Ayr while negotiating for a Scottish estate. It was held that he had not acquired a domicile of choice here until he purchased the Scottish estate as his permanent residence and thereby showed that he elected Scotland as his domicile. Kennedy v. Bell 1863 1 M. 1127 and 1868 6 M. (H.L.)69.

A permanent residence however is not a requirement either of the fact of residence (q.v.) or the proof of intention. "If you establish there was a determination to live in Scotland, and, if the/

the party goes and lives at an hotel, that is enough!" [Lord Cranworth in <u>Bell v. Kennedy</u> 1868 6 M. (H.L.) at p. 76] and so it has been held that a domicile of choice has been acquired after four months residence in a leased house [<u>Macphail v. Macphail's Trustees</u> (G.H.) 1906 14 S.L.T. 388]. But the words in italics require to be emphasised. The difficulty isto show that there was a <u>bona fide animus manendi</u> when there is residence in an hotel or furnished rooms. [See how The Lord Ordinary went wrong in applying this dictum without strong enough proof of the <u>determination</u> in <u>Stavert v. Stavert</u> 1882 9 R. 520]. The less permanent the residence the stronger must be the proof of intention from other sources.

Fourthly, if the residence is in family, that which is very favourable to the view that the domicile is there (Macphail v. Macphail's Trustees, supra; Story p. 51] "The adoption of a family residence by a man and his wife will go far to create a presumption of intention to reside permanently and establish a domicile. "(Lord Kincairney in Hope Todd & Kirk v. Bruce (0.H.) 1899 6 S.L.T. 310) And to leave wife and family here when making voyages to East Indies in-:dicates an intention to retain the domicile of origin. [Purvis Trustees v. Purvis Executors 1861 23 D 812]. Covert residence with a mistress is less valuable evidence than overt residence [Aikman v. Aikman 3 Macq. 854].

Fifthly, in assessing the import of remidence in London, it is to be borne in mind that London is the metropolis of the Empire, the seat of Parliament, and the centre of pleasure and fashion and consequently residence there by wealthy persons who have a domicile of origin elsewhere in the Empire/ Empire and who maintain some connection with their native country has not the same effect in tending to prove the acquisition of a domicile as residence in another city would have <u>[Udny v. Udny</u> 1866 5 M. 164 per Lord Neaves; <u>Mackenzie's Trustees v. Mackenzie &</u> <u>Others</u> (O.H.) 1894 2 S.L.T. 88 McLaren p. 10; Fraser pp. 1258, 9; Savigny p. 97]. The possession of heritage.

- The ownership of estates in the domicile of origin Marchioness of Huntly v. Gaskell 1905 8 F. (H.L.) 4; Aikman v. Aikman 3 McQ. 854; Ross v. Ross 1926 S.C. 1038; 1930 S.C. (H.L.)1; Munro v. Munro 1840 l Robin 492; Forbes v. Forbes 1910 2 S.L.T. 425; Mackenzie's Trustees v. Mackenzie & Others (O.H.) 1894 2 S.L.T. 88] even without a mansion-house which is habitable Udny v. Udny 1869 7 M. (H.L.) 89 is important evidence of the retention of the domicile of Heritable estates are particularly origin. important when they are old and extensive family lands, and the person whose domicile is in question has in addition a title or clan chieftainship associated with the lands Ross v. Ross 1926 S.C. per Lord Sands at p. 1053.

Similarly the purchase of an estate in anew country is important evidence of an intention to settle there, <u>Bell v. Kennedy</u> 1868 6 M. (H.L.) 69. <u>L.A. v. Brown's Trustees</u> 1907 S.C. 333] even when the residence on it is subject to a lease which has still a little time to run. <u>Dyson v. Dyson</u> (0.H.) 1909 2 S.L.T. 404. But see <u>L.A. v. Lamont</u> 1857 1 9 D. 779] Even possession of a farm is a useful indication. [<u>Clark v. Newmarsh</u> 1836 F.C. 11 395]. <u>NATURALIZATION</u>.

Naturalization. Naturalization in a foreign country is very/

very strong evidence of intention <u>exuere patriam</u> [See <u>Ross v. Ross</u> 1930 S.C. (H.L.)1] but, as explained above, [p. ]] is neither necessary, [Boldrini v. Boldrini (1932) L.R. P. 9; <u>Bradfield v.</u> <u>Swanton</u> (1931) 1r. R. 446] nor conclusive. [Wahl v. <u>Attorney General</u> (1932) 147 L.T. 382.] <u>EXPRESSIONS of INTENTION</u>.

(a) <u>In Evidence</u>.

If the person whose domicile in question is alive he is always a competent witness as to his intention. Indeed the 'best evidence' rule demands Perhaps he is  $He may_{A}$  not be one of the that he be examined. litigants, e.g. <u>Udny v. Udny</u> 1869 7 M. (H.L.) 89 but the commonest circumstance in which the person whose domicile is in question gives evidence is a dispute about divorce jurisdiction when he is one of the litigants. In the former case the evidence, being independent, has a better chance of influencing the Court, but in the second case also, if the Court believes the witness, great importance will be attached to his evidence and little corroboration may be needed (Carswell v. Carswell 1881 8 R. 901. Contrast Dombrowitzki v. Dombrowitzki 1895 22 R. 906 For the same reason, Expressions of intention made at a time when no issue depended on domicile are also of more influence than evidence of intention given by a litigant in Court. In one case it was remarked that it was very unsafe to rely on a man's testimony in his own favour on such a subject as his intention twenty five years before; more attention therefore was paid to the correspondence passing at Bell v. Kennedy 1863 1 M. 1127 and the time. In another, the evidence of 1868 6 M. (H.L.)69). correspondence was preferred to the impressions of families/

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families who were litigants <u>[Lowndes v. Douglas</u> 1862 24 D. 1391]. An expression of intention in a letter was open to the objection that it was written shortly <u>ante litem mortam</u>. <u>[Udny v. Udny</u> 1869 7 M. (H.L.) 89, per Lord Chancellor Hatherley at p. 94.]

# (b) Extra judicially.

"Declarations of intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared intention!" [Ross v. Ross 1930 S.C. (H.L.)1 per Lord Buckmaster at p. 6.]

So statements made by a Scotch landowner in documents and verbally to a number of business people, as to his intention to live permanently in New York, being made for the purpose of securing the status of a 'resident alien' in the United States which would minimise his liability both to American ami British taxation, did not suffice to show an intention to become domiciled in New York, particul-:arly since they had not  $^{been}_{\Lambda}$  made to personal friends, and since, in writing to his wife, he referred to his Scotch estates as 'home'.

(<u>Ross v. Ross</u> 1926 S.C. 1038, 1930 S.C. (H.L.)1. See also <u>Woodbury v. Sutherland's Trustees</u> 1939 S.L.T.93 and 1939 S.N.64].

Declarations of intention as to domicile often occur in wills. Here again the declaration is only evidence of the intention and is not conclusive If there is stronger evidence to the contrary the declaration will be disregarded. Thus an Englishman was/

was held to have acquired a domicile in Scotland where he had carried on business for many years and had lived more or less continuously from 1888 till his death in 1918, leaving Scotch heritage, although in both his will and the codicil to a previous will which wascin English form there was this declaration: "I declare that notwithstanding the fact that I have recently thought it desirable to take a house in Scotland it is not my wish or intention to reside permanently in that country or to abandon my English domicile and it is my intention that my testamentary dispositions should be construed and given effect to and my estate administered according to the law of England" (Robinson v. Robinson's Trustees (O.H.) 1934 S.L.T. 183: Cp. Corbridge v. Somerville 1914 1 S.L.T. 305. In re Steer (1858) 3 H. & N. 598; In re Annesley (1926) L.R. Ch. D. 622.)

The Court in such a case is not going to permit a person who has acquired a domicile of choice here, to escape from the consequences, namely limitation of his testamentary power, by a declaration in his will.

How the person described himself in deeds is important. E.g. Ant <u>Colonel</u> Udny described himself in a Marriage Contract in Scotch form as "of Udny in the County of Aberdeen" which was favourable to the retention of his domicile of origin. <u>Udny v. Udny</u> 1866 5 M. 164 & 1869 7 M. (H.L.)89. See also <u>Brooks V. Brooks</u> 1902 4 F. 1014, 1905 8 F. (H.L.)4; <u>Liverpool Royal Infirmary v. Ramsay</u> 1930 S.C. (H.L.) 83.

Perhaps even more favourable is the designation by which a person is known by the outside world. That a man whose domicile of origin was Scotch/

Scotch insisted on being called 'Forbes of Astoun' (an estate in Aberdeenshire) was favourable to the retention of his domicile of origin. <u>Forbes v. Forbes</u> 1910 2 S.L.T. 425. <u>Mackenzie Trustees v. Mackenzie &</u> <u>Others</u> (O.H.) 1894 2 S.L.T. 88.

The style of deeds like wills and marriage contracts may be useful evidence. That the marriage contract in Scots form and said that the provisions were in full of terce, jus relictae and legitim was "a point of the highest importance in the evidence" that an Englishman had acquired a domicile in Scotland at that time. The contention that he merely left the style of the deed to the Conveyancer he employed was not favourably regarded by the Court who thought that he must have known the effect of the marriage contract. [Fairbairn v. Neville 1897 25 R. 192. This consideration was outweighed by... The other evidence in <u>Murray v. Maclachlan</u> 1900 & S.L.T. 233, and <u>Corbridge v. Somerville</u> 1914 1 S.L.T. 305.]

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The word "home" His use of the word "home" in reference to his Scottish estates when writing to his wife was regarded as important in <u>Ross v. Ross</u> [1930 S.C. (H.L.)1] But in most cases such a loose word connotes little. So when a person whose domicile of origin was in Jamaica, abandoned Jamaica, and came to Scotland, his description of this act as "coming fome" was not regarded as important, because it was a natural expression for a colonial to use about the mother country; [Bell v. Kennedy 1863 1 M. 1127 and 1868 b M. (H.L.) 69] and in one case when it was argued that a person had acquired a domicile in Scotland because, <u>inter alia</u>, when writing to his wife in Scotland he referred to it as home, the plea/

plea was rebutted by Lord Dundas showing other instances in the correspondence where "home" applied to a house in Peru, and to a relative's residence in South Africa. [Main v. Main 1912 1 S.L.T. 493]. The term is flexible and unreliable.

Engagement to marry. The fact that a girl has become engaged to a man domiciled in another country is of the very highest importance. In Arnott v. Groom [1846 9D.142] a mother and her minor daughter, who were both domiciled in Scotland, the daughter only derivatively left Scotland and thereafter they had no permanent residence, but lived in furnished lodgings, hotels and with friends in Europe, Scotland and England, but mainly in England. While residing in England the daughter became engaged to a Bristol merchant. She died shortly after attaining majority and before . becoming married or, it seems, any date being fixed for the wedding. The Court held (Lord Jeffrey dissenting) that she died domicaled in Scotland, the Lord Ordinary Wood, remarking that "there is hardly anything more evanescent or uncertain than an that this decision is wrong. Admin Initedly engagement to marry". It is submitted, in every case an engagement to marry a man domiciled in another country will not be conclusive evidence of her intention to become domiciled there. If Miss Stewart had met her fiance in Barcelona on a Mediterranean cruise, had become engaged to him, and had returned to this country for a while before the marriage, then she might still have been domiciled in Scotland, because her intention would then be consistent with the retention of her Scots domicile in the meantime, and might only be an intention to

acquire/

acquire a Spanish domicile at a later date, namely on her marriage. But Miss Stewart was resident in her husband's country, England, at the time of the engagement.

That was the fact. It necessarily follows from the engagement that she intended to marry him and live with him. That was the intention.

Two considerations weighed with the Court in coming to the view that she had not changed her domicile. Firstly, no time had been fixed for the marriage and Lord Fullerton maintained that her engagement was quite consistent with the supposition that she was to return and resume her domicile in Scotland before marrying. But this view is more appropriate to the hypothetical case just given than the facts of Arnott v. Groom where the lady was resident in England before the engagement. It is conceded however that the position would have been stronger if she had gone to England for the wedding which was to take place at a fixed time in the near future. Secondly, the engagement might be broken off and so it was not certain they would marry. Of course it was uncertain. But so is everything in this world. As Lord Fullerton himself said in a later case "If in order to constitute a domicile there were required an animus remanendi so permanent and so absolute, as to be/dependent of any possible change of circumstances I do not understand how, in the constant uncertainty  $\hat{e}_{A}^{and}$  transition of all sub-:lunary events, a domicile ever could be established" Commissioners of Inland Revenue v. Gordons Executors 1850 12 D. 657 Entering/

Entering the armed forces of a foreign country.

It is a strong element in favour of a man acquiring a domicile of choice in another country that he enters the military or naval service of that country. <u>Dyson v. Dyson</u> (0.H.) 1909 2 S.L.T. 404; <u>Ex parte Cunningham</u> (1884) 13 Q.B.D. (C.A.)418.

There is difficulty in applying this con-:sideration where a state is made up of several countries, for if a domiciled Frenchman joins the British Army or navy in what country is this an indication of him being domiciled? If he joins a Scotch regiment presumably Scotland (Dyson v. Dyson supra]. If he joins a corps that has no local association, or the navy, probably the consideration is in favour of the acquisition of a domicile of choice in England, as the Imperial metropolis. (President of the United States v. Drummond (1864) 33 Beav. 449].

There is a strong presumption against a serving officer of one power acquiring a domicile in the country of a foreign power. (<u>Hodgson v. De</u> <u>Beauchesne</u> (1858) 12 Moore P.C. 285).

<u>Other indications of intention</u>. Other circumstances to which attention hay been paid are: where the main domestic establishment **mas** <u>Donaldson v. McClure</u> 1860 22 D. (H.L.) 7; <u>Brooks v. Brooks</u> 1902 4 F. 1014, 1905 ends F.(H.L.) 4]; where the majority of his property was situated <u>Brooks v. Brooks</u> supra]; the holding of public office in a country <u>Brooks v. Brooks</u> supra; <u>Commissioners of Inland Revenue v. Gordon's Executors</u> 1850 12 D. 657; <u>Donaldson v. McClure</u>, supra]; <u>Tasker v. Grieve</u> 1905 8 F. 45; <u>Clark v. Newmarsh</u> 1836 F.C. 11 395]; that he sent his children to be educated in his domicile of origin while resident abroad/

abroad Udny v. Udny 1869 7 M. (H.L.)89; Low v. Low 1891 19 R. 115; Tasker v. Grieve, supra; Tulloh v. Tulloh 1861 23 D. 639; the place which the person was determined to be buried in, Donaldson v. McClure, supra or had buried relatives in McGuckin v. O'Neill 1906 14 S.L.T. 246; Dombrowitzki v. Dombrowitzki 1895 22 R. 906; Kerr v. Richardson's Trustees (O.H.) 1898 6 S.L.T. 244; membership of a Church, Brooks v. Brooks, supra a Masonic Lodge, Sellars v. Sellars 1942 S.C. 206 a club; Wilson v. Wilson 1872 10 M. 573; Armitage's Trustees v. Armitage and Others (O.H.) 1904 11 S.L.T. 697; Campbell v. Campbell 1861 23 D. 256 that the person who died on a visit to his domicile of origin had a return ticket in his pocket L.A. v. Brown's Trustees 1907 S.C. 303); where he kept his bank account (Campbell v. Campbell supra; Donaldson v. McLure, supra; that he wore the kilt Forbes v. Forbes 1910 2 S.L.T. 425. But pride in the country of origin 14, consistent with the acquisition of a domicile of choice elsewhere . "There is no act, no circumstance in a man's life, however trivial it may be in itself, that ought to be left out of consideration in trying the question whether there was an intention to change the domicile" Drevon v. Drevon (1864) 34 L.J. Ch. 129 per V.C. Kindersley.

It is competent in assessing a person's intention at a particular time to consider his subsequent conduct. Thus when the question was the domicile in 1863 of an English civil servant who was working in Scotland the proof that he had no ahimus revertendi to England at that time was assisted by the fact that he did not go back to England/ England in 1878 when he retired on a pension and could have returned [Fairbairn v. Neville 1897 25 R. 192 at pp. 203, 4].

# Definition of Domicile.

It only remains now to define domicile. A few definitions have already considered and rejected [p.] Some judges are prepared to abandon the attempt to define domicile. "It has been repeatedly recognised that the question of domicile is always one which depends on the special circumstances of each particular case, and that it is impossible to frame a definition that will be applicable to every case."[Lord Ordinary Low in <u>Brooks v. Brooks</u> 1902 4 F. 1014]. "Domicile means permanent home, and, if that was not understood by itself, no illustration would help to make it intelligible."[<u>Whicker v. Hume</u> (1858) 28 L.J. Ch. 396 per Lord Cranworth at p. 400] This is pusillanimous.

The attempt to define domicile often breaks down on a failure to appreciate what is being defined. There are three kinds of domicile.

A definition that embraces all three is so vague that it is useless; that is the fault of Dicey's definition. And most of the more precise definitions of domicile are only definitions of domicile of choice. The best plan is to give a definition of each kind of domicile. Thus domicile of origin is that country which the law assigns to a person at birth as his domicile. Derived domicile is that domicile which is imposed on a dependent person by the person on whom he is dependent. The requisites of a domicile of choice have already been described as the fact of residence plus (1) the adoption of the/

the new country as the sole domicile which means to make it one's principal residence and the centre of one's business with the intention of permanence (2) the abandonment of the domicile of origin or the former domicile (3) free choice. These requisites are easily combined into a definition as follows. Domicile of choice means that country which a person sui juris hay freely and permantly chosen as his principal residence and the seat of his business, to the abandonment of his former domicile, and in which he has established himself by the fact of residence. Savigny came very near this when he defined domicile as "That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode and thus for the centre at once of his legal relations and his business". [p. 97. The deletion of "thus" improves it But his definition suffers from two faults which have been avoided in the definition given above, namely he omits the re-:quirement of the abandonment of the former domicile and he says nothing about the fact of residence, so that it appears that a man might choose a domicile of choice from an atlas without moving from his The definition given also avoids the birthplace. fault to which many of the accepted definitions are subject, namely that they do not permit a person to be absent from his domicile for atemporary purpose. Phillimore says that domicile is "a residence at a particular place, accompanied with ... an intention to remain there for an unlimited time" [Sec. 49], but a man who has a domicile of choice in England and who comes to Scotland for a temporary purpose undoubtedly does not lose his domicile of choice in England/

England although he no longer fulfils the requirements of Phillimore's definition (Cp. Vattel's and Story's definitions). Finally the definition proposed contains the qualification that none of the accepted definitions include, that the person must be <u>sui iuris</u>.  $\frac{S T A T U S}{the condition} f belonging to A status is a class of persons to whom the law A assigns certain peculiar rights and duties, capacities and incapacities.$ 

A person's status may be the normal status, which in Scotland is that of the same adult male bachelor who has incurred no legal disability. The normal status receives no special name, but a decision that a person is of the normal status is nevertheless a decision about status (Administrator of Austrian Property v. Von Lorang 1926 S.C. 593 Revd. 1927 S.C. (H.L.)80]. A person's status on the other hand may differ from the normal in that he has rights and duties, capacities and incapacities that which fall short of or exceed the normal. E.g. The status of infancy, lunacy, married man, adult, spinster, married woman, bankrupt, are classes of persons whose rights and capacities differ from those of a same adult male bachelor who has incurred no legal disabilities.

The features of a status are: (1) The rights and duties, capacities and incapacities reside in an individual as belonging to a class (Austin p. 710). Every system of law has alimited number only of these classes, and a person must fall within at least one of the classes. A person may, of course, fall within one or more than one class e.g. he may be a married man and a bankrupt at the same time; (2) The rights and duties, capacities and incapacities attached in respect of membership of any class are extrinsically determined by the law and are not within the power of the person to determine for himself [Niboyet v. Niboyet 4 P.D. per L.J. at p. 11; C.K. Allen in 1930 46 L.Q.R. p. 288). They are the same for every member of the class (3) The capacities and incapacities are commonly considerable in number and various in kind, so as to impart to the party/

party invested with them a conspicuous character, and affect him in most or many of his social relations. [Austin p. 710]

e definions of tus ticised.

Mr. C.K. Allen has defined status as " the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incap-:acities, or both" [1930 46 L.Q.R. 277]. This may be compared to Dicey's definition of status as a person's capacity or incapacity under the laws of his country for the acquisition of exercise of legal rights and for the performance of legal acts (p. 531. See also Bar p. 302). But a status is not only or always concerned with capacities and incapacities. The condition of a bachelor and of a married man are both a status and each is: a different status. A judgement in a divorce action or declarator of marriage which determines whether a man is a bachelor or a married man is a judgement affecting status. Yet the capacities and incapacities of a bachelor and a married man might well be the same. In Scotland perhaps a married man is under an incapacity in that he cannot freely dispose of his estate by will, though it may be doubted whether this is correctly called an incapacity, [see post p. ] but in English law is there any difference of capacity? A married woman is certainly under many incapacities, but if legal reform continues its present tendency there will come a time when the married woman is in exactly the same condition as to capacity as the unmarried woman. Yet decrees of divorce and declarator of marriage are the most obvious examples of judgements about status.

Again, according to a famous aphorism of Maine, legal development has been a progression "from status to contract": Now the very early tribesman had no capacities or/ or incapacities at all, for his whole rights and duties were determined for him by his position in society. In very early times then there were legal systems entirely based on status that did not know the meaning of capacity.

It is wrong then to describe status solely with reference to capacities and incapacities. Indeed if this is done it becomes difficult almost to the point of impossibility to distinguish status from capacity, for status is then only an aggregate of capacities. Yet the idea of general capacities cannot be rejected altogether, for if it were we should have status defined as a class of persons to whom the law assigns certain peculiar rights and duties, and trustees, motor-car owners, landlords, might each merit description as a status, which would not be correct either. Both rights and duties and general capacities and incapacities are required to constitute a status. If a class is described as a status that has cortain poculiar rights and dutios but no peculiar capacities or incapacities, e.g. married men in England, or in future married women, which strictly speaking does not fulfil our definition, but the description is justified on the ground of convenience and the necessity for continuity in the law.

Some of the varieties of abnormal status among natural persons that are known, or which is known, to legal systems are on account of (1) Sex; (2) Nonage; (3) Famiilial relationship (<u>patria potestas</u> and <u>manus</u>); (4) Coverture; (5) Celibacy; (6) Mental Defect; (7) Bodily Defect; (8) Rank, caste, official position; (9) Race and colour; (10) Slavery; (11) Profession; (12) Civil Death; (13) Illegitimacy; (14) Heresy; (15) Foreign nationality; (16) Hostile Nationality; (17) Criminality; (18) Bank -:ruptcy (Holland c XIV; C.K. Allen ibid p. 284].

Status/

Status differs from country to country in three ways. Firstly, some countries have a status or class that is wholly unknown to others, e.g. our law does not know the status of slavery or civil death; Secondly, where there is the same status in two countries, the rights and duties, capacities and incapacities, which one country attaches to the status, differ from those which the other country attaches to it; Thirdly, the stage at which one status is divided off from the next differs from country to country: thus in one, majority is attained at 18, in another at 21: similarly, the dividing line between the normal status and the abnormal status due to mental defect may be drawn in different places.

Capacity is a general power of acquiring and exer-:cising rights and performing legal acts, which the law assigns to a person in virtue of his membership of a particular status. It will not do simply to define capacity as "the power to acquire and exercise rights" C.K.Allen ibid p. 292 for a person might limit or enlarge by contract his power of acquiring and exercising rights, but which would not alter his capacity. Thus a man might, on selling a business, enter into a restrictive covenant not to carry on a similar business within the county, and he would thereby have limited his power to acquire and exercise rights and perform legal acts, but it would be wrong to think of this as a limit-:ation of capacity. Capacity is a general power assigned by the law in virtue of a person's membership of a status.

The power further is a general one. Rules of law that say that foreigners cannot own land or Jews accept more than 5% interest are not rules of capacity, but simply particular positive prohibitions. The general principle, to be mentioned later, is that capacity is governed/

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governed by the law of the domiciled person. Thus if a minor domiciled in country X by the law of X cannot enter into a binding marriage contract, then he cannot do so in country Y, because his capacity is everywhere judged according to the law of his domicile. But if a Jew domiciled in country X is prohibited by the law of X from accepting more than 5% interest which does not mean that he cannot accept more than 5% in country Y if the law of Y permits a greater interest. Similarly if the law of X prohibits anyone from entering into an obligation by Bill of Exchange that does not prevent a person domiciled in X from so obliging himself in country Y, which permits Bills of Exchange [Savigny p. ]. The rule of X in 'each case is not a rule about capacity because it only prohibits a particular act and is not a law about the general power of the person to acquire and exercise rights and perform legal acts.

5.

"Doubts, however, may be raised as to whether we have a case of true incapacity to act, . . . In cases where the law merely refuses to allow a person to under-:take particular legal transactions, e.g. to undertake obligations by bill, or in respect of loans of money, but in other respects leaves him with full capacity to dispose of every asset of his property." Bar p.304. But one must demur when he explains that rules concerned with the capacity to act are imposed for the purpose of protecting the person (p. 306). That is certainly the case with the capacity allowed to infants, lunatics, prodigals, but not with serfs, castes, married women. It is the generality of a power of lack of power and its applicability to many different kinds of acts which make it a question of capacity.

A person's status could be determined by many systems/

systems of law. The three principal contestants are (1) the individual's personal law; (2) the law of the place where a juridical act is performed, which is called lex loci actus or the lex loci contractus, the lex loci celebrationis; and (3) the lex rei situs. We determine status according to the first in regard to certain legal questions, and according to the second and third in regard to others. In regard to most legal questions we determine status by the personal law, e.g.for marriage or marriage contracts or wills, status is determined by the lex domination the legal question concerns a mercantile contract we deter-:mine status by the lex loci contractus. This exception is introduced on the ground of commercial expediency. When the legal question involves immoveable property we determine status by the lex rei situs. This exception comes about through the over-riding principle that the lex situs of immoveables governs all questions concerning A person's status there fore may be considered them. by our Courts to be different on different occasions, depending on the nature of the problem that is being litigated.

Some jurists have criticised this situation as illogical. They say that status is always determined by the personal law of the individual, but effect is not always accorded to the capacities and incapacities that the personal law attaches to him as a result of his status. [Fraser, Parent & Child p. 720; C.K.Allen 1930 46 L.Q.R. p. 297; Dicey Rule 138; Cheshire p. 209]. Thus these writers say that the law of a person's domicile always conclusively settles whether he is a minor, but our Courts give effect to the incapacity that his domiciliary law attaches to him in respect of his minority only in certaincases, e.g. in marriage, but not/

not in mercantile contracts, where our Courts apply our But this theory will not stand close examinown law. When we say that capacity in regard to mercantile :ation. contracts is governed by the lex loci contractus, we mean more than that, if a mercantile contractis executed here, our Courts will decide the capacity of the parties according to our law, even if they are domiciled abroad. We also mean that. if the parties were domiciled in France, executed a mercantile contract in Germany, and the question was litigated here, we would decide the question of the capacity of the parties according to German law. The lex dy is excluded in We should not apply our law. the case of mercantile contracts to admit the lex loci contractus, not the lex fori. When one considers that, it is impossible to say that our Courts recognisers that the status of the parties is determined by their domic-:iliary law, but that they refuse to admit the effects of the domiciliary law in certain cases, and apply our own law. Further, if these jurists are correct, our Courts would decide whether a person is a major or minor lex domicilies according to lex d. and only the effects of minority according to our own law; e.g. if a person domiciled in a country where he is a minor till twenty five, entered into a mercantile contract in Scotland, our Courts should hold that he is a minor (because his status is always determined by his domiciliary law) but refuse to apply the foreign rules of minority because it is a mercantile contract, to apply instead the Scots rules of This is absurd. minority.

## The steps are as follows: What is the nature of the question involved?

Determine the status of the party according to the legal system appropriate to the question. Then decide from the expert evidence what are the rights and duties, capacities and incapacities attached to that status by that law. Apply the appropriate duty, capacity or in-:capacity, to the problem at issue.

The appropriate foreign law for the determination of status whether it is the <u>lex d</u>. or the <u>lex loci</u> <u>contractus</u> will be ignored and our own law enforced where: (1) there is a question of public order, (2) the status indicated by the appropriate foreign law is unknown to our law, and (3) the status indicated by the appropriate foreign

The conception of <u>ordrepublic</u> is a favourite one of the Continental Statutists, but is too vague to be of much practical utility. But it is worth noticing that the exception has its place in our law e.g. although the property rights of the spouses <u>inter se</u> are in general and in the absence of a M.C. governed by the law of the domicile of the husband for the time being as is the question of the dissolubility of the marriage. The husband's power over his wife is determined by the Courts of the residence of the spouses applying their own law; similarly with the <u>patria potestas</u>; for in these questions the public order is involved.

2.

In many systems of law there are kinds of status unknown to our law, e.g. civil death, slavery, prodigality. When the lex d. (or lex loci contractus if that is the appropriate system for determining the person's status in the particular legal question in dispute) classifies the person in a status unknown to our law, two situations are possible, namely, (a) the transaction in question had occurred wholly or partly outwith the territory of the lex d.

(a) In the former case we ignore the foreign classifi-:cation and allocate him to the status that he would occupy according to our law. E.g. suppose the person is

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law is penal, whether known to our law or not.

a slave by the law of his domicile, and consequently un-:able to sue in a Court of law. If the question of his capacity to sue arises in this country, i.e. outside the territory of his domicile, since slavery is a status un-:known to our law, that classification of the law of the domicile will be ignored and the person will be allo-:cated to the status that he would have according to our law, i.e. if he is adult and same, the normal status, with the result that he can sue Polydore v. Prince 1837 Ware 402, 3 Beale 2). Again, when a person who is a slave by the law of his domicile is brought. Knight v. Wedderburn 1778 Jan. 15 Mor. 145 45; Somerset v. Stewart 1772 Lofft 1, 3 Beale 1 or escapes, Forbes v. Cochrane 1824 2 B. & C. 448 to this country, so long as he is here he is classified according to our law and is He cannot be forced to return to his domicile, free. Knight v. Wedderburn supra; Forbes v. Cochrane supra but if he does, he comes under situation (b) and is classified again as a slave. The Slave, Grace 1827 2 Hagg. Admir. 94. Similarly although a person is a prodigal Worms v. De Valdor 1880 49 L.J. (N.S.)Ch. 261 In re Selot's Trust 1902 1 Ch. 488 or has suffered civil death. Wilson v. King 1894 59 Arkansas 32, 3 Beale 15 by the law of his domicile he is not to be classified as such and subject to the disabilities attaching to that status in countries where such kinds of status are not known.

(b) In the latter case, when the transaction occurs wholly within the lex  $\underline{d}_A$  we recognise that even a status that is unknown to our law will validly affect the person (the validity of all personal statutes "will be admitted, and they will be enforced by the tribunals of other countries as to acts that are done and rights that/

that are acquired within the territorial limits of the community where these laws are established" Polydore v. Prince (1837) Ware 402, 3 Beale 2, per Ware J. at p. 4 This principle has to be applied in a number of old cases on slavery. Thus Holroyd J. stated: "If he (the plaintiff) being a British subject , could show that the defendant, also a British subject, had entered the country where he, the plaintiff was domiciled, and had done any act amounting to a violation of that right to the possess-:ion of slaves that was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him" Forbes v. Cochrane 1824 2 B. & C. 448 at p. 462]. Again, when British subjects, resident and domiciled in Great Britain, who possessed slaves in Brazil, contracted to sell them to a subject of Brazil, domiciled there, for employment in Brazil, the English Courts held that the contract might be enforced here. Santos v. Illidge 1860 8 C.B. (N.S.) 861. Cp. Madrazo v. Willes 1820 3 B. & Ald. 353; Buron v. Denman 1848 2 Ex. 167 . And if a slave was brought to this country and returned again to his domicile that permitted slavery, our Courts recognised that on his and return he must be classified again as a slave, although She would not be, classified as free while here. (The Slave, Grace 1827 2 Hagg. Admir. 94).

It is submitted that the principle still applies to kinds of status unknown to our law, other than slavery, but not to slavery that, as well as being an unknown status is also contrary to the policy of our law and to morality. When the above cases on slavery were decided, slavery was simply a status unknown to our law, and slave traffic was considered as prohibited by public inter-. national law. (Le Louis 2 Dod 210; Brown v. Denman supra) Now/

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Now slave traffic may be regarded as contrary to public international law and slavery so contrary to the policy of our law and to morality that no right arising out of slavery, even in a country that permitted it, would be recognised or enforced here.

But where the foreign status is simply unknown to our law, and is not contrary to morality or the policy of our law, then we recognise that such kinds of status validly affect the person in regard to transactions that take place wholly within the foreign territory. Thus e.g., although civil death is unknown to our law, if, according to the law of Spain the property of a person who becomes a monk should devolve on his heir, we should recognise the fact of the property in Spain of a person domiciled there having, through his taking monastic vows, devolved upon his heir, [Dicey p. 537]  $\in$ 

These principles involve assigning a different status to a person according to his location. It has been said before that there is nothing illogical about a person having a status for one legal question and a different status for another, and similarly there is nothing illogical about a person having one status, e.g. that of prodigality in his domicile where prodigality is recognised, and another, e.g. of a normal adult, in this country where it is not. But the same jurists who say that you cannot have more than one status at one time also say that your status does not change as you change your geographical position. [And see Bar. p. 319] Why Status is not a "personal attribute" of the pronot? :positus that, like mental deficiency or youthfulness, he carries about with him everywhere he goes. It is a legal conception purely. It is a method of classifi-:cation to determine how a person's rights, duties, capacities/

capacities and incapacities under a certain legal system differ from those of the normal person under that system. There is no reason why a person should not be classified according to one system of law for a certain question, according to a second system for another question; and according to one system of law for a trans--action taking place in a certain locality, and according to a second system for a transaction taking place else-;where. As an American judge has said:

"It follows of course that when a slave passes into a country, by whose laws slavery is not recognised, his civil condition is changed from a state of servitude to that of freedom, and he becomes invested with those civil capacities which the law of the place imparts to all who stand in the same category. It is indeed said, by Chief Justice Shaw, in delivering the opinion of the Court in the case of the Slave Med, (C v. Aves, 18 Pick. 193) that "slaves in such case become free, not so much because any alteration is made in their status or con-:dition, as because there is no law that will warrant, but there are laws, if they choose to avail themsleves of them, that prohibit their forcible detention or forcible removal." If by this is meant there is no change in the personal state of a slave in relation to the law of the country he has left, it may well be admitted to be correct. The law of that country, notwithstanding he is for the time withdrawn from its direct and immediate control, would hold him to be a slave until he acquired his freedom in some of the forms of emancipation known His mere transit into a country whose law to that law. declared him free, within its jurisdictional limits, would not per se liberate him from the capacities and obligations resulting from the law of his domicile within the/

the legitimate sphere of that law's operation, and if he is to return to that country the condition would reattach to him precisely as when he left it.<sup>4</sup>... (Lord Stowell Slave Grace 2 Hagg. Adm. 94)... <sup>4</sup>But it by no means follows that because the law of his domicile holds him to be a slave, he has not, while within a jurisdiction that declares him to be free, all the faculties that be-:long to a state of freedom. It is difficult to under-:stand what the law does by declaring him free, if it does not invest him with the rights and capacities of a free man; and, if it does, it confers upon him a personal state, very different from that of slavery; and there is no absurdity or contradiction in supposing a man to be a free man in one country and a slave in another......"

Although a status unknown to our law is ignored for transactions that take place outwith the territory of the <u>lex domicilli</u>, that status may have subsidiary effects that are recognised by our law. Thus polygamy, which that is unknown to our law and the rights and duties of which are not <u>recognised by our law</u>, can still have the effect that the children of the polygamous union are legitimate, and that their legitimacy will be recognised by our Courts (See post p. ).

3.

Some kinds of status are penal e.g. outlawry, infamy, civil death and that resulting from attainder, being visited on individuals for crimes and offences. If the <u>lex domicilli</u> (or <u>lex loci contractus</u> if that is the law appropriate to the determination of status in the question that is being litigated) classifies the person in a penal status, we ignore the foreign classiification, <u>Commonwealth v. Green 17 Mass. 515, 3 Beale</u> 9; <u>Wilson v. King</u> (1894) 59 Arkansas 32, 3 Beale 15; <u>Polydore v. Prince</u> (1837) Ware 402, 3 Beale 2, per Ware

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J. at p. 3) even though our law has the same penal status. (Folliott v. Ogden (1789) 1 H.Bl. 123 attainder) This rule is only an application of the wider principle that "the penal laws of one country cannot be taken notice of in another" [Ogden v. Folliott (1790) 3 T.R. 726 per Buller J. at p. 733 "The penal laws of foreign countries, are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither comes with all his transitory rights; he may re-:cover money held for his use, stock, obligations and the like, and cannot be affected in this country by proceedibgs against him in that which he has left, beyond the limits of which such proceedings do not extend Folliott v. Ogden (1789) 1 H.Bl. 123 per Lord Loughborough at p. See also Lynch v. Provisional Government of 135; Paraguay (1871) 2 P. & D. 268; Wolff v. Oxholm (1817) 6 M. & S. 92; Huntingdon v. Attrill 1893 A.C. (P.G.) 150; Scott v.Attorney General 1886 11 P.D. 128, as explained in Warter v. Warter 15 P.D. 152). Thus, when it was objected during a trial in Massachusetts that one of the witnesses was infamous because he has been convicted of larceny in New York, and for that reason his evidence could not be received, Parker C.J. stated: "The penal laws of a country do not reach, in their effects, beyond the jurisdiction where they are established"; [Common-:wealth v. Green supra 3 Beale p,11 and when in an action in Arkansas it was pled in defence that the porsons had suffered civil death because he had been sen-:tenced to death for murder in Tennessee, Battle J. said "The conviction and sentence of King in the State of Tennessee did and does not affect his right to sue and recover in this State. (Wilson v. King supra).

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In the next chapter we shall take the legal questions of common occurrence, and consider in more detail the systems of law that determine the most important implication of status, namely capacity, in regard to these questions.

As already mentioned, the steps are -(i) What is the nature of the question involved? (ii) Determine the status of the party according to the legal system appropriate to the question. (iii) Decide from the expert evidence what are the rights and duties, capacities and incapacities, attached to that status by that law.

(iv) Apply the appropriate duty, capacity or incapacity to the problem at issue. But in practice, where capacity is involved, these steps are compressed so that the steps are:
(i) What is the legal question involved?
(ii) Determine the capacity of the party according to the legal system appropriate to the question.
(iii) Apply the capacity given by the appropriate law. It is necessary to state the matter in the more longer winded way in order to explicate the theory and the rules applicable when an unknown status was involved, but now it will be more convenient to state the rules in the manner in which they have been evolved by precedent and are most likely to arise in practice.

#### CAPACITY

The party's personal law at the time of the act determines whether he has capacity to perform a juridical act, except in the case of capacity to enter into a mercantile contract, where the <u>lex loci contractus</u> rules, and in regard to immoveables, where the <u>lex situs</u> rules.

By personal law is meant the law of the party's domicile and if the domicile has more than one system of law then the system that the sovereign power of the domicile recognises as appropriate to him. Thus the personal law of a native domiciled in India where there are many systems of law is the law of the religious community to which he is attached.

## HISTORICAL SUMMARY

The almost universal opinion of the early continental jurists was that all questions of capacity (except in regard to immoveables) must be determined by the <u>lex</u> <u>domicilii</u>.  $\sum$  See <u>Story</u>§50 et sequ for an account of their opinions\_7\_\_\_\_\_\_ The early English authorities on the other hand, state that all questions of capacity must be governed by the <u>lex loci contractus</u>. There are a number of cases dealing with the invalidity of marriages on the ground of incapacity, where the <u>lex loci celebrationis</u> of the marriage was looked to, <u>Compton v. Bearcroft 1769</u> 2 Hagg. Cons. 444 N; <u>Middleton v. Janverin</u> 1802 2 Hagg. Cons. 437; <u>Scrimshire v. Scrimshire</u> 2 Hagg. Cons. 395.

Cp. Harford v. Morris 1776 2 Hagg. Cons. 423\_7

423 and one case where Lord Eldon held that capacity to accept a loan was ruled by the lex loci contractus. Male v. Roberts 1800 3 Esp. 163) The same attitude was adopted by Story and Burge. Thus Story said: "As to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquir-:ed, or the contracts are made, will generally govern in respect to the capacity, state and condition of persons" Sec.102 "Hence we may deduce, as a corollary, that in regard to questions of minority, competency or incom-:petency to marry, incapacities incident to coverture, guardianship, emancipation and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired or fixed domicile, is not generally to govern, but the lex loci contractus ant actus, the law of the place where the contract is made or the act done. Therefore a person who is a minor until he is of the age of twenty five years by the law of his domi-:cile and incapable, as such, of making a valid contract there, may, nevertheless, in another country where he would be of age at twenty one years, generally make a valid contract at that age, even a contract of marriage." Sec. 103.Cp. Burge Col. & For. Law pt. 1 p. 132) 5

Turning to the more recent English cases, in <u>Simonin v. Mallac,</u> [1860 2 Sw. & Tr. 67] parties domicil-:ed in France may be married in England without the con-:sents of their parents required by the law of France but not by the law of England. The marriage has been held valid in accordance with the above decisions because in conformity with the <u>lex loci celebrationis</u>. It is to be noticed that lack of the consents required is not an absolute bar to marriage according to the French law: **the** man was 29 and the woman 22, and for persons of those

ages/

ages the absence of consent did not prohibit the marriage, but merely postponed it;  $\theta$  The parties asked their parents' advice by a formal and respectful act each month for three months, they could marry at the end of the fourth month despite an adverse answer from their parents; the French Courts would hold a marriage abroad without the formalit-:ies of consent valid or invalid according as they consider. ed that the parties had got married abroad to defraud the lawor not; the marriage could be validated subsequent-:ly by the parents consent, and would be valid if not im-:peached within a certain time. However, in Ogden v. Ogden, (1908 P. 46) where a domiciled Englishwoman married a domiciled Frenchman, aged 19, in England, without the consent of the Frenchman's parents, the marriage was also held valid because conformable to the lex loci celebrationis, although the effect of the lack of consent in his instance was different from the instance of the man and woman of 29 and 22 in the case last considered; for the marriage of A person of that age, without the consent of his parents was, according to French law, altogether null, voidable. [per sin Grell Burnes at p. 57] Ogden was a bolder application of the lex loci to I void, but capacity than Simonin v. Mallac (Cheshire p. 231; contra Dicey p. 966). It is important to appreciate this, because it has been said by the Court of Appeal Simonin v. Mallac did not deal with capacity to contract, but only with the formalities of the ceremony. [Sottomayor v. De Barros (No.1) 1877 3 P.1. It may be possible to say that about Simonin v. Mallac, but it is very difficult to refuse to recognise that Ogden dealt with capacity. [Falconbidge, THT L. Q.R. pp. 249 et sequ.] In Scotland too the early view about capacity to contract marriage was that the lex loci celebrationis ruled. Thus Lord Meadowbank enquired: "Or would a

marriage here be declared void because the parties were domiciled in England and minors when they married here, and/

and of course incapable by the law of that country of contracting marriage? This category of law does not affect the contracting individuals only, but the public, and that in various ways; and the consequences would prove not a little inconvenient, embarrassing, and, pro-:bably, even inextricable, if the personal capacities of individuals, as of majors or minors, the competency to contract marriages . . . were to be qualified and regulated by foreign laws and customs, with which the mass of the population must be uttorly unacquainted." [Gordon v. Pye Fergusson's Consist. Reports App. at p. 362. See also Fraser , Husband and Wife, p. 1299; Gillespie in Bar p. 373; Fraser, however, states that the lex domicilii governs capacity and minority and majority in his Parent and Child pp. 715 et sequ. Cooper Cooper's Trustees [1885 12 R. 473 Revd. (H.L.) 21] dealt with capacity to make a marriage contract was in-Aclusive because the lex domicilii of the party whose capacity was in question to be the same as the lex loci contractus, and in holding that the law of Ireland should govern it was not necessary to say whether it governed qua lex domicilii or qua lex loci contractus.

The law of the domicile first came into the pinture, apart from an <u>obiter dictum</u> in <u>Udny</u>, ["Domicil or the place of settled residence of an individual is the criterion established by law for the purpose of determining the civil condition of the person, for it is on this basis that the personal rights of the parties, that is, the law that determines his majority or his minority, marriage, succession, testacy or intestacy\_must depend." 1869 7 N. (H.L.) S9 per Lord Westbury at p. 99] in <u>Sottomayor v. De Barros</u> (No.1). [supra] which dealt with the/ the question whether a marriage was invalid because the parties were within the prohibited degree of relationship by the law of their domicile, although they were not by the lex loci celebrationis. In the Court of Appeal Cotton L.J. made the startling declaration: "But it is a well recognised principle of law that the question of capacity to enter into any contract is to be decided by the law of domicile . . . as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile" at p. 5 Simonin v. Mallac was distinguished as dealing only with the formalities of the ceremony, which are ruled by the lex loci celebrationis. That the lex domicilii governs capacity wis certainly not a "well recognised principle of law", and this is recognised by Sir James Hannen in Sottomayor v. De Barros (No.2). 1879 5 P. 94 at p. 100, although a great deal can be said for its suitability to regulate capacity in marriage. and the statement occurs in a case in which an impediment to marriage, arising from the prohibited degrees of relationship, were treated as a question of capacity, whereas "it may be questioned whether . . . the question of capacity is really raised at all in such a case; that is to say, where both the parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own That is rather a question of illegality than country of capacity . . . " Ogden v. Ogden 1908 P. 46 per Sir Gorell Barnes at p. 74).

In short, capacity in all contracts was formerly governed by the <u>lex loci contractus</u>, until a case that did not deal with capacity said that capacity in all contracts is governed by the <u>lex domicilii</u>.

/The early cases made no attempt to distinguish between, e.g. capacity in regard to marriage and capacity/

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capacity to enter into a mercantile contract. Sir Edward Simpson in Scrimshire 2 Hagg.Cons. 395 and Cotton L.J. in Sottomayor v. De Barros (No.1) (supra each states his principle as applying to all con-This has caused embarrassment to English tracts. lawyers. Story, as we have seen, following the early cases, states that the lex loci contractus and actus governs capacity in all cases, while Westlake, following the more recent dictum in Sottomayor v. De Barros (No.1), lays down the rule that the lex domicilii governs capacity in all contracts. Dicey (pp. 634 et sequ) and Cheshire (p. 215) make a distinction between mercaptile and other contracts which their different nature demands. Fortunately, the Scots lawyer is not under the same embarrassment. Lord Nacnaghten gave the lead for making a distinction in Cooper v. Coopers Trustees, that dealt with capacity to enter into a Marriage Contract where he said: "Perhaps in this country the question is finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the Itmay be that all cases are not to be govdomicile. erned by one and the same rule." [15R. (H.L.)21 at p.30). And when the Court of Session decided, in McFeetridge v. Stewarts & Lloyds, that the lex loci contractus governed capacity in mercantile contracts, Lord Guthrie remarked: "It may be that, in the case of contracts like marriage contracts, affecting premanently the domestic relations, the law of the domicile would be held to apply. Cooper, in which an obiter dictum of Lord Macnaghten was expressed, on which the pursuer strongly relied, was a case of that kind" (1913 S.C. 773, at p. 792] Considering that the Scots Courts have, since the inconclusive case of Cooper, in which the lex loci contractus and the lex domicilii were the same, adopted different/

different rules in regard to non-mercantile acts, where the lex domicilii was held to govern capacity in Sawrey-Cooksons v. Sawrey-Crooksons Trustees, (1905 8 F. 157) and in regard to mercantile contracts where the lex loci contractus was held to govern capacity ih McFeetridge v. Stewarts & Lloyds (supra) there can be no doubt that the statement at the commencement of this chapter is correct. In addition there are Scots cases dealing with non-mercantile acts other than contracts, namely cases about wills (Purves v. Chisholm 1/8/1611 Mor. 4494; Robertson v. Landell 1843 6 D. 170; Hunter v. Dunn (0.H.) 1900 8 S.L.T. 197 and receipts for legacies, Freman v. Bruce's Executors (0.H.) 1905 13 S.L.T. 97; Seddon Petitioner 19 R. 101 and 20 R. 675; Atherstone's Trustees 24 R. 39; Elder Petitioner 1903 5 F. 307 Revocation of trust deeds, SawreyCookson v. Sawrey-Crookson Trustees 1905 8 F. 157 and assignations, De Virte v. McLeod 1869 7 M. 347, 6 S.L.R. 237 where the lex domicilii washeld to govern. (Cp. In re Da Cunha (1828) 1 Hagg. Ecc. 237].

pacity of stator.

## CASES WHERE THE LEX DOMICILII GOVERNS.

Incapacity to make a will may result from weakness of mind; from nonage; or from restraints which are im-:posed by positive law on the weaker sex, and particularly on married women. [McLaren p. 22]; In all these cases the question whether the [estater had capacity is decided, as far as regards moveables, according to the law of his or her domicile at the time of making the will. [Purves v. Chieholm 1/2/1611 Mor. 4494; In re Maraver (1828) I Hagg. Ecc. 498; Robertson v. Landell 1843 6 D. 170 (nonage); Hunter v. Dunn (0.H.) 1900 8 S.L.T. 197 (facility); McLaren p. 23]; Capacity to make a will of/

of immoveables is governed by the <u>lex situs</u> (<u>Robertson</u> v. <u>Landell</u> supra; McLaren p. 24; Cheshire p. 550; Dicey p. 585]

According to some writers,  $\left[\operatorname{Savigay} \overset{SS}{S} 377,393\right]$ capacity is required both at the date of making the will and at the time of death of the testator, while others  $\left[\operatorname{Cheshire p. 514}\right]$  state that the testator must have capacity by the law of his domicile and the time of his death. But the rule of our law, that a will valid at the time of execution is not invalidated by a subsequent change of domicile, would doubtless be held to cover the case of objections to the capacity of the testator. [McLaren p. 23n. This is probably the rule at common law, but in any event, by Sec. 3 of the Wills Act 1861 it is the rule for at least British subjects and probably for all persons — In re Groos (1904) P. 269].

The capacity of a legatee to receive payment of a moveable testamentary provision, and to grant a valid discharge therefor, is determined by the law of the domicile of the legatee at the time of receipt. Freeman v. Bruce's Executors (0.H.) 1905 13 S.L.T. 97; Seddon, Petitioner 19 R. 101 & 20 R. 675; Atherstone's Trustees 24 R. 39; Elder Petitioner 1903 5 F. 307). When the legatee has not capacity by the law of his domicile, the only person to whom payment is due, and who can give a valid receipt is the guardian by/the law of the beneficiary 's domicile; Seddon supra; Ogilvy v. Ogilvy's Trustees (0.H.)1927 S.L.T. 83) and if that law does not recognise a person as guardian unless appointed by its own Courts, then our Courts will not recognise him as guardian until appointed [Seddon supra]. A petition to the nobile officium by trustees under a Scotch Trust Disposition and Settlement for authority to pay the income of legacies to the fathers of minor beneficiaries

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ity of 00. who were domiciled in England, and from whom, according to the law of England, a valid discharge could not be obtained, was refused as overdriving the <u>nobile officium</u>. (<u>Atherstone's Trustees supra</u>].

23.

Capacity to receive payment of an immoveable legacy, and to grant a valid discharge therefor, is governed by the <u>lex situs</u>, and a discharge tendered by a guardian duly appointed under the law of the domicile of a minor is not sufficient. <u>(Ogilvy v. Ogilvy's Trustees</u> (O.H.) 1927 S.L.T. 83; <u>Allen v. Robertson</u> 1855 18 D. 97; See <u>McFadzean Petitioner</u> 1917 **S.C.142**].

Capacity to enter into a marriage contract is determined by the law of the domicile of each party at the time of making the contract. Each party must have capacity by the law of his or her domicile at that time. In Cooper v. Cooper's Trustees, 1885 12 R. 473, Revd. 15 R. (H.L.)21) a Scotsman aged 29 married in Ireland an Irishwoman aged 18, and an antenuptial Marriage Contract in Scotch form was signed in Ireland before the ceremony. After his death, she brought an action of reduction of the contract on the ground of minority and lesion. It was held that Irish law must determine whether she had capacity to enter into the contract. Unfortunately this decision of the House of Lords was inconclusive, because the law of Ireland was both the law of her domicile and the lex loci contractus. All that the casedecided was that the matrimonial domicile or the "proper law" of the contract could not govern the question of The Lord Chancellor, Halsbury, put it thus: capacity. "It is said . . . . as both parties contemplated a Scottish married life, and as a consequence a Scottish domicile, the principle [ have spoken of (the law of the domicile) does not regulate the contract relations of Minsel

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these two persons ..... But .... the argument assumes a binding contract, and if one of the parties is under incapacity the whole foundation of the argument fails! /at p. 25 7 Lord Machaghten said: "It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile! / at p. 31 7 On the issue between the lex domicilii and the lex loci contractus the case is not helpful. The Lord Chancellor applied Irish law as the law of her domicile, while Lords Watson and Macnaghten reserved the question whether Irish law was applicable as the law of the domicile or as the lex loci contractus, although Lord Macnaghten seemed to favour the former. The question was clinched, however, in favour of the law of the Comicile in Sawrey-Cookson v. Sawrey-Cookson's Trustees / 1905 8 F. 157 7, a decision of the Court of Session, which has the great authority of Lord President Lunedin. / In McFeetridge v. Stewarts & Lloyds 1913 S.C. 773 where the lex loci contractus was held to apply to capacity in mercantile contracts, Lord Guthrie said: (at p. 789) "It may be that, in the case of contracts like marriage contracts, affecting permanently the domestic relations, the law of the domicile would be held to apply. Cooper, in which an obiter dictum of Lord Macnaghten is expressed, on which the pursuer strongly relied, is a case of that kind." Cp. In re Cooke's Trusts (1887) 56 L.J. (N.S.) Ch. 637; Duncan v. Dixon (1890) 44 Ch. D. 211; Guépratte v. Young (1851) 4 De G. & Sm. 217; Viditz v. O'Hagan 1900 2 Ch. 87 (which was treated purely as a question of capacity although it was probably, in part at least, a question of essential validity - Cheshire p. 257 and contrast Sawrey-Cookson supra);7

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Subject to the exception mentioned, the law of the domicile of each party governs the capacity of that party to marry. Each party must have capacity by the law of his or her domicile. By capacity is meant only the question whether the person is old enough and same enough to marry. The rule is subject to this exception: when the parties are by the laws of their respective domiciles of marriageable age our Courts will not recognise any incapacity attached by the law of the domicile of either simply through refusal of parents or guardians to consent to the marriage, which is not recognised by the lex loci celebrationis. This topic is fully dealt with in the subsequent chapter on marriage.

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Capacity in regard to miscellaneous non-mercantile acts is referable to the lex domicilii. Thus the question whether a married woman had capacity to revoke a unilateral trust deed which she had made before marriage was referred to the law of her domicile at the time of the purported. revocation: / Sawrey-Cookson v. Sawrey-Cookson's Trustees 1905 8 F. 157  $\overline{/}$ ; and the question whether an obligation or assignation by a married woman was valid without the consent of her husband was referred to the law of her domicile at the time. / De Virte v. Macleod 1869 7 M. 347, 6 S.L.R.237: As to assignation contra Dicey p. 606; Republic of Guatemala v. Nunez 1927 1 K.B. 669 is inclusive, the lex domicilii and the lex loci actus being the same. Pender v. Commercial Bank (0.H.) 1940 S.L.T. is another authority in favour of the lex domicilii, although the issue there was truly this: whether or not a benefit under a policy of assurance was assignable, a question to be settled by the proper law of the contract of insurance. Lord Robertson's judgement at one point treats the issue as that, at another treats it as a question of capacity to assign, and at still another treats it as a question of the validity of the assignation, to be governed by the proper law of the assignation./

### EXCEPTIONS TO THE LEX DOMICILII.

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Capacity to enter into a mercantile contract is gov-:erned by the lex loci contractus. Each party must have capacity by the lex loci contractus. McFeetridge v. Stewarts <u>& Lloyds</u> 1913 S.C. 773; Wilkie v. Dunlop 12 5.506; Male v. Roberts 1800 3 Esp. 163 In McFeetridge v. Stewarts & Lloyds. subra a minor whose domicile was Irish, and whose father resided in Ireland, took service as a labourer, with a firm in Scotland. He was injured at his work, and agreed, without consulting his father, to accept compen-:sation under the Workmens Compensation Act 1906. After compensation was paid for some time, he brought an action of damages for his injury at common law, and contended that, being a minor, he was bound by his election of Workmen's Compensation. It was held that his capacity as a minor to enter into the agreement to accept Workmen's Compensation fell to be determined, not by the lex domicilii (Irish Law), but by the lex loci contractus (Scots Law). "To apply the law of a foreign country to a contract for hire of labour would be to relegate such cases to the most inconvenient forum" per The Lord Justice Clerk, Macdonald, at p. 784 6 Traders can not be expected to satisfy themselves as to the domicile of business acquaintances and as to the law of that domicile, before entering into contracts with them. If a man twenty four years of age, resident in Scotland, ordered timber from a Scottish firm, it would be most un-:fair, if when asked to pay for the timber, he could reply that he was of Mexican extraction, that he was still domiciled in Mexico, and that by his personal law he could not make a binding contract until he was twenty five. "The obstacles to commercial intercourse between the sub-: jects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by the means within/

within his reach, but by recourse to the law of the domicile of the person with whom he is dealing, whether the latter has attained the age of majority, and, consequently whether he is competent to enter into a valid and binding contract. If the country in which the contract is litigated is also that in which it was entered into, and if the party enforcing it were the subject of that country, it would be unjust as well as unreasonable, to evoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state. Burge: Colonial and Foreign Law pt.1 p.132.

Some modern writers have expressed the opinion that it should be 'the proper law of the contract' which should govern capacity in mercantile contracts, Cheshire p.211. Dicey p. 639 (that, however, is only a comment. The rule that Dicey gives is the lex loci contractus) 7 'the proper ' law of the contract' being the law by which the parties to a contract intended, or may fairly be presumed to have intended, to submit themselves. / Dicey p. 628 7 This view has little to recommend it. It is difficult to see how a minor who has no capacity to commit any juridical act, can acquire capacity by intending that his juridical acts should be governed by the law of another country; or how a major, who has full capacity, can escape the results of it by pleading that the parties were contemplating a foreign lawx To say that the proper law of the contract governs capacity assumes that there is a binding contract, which of course there never was if one of the parties had no capacity. [See the reasoning in Cooper v. Cooper's Trustees 15 R. (H.L.) 21 by the Lord Chancellor Halsbury at p. 25 and Lord Macnaghten at p. 31 against a similar argument there quoted above p. 1

A correction that might be made in the rule as above stated, would be to put it thus: a person has no capacity to enter into a mercantile contract if he has not capacity

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by either his lex domicilii or the lex loci contractus and he has capacity if he has it by either his lex domicilii or by the lex loci contractus. There is no authority as to this, but it is a possible view. [See McLaren p. 23; Savigny p. 155, where he described a provision of the then Prussian law to that effect; Bar p. 307, 312. The Hague Convention of 1912 contained an article concerning a Uniform law for Bills and Cheques which provided that, while capacity to contract is normally governed by the national law: "La personne qui serait incapable, d'après la loi indiquée per l'alinéa précedent, est, néanmoins, valablement tenue, si elle s'est obligée sur le territoire d'un Etàt, d'après la législation duquel elle aurait été capable "\_quoted by Westlake  $\S$  2. Article 2 of the Geneva Convention of 1930 is to a similar effect - H.C. Gutteridge (1934) 16 Jo. Comp. Leg. 53 at p. 60.7

It is difficult to see how the capacity of a corporation, even in regard to mercantile contracts, can be referred to any law other than the law under which the body is incorporated, and this may be held to be an exception to the rule that the <u>lex loci contractus</u> determines capacity. However there is no authority.  $\angle$  But see Bills of Exchange p.  $\angle$  The capacity of a corporation means its powers under its articles, or incorporating statute or charter, and the question whether directors have power to bind the corporation is a distinct issue.  $\angle$  Chalmers, Bills of Exchange Act p. 70\_7

Teables.

All questions of capacity in regard to immoveables are governed by the <u>lex rei situs.</u> Ogilvy v. Ogilvy's Trustees (0.H.) 1927 S.L.T. 83; <u>Murray v. Baillie</u> 1849 11D. 710; <u>Allen v. Robertson</u> 1855 18 D.97; <u>McFadzean</u>, <u>Petitioner</u> 1917 S.C. 142; <u>Lamb v. Montgomerie</u> 1857 20 D. 1323; Burns Conveyancing Fractice p. 149; Cheshire p. 540; Westlake Sec. 165 (a); Story Secs. 429-431; Dicey p. 585; <u>Bank of</u> <u>Africa Limited v. Cohen</u> (1909) 2 Ch. 129. Contra Fraser, Farent and Child pp. 727, 8 / "The Court, in dealing with a contract relating to immoveables, is bound to determine this question of capacity by/ by the <u>lex situs</u>, and if the <u>lex situs</u> shows that the con-:tracting party has not the capacity to contract, the whole contract is void, and nothing can be done in this country to enforce that contract against the contracting party" <u>Bank of Africa Limited v. Cohen</u>, supra, per Eve J. at p. 135; Cp. Buckley L.J. at p. 143. Although this principle is unexceptional it may be doubted whether the case raised a question of capacity or only one of the formalities of the contract. Cp. Cheshire p. 541.

Thus for a conveyance of immoveables to be valid, the granter must have capacity to grant the conveyanceaccording to the lex situs and the grantee capacity to receive accord ing to the lex situs. Under the head of capacity to receive a conveyance of lands is sometimes put the rule, that used to exist in Scots law (Lord Kincardine's Creditors v. Heere Van Sommerdyke 1683 Mor. 4635; Leslie v. Forbes 1749 Mor. 4636; Alexander 1852 24 Scots J. 522) and still persists in other systems, that an alien cannot own land. If the lex situs excludes aliens from holding lands, that rule prevails whatever be the law of the domicile. But if by the lex situs an alien can hold lands, it is immater-:ial that the law of the domicile prevents it \_\_\_\_ Story Sec. 430 . This, however, is not really a question of capacity).

Where the granter or grantee has no capacity by the <u>lex situs</u>, it will not suffice that he has capacity by his <u>lex domicilii</u>. If it is desired to convey immoveables during non-capacity of the granter or grantee, this must be done through the intervention of a guardian appointed by the <u>lex situs</u>, and the guardian appointed by the <u>lex domicilii</u> does not have the right, as he would have with moveables, to receive (<u>Ogilvy v. Ogilvy's Trustees</u> supra; <u>Allen v.</u> <u>Robertsoh</u> supra) or grant (<u>Lamb v. Montgomerie</u> supra; <u>McFadzean, Petitioner</u>, supra. In the latter case, oh an application/

application to the <u>nobile officium</u> the Court on production of evidence that the petitioner had been duly appointed guardian according to the law of the domicile of the pupil, granted authority to complete a title in the pupil's name and sell property, but the authority of our Court has always to be obtained, either in this way, or by the appointiment of a <u>curator bonis</u>, (as in <u>Allen v. Robertson</u> and <u>Murray v. Baillie</u>) or a <u>factor loco tutoris</u> (as in <u>Lamb</u> <u>v. Montgomerie</u>) the property.

Capacity to enter into a contract to convey or mortgage land is also governed by the lex situs. Bank of Africa Limited v. Cohen, supra . It would be absurd to say that a person, who has full power by the lex situs to convey heritage, is unable owing to the law of his domicile to enter into a valid contract for the sale of it; and conversely, a foreigner who is not old enough by the lex situs to convey heritage, could not possible under-:take a binding obligation to convey it. (Fraser, Parent and Child p. 728. Dicey, however, states that capacity to make a contract re immoveables is governed by the pro-:per law of the contract (p.597). In addition to the reason just given in the text this is subject to all the objections applicable to the view that capacity in regard to mercantile contracts is governed by the proper law and in regard to marriage contracts is (q.v)by the law of the matrimonial domicile  $(q \vee)$ 

Again, Capacity to make a will regarding immoveables is governed by the <u>lex situs</u>. <u>(Robertson v. Landell</u> 1843 6 D. 170; McLaren p. 24; Cheshire p. 550; Dicey p. 585)

These rules are merely applications of the general principle that the <u>lex situs</u> governs all rights relating to immoveables.

THE EFFECT OF A CHANGE OF DOMICILE ON CAPACITY. Saving [p.170] and Bar [p.328] discuss the problem of Since the age of majority differs from country to

country a difficult question-arises when a person aged, sixteen.domiciled/

domiciled in country A, where the age of majority is fourteen, changing his domicile to country B, in which the age of majority is twenty one, - does he lose his capacity? And if he changed from B to A would he gain capacity? If each country decided domicile according to its own law of domicile, The Courts of A would hold that the person of sixteen could change his domicile to B, while the Courts of B would hold that he could not. Similarly the Courts of A would hold that his parents could not change his domicile for him by becoming domiciled in B, while the -Courts of B would hold that they could. The Courts of A would hold that when he moved his domicile from B to A he acquired capacity, that when he moved from A to B he lost capacity which he had. The Courts of B would hold that when he moved from B to A he could not acquire a domicile there and accordingly his capacity would remain unaltered, unless his parents changed his domicile for him, when he would become emancipated, and similarly that when he moved from A to B he could not acquire a domicile in B, and so his capacity would remain unimpaired, unless his parents changed his domicile for him, when they would hold that he had lost capacity. This seems ridiculously complicated, and to involve the impossible position of a major losing majority by changing his domicile.

It has been submitted that the rule about the age at which one can acquire a domicile should be that suggested by Bar, namely: "It is necessary that a person should have, in order to an independent and voluntary acquisition of a domicile, capacity to act, and that both by the law of the domicile that he has, and by that of the country to which he intends to remove; the former, that he may be able to undo the tie that binds him to his native country; the latter, that he may be in a position to enter into the new allegiance", / Gillespie's/ [Gillespie's translation 2nd Ed. p. 329 7 and accordingly the person of sixteen cannot change his domicile from A to B or B to A: he must wait till he is twenty one before he can do that. Consequently the difficulty never arises of a person changing his domicile from a country where he is a major to a country where he is not, or contrariwise. / The results that Bar deduces, however, are different from those submitted here. After the passage quoted he goes on: "The authority of the State that permits one who is minor by her laws, to establish his domicile independently in her territory, silently recognises the capacity of this person to act; she silently concedes the right of majority, if she permits anyone who is not yet major by her laws to establish his abode independently in her territory ... On the other hand, however, we must hold that a person who is still a/

a minor by the law of the domicile which he had hitherto enjoyed, becomes major at once upon acquiring citizenship in another state, if he is of the age that it requires as a condition of majority." Thus Bar appears to hold that the person of sixteen could change his domicile from B to A, gaining capacity. This does not follow very logically from the principle. Bar arrives at the same result as Savingy did by different reasoning.(Savingy p.170)

To Bar's rule should be added one other rule, namely that once a person has acquired capacity by his domicialiary law, he cannot be deprived of that capacity, and the domicile which gives it, *uriag* a domicile in another country by through the action -of a parent the law of which the child would still be in infancy and dependent on the parent for domivile. Thus if the father of the minor of sixteen were domiciled, like the minor, in Scotland, and the father acquired a domicile in England, he would not confer the English domicile derivatively on the child, and thus rob him of the capacity which he had gained. Arnott v. Groom 1846 9 D. 148 This should be the decision of the English as well as the Scots Gourts. But if the father of a child of sixteen changed his domicile from England to Scotland, the child would be emancipated, both in the View of the English and the Scots Courts.

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a minor by the law of the domicile which he had hitherto enjoyed, becomes major at once upon acquiring citzenship in another state, if he is of the age that it requires as a condition of majority." Thus Bar appears to hold that the person of sixteen dould change his domicile from A to B without losing capacity, and from B to A, gaining capacity. This does not follow very logically from his prinicple. Bar arrives at the same result as Savingy did by different reasoning (Savingy p. 170)

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A marriage that has been validly contracted, will be contract recognised everywhere. Thus if parties marry in country Y and their marriage is formally valid, and is valid as to the capacity of the parties, and the essentials of the contract, according to the several systems that govern these different points, they are husband and wife when they go to reside in country Y, and that even though the marriage did ... not satisfy the forms, or the requirements as to capacity, or essentials, of country Y. (Brook v. Brook 1861 9 H.L.C. 139 per Lord Campbell at p. 213 . But it is only the constitution of the relationship of husband and wife that is given effect to; the rights and obligations of the spouses are not determined at its inception so as to adhere to the marriage in whatever country it may subsist. In this respect marriage differs from a contract. In the case of a mercantile contract, the rights and obligations of the parties inter se are conclusively settled by the contract, will not alter if the parties change their residence, and can be enforced in any country exactly as the parties originally contracted. The legal relation of the parties to a mercantile contract is fixed at the time of making The legal relation of spouses, on the the contract. other/

other hand is fluid. The parties to a marriage cannot attach any conditions to it or vary its legal obligations by consent, / Lang v. Lang 1921 S.C. 44 per Lord President Clyde; Gordon v. Pye Ferguss Cons. Rep. App. 276 per Lord Meadowbank at p. 3617 and accordingly they are not bound in any implied contract to the rights and obligations at the inception of the marriage. / Gordon v. Pye supra; Warrender v. Warrender 1835 2 S. & McL. 154, Affg. 12S. 847; Edmonstone v. Edmonstone etc. June 1st 1816 F.C. per Lord Robertson at p. 149 7 The property rights of the spouses inter se will, in general, and in the absence of a Marriage Contract, be governed by the law of the husband's domicile for the time being; / See post p. - 7 the question of the dissolubility of the marriage by the law of the Courts which have jurisdiction to dissolve it; other rights, such as the husband's power over his wife, by the law of their residence for the time being. / Dicey p. 548; Fraser p. 1318 7 "Would a husband in this country be permitted to keep his wife in an iron cage, or beat her with rods of the thickness of a Judge's finger, because he had married her in England, where it is said this may be done?" / Gordon v. Pye supra, per Lord Meadowbank at p. 361 7. The fact that a marriage is indissoluble in the country in which it was contracted is not of the essence of the contract so as to adhere to it and prevent the marriage being dissolved if the spouses become domiciled, and so give the Courts jurisdiction, in another country where it is dissoluble. <u>/ Gordon v. Pye</u> supra; Warrender v. Warrender, supra; Edmonstone v. Edmonstone, supra; Humphrey v. Humphrey's Trs. (0.H.) 1895 33 S.L.R. 99; Harvey v. Farnie 1880 6 P.D. 35 7 Lord Brougham in Warrender v. Warrender /1835 2 S. & McL. 154 7 said: "If, indeed, there go two things under one and the same name in different countries - if that which is called marriage is of a

different nature in each - there may be some room for holding that we are to consider the thing to which the parties have bound themselves according/

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according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wows, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put on any rational g-round, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore, all that the Courts of one country have to determine is whether or hot the thing called marriage - that known relation of persons, that relation that our Courts are acquainted with, and know how to deal with - has been validily contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

As Lord Brougham states in the above passage, these principles only apply to marriage as we understand it. Polygamous unions are of a different nature, and although some of the subsidiary effects of polygamous unions, such as the legitimacy of the children, are recognised as marriages. It is necessary therefore to define marriage as we understand it, to distinguish it from polygamous unions, and to describe what recognition is accorded to polygamous unions.

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Marriage as we understand it is "the voluntary union for life of one man and one woman to the exclusion of all others." (Hyde v. Hyde 1865 L.R. 1 P.D. 130 per Lord Pen-:zance at p. 133; Approved in In re Bethell 1887 36 Ch.D. 220; Brinkley v. A.G. 1890 15 P. 76; Nachimson v. Hachimson 1930 P. 217; Walton Husband and Wife 2nd Edition p.1, Thus when two Mormons contracted a "marriage" in a Mormon state, where polygamy was both lawful and usual, Hyde v. Hyde supra and when a domiciled Englishman "married" in the tribal territory an African native woman according to the custom of the tribe, that permitted polygamy [In re Bethell supra] thèse were held not to be valid marriages as understood in Nor did it matter in these cases that the parties our law. were both single at the time that they "married": what they entered into was a polygamous union, and not marriage in our meaning of the term. In the American case of Royal v. Cudahy Packing Company (1922) 195 Iowa 759 and by S.G. Vesey-Fitzgerald in 1931 L.Q.R. p. 253 the attitude is taken that a union between persons capable of contracting a polygamous marriage, and doing so in a polygamous form, should be regard-:ed as a marriage in our sense if they were both single at the time and intended the union to be monogamous. -\_\_\_\_ Some of the cases talk of "Christian marriage", or "marriage as it is understood in Christendom", [Hyde v. Hyde supra; In re Bethell supra) but a marriage between non-Christians, or between a Christian and a non-Christian, entered into in a foreign country according to the appropriate ceremony there, will be regarded as a marriage in our sense, if by the foreign law the union is of one man and one woman for life to the exclusion of all others. Brinkley v. A.G. 1890 15 P. 76 - a marriage in Japan . Further, if the marriage satisfies the test that it is at inception the voluntary union of one man and one woman for life to the exclusion of all others, its validity will not be further tested/

tested by the question of its dissolubility, and a Russian retriage which could, seconding to Russian law, be dissolved by mutual consent, or at the will of one of the parties with merely formal conditions of registration, was none the less a marriage as we understand it: although the marriage could be so readily dissolved, until it was dissolved it subsisted, to the exclusion of all others, and was intended by the parties at its inception to last all their lives. [Nachimson v. Machimson 1930 P. 217. The Russian system in this respect is similar to the Classical Roman law, where marriage could be dissolved by <u>repudium</u>].

How is it determined whether a union is a marriage in our sense or a polygamous union? Speaking cenerally, The form of the ceremony is the criterion. The principles are more accurately compressed thus: If the union is entered into in the form prescribed by the lex loci celebrationis for marriages in our sense, it is a marriage in our sense, and that even though the husband or both spouses are capable of entering into a polygamous union by their personal law, Rex v. The Superintendent Registrar of Marriages, Hammer-:smith 1917 1 K.B. 634; Chetti v. Chetti 1909 P. 67, where the Court granted judicial sexparation in a marriage cele-:brated in London against a Hindu domiciled in India, and over-ruled inter alia his contention that the marriage was a polygamous one and consequently not within the matrimonial jurisdiction of the Court; Lendrum v. Chakravarti 1929 S.L.T. 96, MacDougall v.Chitnavis 1937 S.C. 390, Mangrulkar v. Mangrulkar 1939 S.C. 239, when marriages in Scotland with Hindus domiciled in India were held to be monogamous; Brinkley v. A.G. 1890 15 P. 76; Westlake Sec. 34(a)) and even-if-a prior-polygamous marriage had been validly -ontored (Rex v. Naguib 1917 1 K.B. 359). <del>into</del>-If/

-If the union ha ${f S}$  been entered into in a form for polygamous marriages, it is not a marriage in our sense. Hyde v. Hyde 1866 L.R. 1 P.D. even though celebrated in this country, In re Abdul Majid Belshah, Times Newspaper December 16th, 18th, 1926, January 14th, 18th, 1927, 1932 L.Q.R. at p. 348; In re Ullee 1885 53 L.T. (N.S.) 711 or even though both the parties were single at the time and intended monogamy. Hyde v. Hyde supra; In re Bethell 1887 38 Ch.D.220; S.G.Vesey-Fitzgerdd in 1931 L.Q.R. p. 253 takes the opposite attitude that a union between persons capable of contracting a polygamous union, and validly doing so in a polygamous form, should be regarded as a marriage in our sense if they were both single at the time and intended the union to be monogamous, and this has the support of the American case of Royal v. Cudahy Packing Company (1922) 195 Iowa759 .

Súch a union entered into in a polygamous form is a valid polygamous union, and as such the subsidiary effects of it, e.g. the legitimacy of the children, are entitled to the recognition of our Courts, if the husband was capable of entering into a polygamous union by his personal law, and the union is celebrated in the form prescribed by that law for polygamous unions, Hyde v. Hyde supra at p. 138) even though celebrated in a country where polygamy is not permitted. This last clause is necessary in the interests of just reciprocation. It is only proper that we should permit Moslems to contract their institution according to their forms in this country, when we claim that our subjects are validly married in the Christian sense if they marry in an Eastern country, where the use of the local form is impossible, as nearly as may be in conformity with the Scots Common Law (See p. )₩.E. Beckett in 1932 48 L.Q.R. at p. 366. In In Re Abdul Majid/

Majid Belshah, supra, and In re Ullee, supra, Moslems domiciled in Bagdad and India respectively contracted polygamous marriages in England according to the Moslem rites, and these were regarded by the English Courts as valid polygamous unions under which the children might be legitimate. ₩.8. Beckett states (Ibid) "It is, moreover, well known that Mohammedan marriages are from time to time performed at the mosque in Woking." Westlake Sec. 34 b. A union entered into in a polygamous form is not a valid polygamous union, the subsidiary effects of which our Courts will recognise, if the husband has not the power by his personal law to enter into a polygamous union; In re Bethell 1887 38 Ch.D. 220 - the husband was domiciled in England and although the union was entered into in tribal territory, where polygamy was lawful, according to the polygamous form, the marriage was not only held not to be a marriage in our sense, but the children were held to be illegitimate, showing that it was not even a valid polygamous union; such a union is not a monogamous union either, it is a complete nullity.

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What now is the recognition that our Courts extend to a polygamous union? If the union does not conform to our conception of marriage, our Courts will not entertain a Our Courts will not divorce, matrimonial suit thereanent. or judicially separate the parties. Hyde v. Hyde 1866 L.R. The ratio of this is the impossibility 1 P. & D. 130). of applying our law of marriage, and our marital remedies, to a totally different institution. It would be ridiculous to give a third Hindu "wife" a divorce for adultery because the husband had married a fourth "wife". "We have in England no law framed on the scale of polygamy or adjusted to its requirements" per Lord Penzance at p. 136. But it is going too far to say that our Courts will (recognise a polygamous union at all, and will give no effect to it whatever. Lord Penzance concluded his judgment in Hyde v. Hyde With/

with these words- "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons that people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not en-:titled to the remedies, the adjudication or the relief of the matrimonial law of England. [1866 L.R. 1 P. & D. at p. 138].

The rule appears to be that if the polygamous marriage was validly entered into, it was validly entered into if the husband was capable by his personal law of contracting a polygamous marriage union and such a union has been celebrat-:ed according to the forms of the law. The ceremony may be performed anywhere, even in this country where polygamy is not permitted to persons whose personal law does not permit See supral although our Courts will not recognise jt. that the man and the woman are husband and wife and will not entertain matrimonial causes between them, it will recognise the polygamous union to a certain extent and accord recog-:nition to certain subsidiary effects of the marriage. Thus the children are legitimate, [In re Ullee supra . See\_dat's f Executor v. The Master, South African case, (1917) App. Div. 302,1932 48 L.Q.R. 344 n. & 349 and on the death of their father intestate entitled to succeed to his estate in accord-:ance with the law of his domicile. In re Abdul Majid Belsah supra. The position in regard to the children seems reason :ably clear, but it is an undecided point in this country whether any subsidiary effects of marriage will be accorded Is she a wife to the extent of conferring on to the wife. her her "husband's" domicile; a right to Workmen's Compen-:sation; See American case Royal v. Cudahy Packing Co. (1922) 195 Iowa 759,1931 47 L.Q.R. at p. 261) or solatium in/

in respect of the death of her "husband"? In South Africa it has been held that the spouse of a polygamous marriage is not a "wife" either within the meaning of an immigration statute which entitled a woman, although otherwise a pro-:hibited immigrant, to enter the country if she was the wife of a person who was not a prohibited immigrant, / Esop v. Union Government 1913 13 C.P.F. 133; R. v. Subina 1912 T.D.P. 1079 7 or within the meaning of a rule which debars a wife from giving evidence against her husband in a criminal trial; / Nalana v. E. 1907 T.P. 407; F. v. Mboko 1910 T.P. 445\_7 nor is she a "surviving spouse" for the purposes of succession duty./ Seedat's (Executors) v. The Master supra. For these South African cases see 1932 48 L.Q.E. p. 349 7 In England it has recently been held that a prior polygamous marriage, invalidates a subsequent monogamous marriage, / Clayton v. Vasan, 1946 P. 67; Baindail v. Baindail 1945 (1 T.J.P. 549, Affd. 1946 62 T.L.F. 263. In re Millard (1887) I.I.F. 10 Mad. 218. The Registrar General refused to allow the celebration of a marriage between two Hindus, the woman having been married in childhood to another Hindu - The Scotsman August, 15th 1931. A prior monogamous marriage that is still subsisting would invalidate a subsequent polygamous union, because the two could not subsist together, and the prior one, valid at the time of the marriage, could not be defeated - Contra W.E. Beckett in 1932 48 L.Q.P. p. 364 7 and in view of that, an earlier dictum that, if one of the wives of a polygamous union came to this country and married again, the polygamous union would not be recognised to the extent of subjecting her to a charge of bigamy, [ Harvey v. Farnie 1880 6 P.D. 35 per Lush Lord Justice at p. 53\_7 may have to be considered. The question was left open in <u>Rex</u> v. <u>Naguib</u> 1917 1 K.B.359\_ If a polygamous "wife" came to this country, and some person said that because she was not married in the Christian sense she/

she was no true wife but an immoral woman living in fornication with a man not her husband, it has been suggested that she would surely have a good cause for an action of defamation in a Scots Court. / C.K. Allen in 1930 46 L.Q.R. at p. 309. He also says that it is inconceivable that a Moslem "married" to a wife of fourteen years would be liable to prosecution for carnally knowing his wife under the Criminal Law Amendment Act 1885. Agreed, but this result must depend on the good sense of the Crown not to bring a prosecution, for if one were brought would our Courts not be bound to convict, being bound by the statute, which is in general terms? 7 Whatever recognition is accorded to polygamous marriages, equivalent effect must be given to polygamous divorces. / Walton p. 372 7"... this is certain, that if the laws of one country and its courts recognise and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved," /Warrender v. Warrender II S. & McL. per Lord Brougham at p. 213 7 The Hammersmith Marriage Case / 1917 K.B. 634 7 refused effect to a polygamous divorce according to the law of the husband's domicile because the marriage was a monogamous one.

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If a polygamous union is not valid, because, for example, the husband's personal law does not permit polygamy, no recognition will be accorded to the union by our Courts, even to a limited extent. Thus the children will be illegitimate. <u>In re Bethell</u> 1887 38 Ch. D. 220, where the husband's domicile was English 7. The rule that certain subsidiary effects of a polygamous marriage will be recognised if such a marriage is permitted by the law of the matrimonial domicile, is in harmony with the principle that, the essential validity of a marriage in our sense is tested by the law of the matrimonial domicile. See post

p.

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# MAPPITAGE

#### Formal Validity

A marriage is formally valid if (a) celebrated in accordance with the forms required by the <u>lex loci</u> <u>celebrationis;</u> Fraser p. 1309; Dicey p. 732; Cheshin p. 322; Westlake Sec. 17; Savigny p. 292; <u>Administra</u> <u>of Austrian Property v. Von Lorang</u> 1926 S.C. 598, Revd. 1927 S.C. (H.I.) 80.7; (b) celebrated in a foreig country in compliance with the Foreign Marriages Acts 1892 [55 and 56 Vict. c. 23]; (c) when celebrated in a foreign country in which the use of the local form is impossible, it is celebrated as nearly as possible in conformity with the requirements of the law of/ of the person's domicile. [Fraser p. 1313; Westlake Sec. 26: Cheshire pp. 328-332; Dicey pp. 742-744 and 758 (n); Story Sec. 119; <u>Ruding v. Smith</u> 2 Hagg. Cons. 371; <u>Phillips v.</u> <u>Phillips</u> (1921) 38 T.L.R. 150; <u>R. v. Brampton</u> 1808 10 East 282].

# (a)

42.

"If a marriage's good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony that constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage." [Berthiaume v. Dastous 1930 A.C. (P.C.) at p. 83].

Striking illustrations of this doctrine occurred as a result of the Scots Common Law, that allowed marriage by consent de praesenti, by promise subsequente copula, and by cohabitation with habit and repute. [The first two methods of contracting marriage have been abolished by the Marriage (Scotland) Act 1939 Sec. 5 5 Scotch parties ware not married by exchanging consent for co-habiting with habit and repute solely in another country where these rules did not apply and where a marriage ceremony was required Macculloch v. Macculloch 1759 Mor. 4591, 2 Pat. 33; contra Strathmore v. Forbes 1751 6 Pat. (Supp.) 634; Sassen v. Campbell 1324 35, 159, See, 2 W. & S. 309; Cullen v. Gossage 1850 12D. 633; Johnstone v. Godet 1813 Ferguss Cons. Reports 8; Campbell v. Campbell 1867 5 M. (H.L.)115; Napier v. Napier 1901 Hume 367; Fergusson Consist. Law p. 27; Walton p. 315; Fraser p. 1309 and conversely subjects of another state coming to Scotland and exchanging consent were validly married, notwithstanding that a ceremony was prescribed by their law. (Fergusson ibid. Hence/

It has been said (Sottomayor v. De Barros (No. 1) 1977 P. 1; Chetti v. Chetti 1909 P. at p. S2: Cheshire p. 229, 322; Dicey p. 732, 736 that cases where a marriage without the consent of parents, which was not required by the lex loci celebrationis but was required by the lex domicilii of the parties, was held valid Ogden v. Ogden 1908 P. 46; Compton v. Bearcroft (1769) 2 Hagg. Cons. 444N.; Middleton v. Janverin (1802) 2 Hagg. Cons. 437; Scrimshire v. Scrim-:shire 1752 2 Hagg. Cons. 395; Simonin v. Mallac 1860 2 Sw. & Tr. 67 are concerned with the question of the formalities of the ceremony and if this attitude is adopted it is possible to quote these cases as illustrations of the rule that the lex loci celebrationis governs the formalities of marriage. This classification of the requirement of consents as a formality, however, is not regarded either as correct; or necessary: it is as simple to state that there is an exception to the applicability of the law of the domicile to capacity to marry, namely that our Courts will not recognise any restriction imposed by the law of the domicile on persons of marriageable age simply through the refusal of parents or guardians to consent to the marriage See post p.

The Marriage With Foreigners Act 1906 [6 Edw. 7 Ch. 4] provides for the granting of certificates to British subjects who desire to be married abroad according to the <u>lex loci</u> where such certificates are required by the <u>lex loci</u> that there is no impediment to the marriage according to our law.

That/

That the parties have only gone to the <u>locus</u> <u>celebrationis</u> in order to evade troublesome formalities of their own law as to the ceremony, publication, or consents of parents, is no objection to the validity of the marriage. <u>/ Dalrymple v. Dalrymple</u> supra; <u>Scrimshire v. Scrimshire</u> 1752 2 Hagg. Cons. 395; <u>Simonin v. Mallac</u> 1860 2 Sw. & Tr. 67; Fraser p. 1301. <u>Contra</u> Huber 1, 39; J. Voet 23, 2, 4; in France such conduct constitutes <u>fraude à la loi</u> and the marriage is invalid.

----- Nor will our Courts hold that a marriage, which a person has validly contracted according to the forms of the <u>lex loci</u> of a country other than his domicile, is invalid because he is disabled by his domiciliary law from marrying otherwise than in accordance with the forms of his domiciliary law. / Papadopoulos v. Papadopoulos 1930 P. 557

A British consul, on being satisfied by personal attendance that a marriage between parties of whom one at least is a British subject, has been duly solemnised in a foreign country in accordance with the local law of the country, may register the marriage as having been so solemnised. Foreign Marriages Act 1892 Sec. 18\_7

According to the principle of exterritoriality, an Ambassador's residence, merchant ships on the High Seas, warships wherever they are, and the lines of an army serving abroad, are considered for certain purposes as part of the country to which the Ambassador is accredited or the ship or army belongs. At Common Law if a marriage is celebrated in a British Embassy abroad according to the formalities of the English Common Law, that marriage is formally valid because by a fiction it is in accordance with the <u>lex loci</u> <u>celebrationis</u>, <u>Este</u> v. <u>Smyth</u> 1854–18 Beav. 112\_7, or at anyrate our Courts would hold it valid. Conversely, if a marriage is celebrated at a foreign Embassy in England. according to the forms required by the foreign law, that marriage/ marriage would be formally valid because by a fiction, in accordance with the <u>lex loci celebrationis</u>. <u>Bailet</u> v. <u>Bailet</u> 1901 17 T.L.R. 317\_7. Similarly the marriage of a British soldier within the lines of a British Army serving abroad, and a marriage on board a British warship laying in port at Cyprus/ Cyprus according to the formalities of the English Common Law were valid  $(\underline{R. v. Brampton} (1808)10. East 282; Culling$ <u>v. Culling</u> 1896 P. 116]. In the case of Embassies this is only so when both of the contracting parties are subjects of the State at whose Embassy they are married. (Petreis v. <u>Tondear</u> 1790 1 Hagg. Cons. 136; Lloyd v. Petitjean (1839) 2 Curt. 251; Bar p. 374]. In the case of ships on the High Seas there is no reason to restrict the application of the rule, and the marriage of any persons according to the law of the ship's nationality would be valid because according to the lex loci celebrationis.

It is probably the forms of English law that have to be observed in British Embassies, on British warships, and within the lines of a British Army abroad, in harmony with the principle that when British subjects establish a colony Dicepp. 741a Lauderdale Reerage Case 1885 abroad, they carry English law with them. Contra Walton p. "A.C. 321, 323 But on a merchant ship on the High Seas it is 744] probably the forms of the law of the country where the ship is registered that have to be recognised. So that on a blasgow the forms of Scots law, and on a British London the forms of English law, ship British ship registered at L.323 would apply. Contra Dicey p. 74M

The Gommon Law possibility of being married according to English forms at a British Embassy, within the lines of a British army, or on board a British warship abroad, have been extended by statutory provisions for marriages at British Embassies and Consulates and within the lines of a British Army or on board a British warship abroad. These provisions implement and do not supersede or impair the Common Caw as to marriages abroad. [Poreign Marriages Act 1892 Sec. 23]. The Foreign Marraiges Act 1892. [55 & 56 Vict. c. 23, a consolidating enactment, repealing 4 George IV/

(b)

IV c. 91; 12 and 13 Vict.c.68;31 and 32 Vict.c.61;53 and 54 Vict. c.47;54 and 55 Vict.c.74. See also 4 George IV c.67;5 George IV c.68; 3 and 4 William IV c. 45; 17 and 18 Vict.c.88;21 and 22 Vict.c.46;22'and 23 Vict.c.64;27 and 28 Vict.c.77;30 and 31 Vict.c.2; 30 and 31 Vict.c.93; 42 and 43 Vict.c.29; 49 Vict. c.3;55 and 56 Vict.c.23; 2 and 3 George V c.15; which remove doubts as to marriages already celebrated abroad provides that all marriages between parties of whom one at least is a British subject, solemnised as provided in The Acts in any foreign country before a "marriage officer" shall be as valid. in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law. (Sec.1.) "Marriage officers" are such persons as are authorised by a Secretary of State in writing to act. Ambassadors, consuls, [1892 Act Sec. 1] governors and high commissioners may be authorised, and the authority may be in favour of the person holding an office for the time being. An officer may by regulation be authorised to act as a marriage officer without written authority and by the Foreign Marriages Order in Council 1913, Ambassadors, or any member of the diplomatic service not below the rank of Secretary, may act (Sec.4. (Sec.11). The Act has requirements as to residence and notice Secs. 2,3,6,7,8, and see Foreign Marraiges in Council Order 1913] and provides that "the like consent shall be required to a marriage under this Act as is required by law (Sec . 4. X). to marriages solemnised in England" The last provision was not limited to persons domiciled in England, and would appear to apply to persons domiciled in Scotland, although no consents The marriage must be solemnised at are required by Scots law. the official house of the marriage officer, with open doors, and may be solemnised by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnised by the marriage officer/

officer (sec.8]. A marriage under the Act may be solemnised on board one of Her Majesty's Ships on a foreign station, [Sec.12] and the Commanding Officer of the ship is the marriage officer. [Foreign Marriages Order in Council Sec. 20]. The Commanding Officer, before he solemnises a marriage, shall be satsified that, at the port or place where the marriage is solemnised, sufficient facilities do not exist for the solemnisation on land, either according to the lox loci or according to the Act. [Foreign Marriages Order in Council Sec.20].

The Acts contains provisions for avoiding objections to the formal validity of marriages under it. After the marriage has been solemnised, it shall not be necessary, in support of the marriage, to give any proof of the residence or consent required, or of the authority of the marriage officer, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage. [Sec.13].

The marriage is registered with the marriage officer. [Secs. 9 and 10] and # British consul, on being satisfied by personal attendance that a marriage between parties of whom one at least is a British subject, has been duly solemnised in a foreign country in accordance with the local law of the country, may register the marriage as having been sosolemnised [Sec.18].

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of the particular ceremony. [Waldergrave Peerage Case (1837) 4 Cl. & F. 649 under 4 George 4 c. 91 now repeated, that is to the same effect.]

A marriage duly solemnised in a foreign country in accordance with the Act is formally valid here, even if declared invalid as regards form by the Courts of the locus celebrationis. Hay v. Northcote 1900 2 Ch. 262 - Ittis obvious that although a marriage solemnised in accordance with the Act is formally valid in the eyes of our law, it may not be so in the eyes of the lex loci celebrationis. "It is, of course, well settled that a marriage may be valid in one country and at the same time void in another. Hay v. Northcote supra per Ferwell Justice at p. 265 . To minimise the occasions on which this will happen, it is provided that a marriage officer shall not be required to solemnise a marriage, or to allow a marriage to be solemnised in his presence, if in his opinion the solemnisation thereof would be inconsistent with International law or the comity of nations That. Sec. 19. But this is a vague provision of doubtful value. The provision might prevent the marriage of, say first cousins in a country where that is not per-:mitted, although it is permitted by our law, but it hardly helps on the question of formal validity. Further, if it appears to the marriage officer that the woman about to be married is a British subject, and that the man is a foreigner, he must be satisfied that: -

(a) the marriage will be recognised by the law of the country to which the foreigner belongs; (presumably belongs by nationality) or,

(b) some other marriage ceremony, in addition to that under the Act, has taken place, or is about to take place, between the parties, and that such other ceremony is recognised by the law of the country to which the foreigner belongs; or, (c) the leave of the Secretary of State has been obtained. [Foreign Marriages, in Council Order 1913 Sec.2.] [Foreign Marriages, in Council Order 1913 Sec.2.]

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This still does not cover all cases, and a marriage under the Foreign Marriages Act 1892 may be valid here but invalid abroad. This is inconvenient. Another unsatis-:factory feature is that, while we claim that marraiges celebrated abroad at British Embassies are valid if one of the parties is a British subject, the marriage of foreigners. at their Embassy here is valid only if both of the parties are nationals of the State whose Embassy it is. Logically we should concede as much as we claim. This might be done by abandoning the theory of exterritoriality as the basis for the validity of the marriage of foreigners at their Embassy here, and by adopting the Continental theory about formalities of marriage, namely that the forms of the locus celebrationis are not imperative but optional, an alternative form being the form of the parties' personal law [Westlake \$27 (which would be that form which the personal law pro-:vided for marriage abroad). Therefore, if the law of the domicile of the husband, say French law, permitted marriage abroad in certain circumstances when only one of the parties was French, that marriage would be valid because in accord-:ance with the lex domicilii. A Will is validly executed if executed according either to the lex domicilii or the lex loci actus, so why not a marriage?

# <u>(c)</u>

The purpose of the rule is to provide facilities for persons who might find themselves in a country where the local form of marriage could not beused because they were not of the religion which the local law required them to be for the use of the local form, [Lord Cloncurry's Case 1811, Cruise on Dignities p. 276] or because the local form was for polygamous marriages. The use of the local form must be impossible: it is not sufficient that it imposes difficult-:ies, e.g. that it requires six months previous residence of the parties. [Kent v. Burgess (1840) 11 Sim 361].

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The rule will not apply in this form if the persons are British subjects, and the marriage takes place in a *Lew* British colony or in a country which has no civilised legal system. In these cases the marriage would presumably have to take place according to the forms of the English **E**ommon **f**aw as the <u>lex loci celebrationis</u>, in accordance with the principle that British colonists carry English law with them to their new home. <u>Lattour v. Teesdale</u> (1816) 8 <u>Welfenden v. Welfenden Rich P.64</u> Taunt 830; Fraser p. 1310

It is difficult to say what is the Scots law on marriage applicable to a marriage by domiciled Scots in a foreign country where the use of the local ceremony is impossible. It is clear that statutes like the Marriage Notice (Scotland) Act 1878, [41 and 42 Vict. c. 43] and The Marriage (Scotland) Act 1939, 2 and 3 George IV c. 34 in so far as they prescribe formalities for religious and civil marriages in Scotland, have no application to marriages celebrated by Scots people abroad. But the latter Act provides: [Sec.5] "No irregular marriage by declaration de presenti or by promise subsequente copula contracted after the commencement of this Act shall be valid". This clause is in general terms, and notwithstanding that the Act is entitled "An Act to amend the law relating to the constit-:ution of marriage in Scotland", would appear to apply to marriages wherever they take place. In re Groos 1904 P. 269. Consequently the Scots law of marriage applicable to domiciled Scots in a foreign country where the use of the local form is impossible would appear to be: -

1. <u>Irregular marriage</u>: only marriage by cohabitation with habit and repute. The rule has already been stated [supra p. ] that Scotch parties are not married by cohabiting with habit and repute in a foreign country where this form of constituting marriage is not recognised, but that/

that rule only applies where there is a local form of marriage which the parties could have used. Where there is no local form of marriage which the parties could use, they will be validly married if they cohabit with habit and repute.

2. <u>Marriages by clergyman</u>: The marriage should be as nearly as possible in the form for marriage by a clergyman in Scotland.

## CAPACITY and ESSENTIAL VALIDITY of MARRIAGE.

General nciples.

Subject to the exception, mentioned, a marriage is valid as regards the capacity of the parties if each party has capacity by the law of his or her domicile, (Fraser, Parent & Child p. 722 (contra Fraser, Husband & Wife p. 1299); Bar p. 344, 352-4; Savingy p. 291; MacDougall v. Chitnavis 1937 S.C. per Lord Moncrieff at p. 406. There is no pre-:cedent to support this statement; the only authority is the analogous position of marriage contracts (q.v.). Dicta from English cases are usually quoted here, e.g. "as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile \_ Sottomayor v. De Barros (No. 1) 3 P.D. per Court of Appeal at p. 5; or "There could be no valid contract (of marriage) unless each was competent to contract with the other\_ Mette v. Mette 1 Sw. & Tr. 416 per Sir Cresswell Cresswell at p. 423 but as these cases do not deal with capacity as here meant, it would be unfair to quote them in support of the statement and by the lex loci celebrationis, There is no authority for this, but it Baty, Polarized Law, p. 60; seems reasonable: Cheshire p. 222; Westlake Sec. 19] and otherwise is invalid. By capacity is meant only the question whether the person is old enough and same enough The rule is subject to this exception: when the to marry. parties are by the laws of their respective domiciles of marriageable age, or Courts will not recognise any incapac-:ity/

:ity attached by the law of the domicile of either through refusal of parents or guardians to consent to the marriage, t is not recognised by the <u>lex loci</u> celebrationis. MacDougall v. Chitnavis 1937 S.C. 390 per Lord Moncrieff at p. 407 (commenting on Simonin v. Mallac and Ogden); This, if is submitted, is the correct interpretation of the decisions in Simonin v. Mallac 1860. 1 Sw. & Tr. 67; Ogden v. Ogden 1908 P. 46; Compton v. Bearcroft 1769 2 Hagg. Cons. 444N. It is noobjection to the validity of a marriage that the parties married in the locus celebrationis for the purpose of avoiding the law of their country as to consents of parents. - Dalrymple v. Dalrymple (1811) 2 Hagg. Cons. 54, and subsequent Scots cases Ferguss. Consist. Law p. 23; Scrimshire v. Scrimshire (1752) 2 Hagg. Cons. 395; Simonin V. Mallac (1860) 2 Sw. & Tr. 67. In other countries, e.g. France, this amounts to fraude a la loi and the marriage is invalid. felow

Subject to the exceptions mentioned, a marriage is valid as to essentials if it satisfies the requirements of the law of the matrimonial domicile, Bar pp. 352-4; Savingy p. 291,2; Cheshire pp. 218-233; Beattie v. Beattie 1866 5 M 181; Brook v. Brook 1861 9 H.L.C. 193; MacDougall v. Chitnavis supra; Mette v. Mette 1 Sw. & Tr. 416; Scott v. Attorney General 11 P.D. 128; In re Bozzelli 1902 1 Ch. 751; In re De Wilton 1900 2 Ch. 481. This statement of the law is con= :sistent with the decisions in, but not the ratio decidendia of: Sottomayor v. De Barros (No.1)1877 2 P. 81, Revd. 1877 3 P.1; Sottomayor v. De Barros (No.2) 1879 5P. 94 (where a question that was truly one of the essential validity of the marriage was treated as a question of capacity). It is inconsistent with both the decision and the ratio of In re Paine 1940 1 Ch. 46 (where essential validity was also/

also treated as capacity) and the lex loci celebrationis Lendrum v. Chakravarti (0.H.) 1929 S.L.T. 96 per Lord Mackay: "The capacity of each spouse is ruled primarily by the laws of his own domicile, but also he must be able to satisfy the law of capacity for marriage of the lex loci celebrationis (p. 103) For "capacity" read "essential validity" for the case is really about essential validity. This case has been over-ruled by MacDougall v. Chitnavis be ca ile. 1937 S.C. 390 but not the cofore of disagreement with this Cheshire p. 222; Westlake Sec. 19) as to principle. essentials, and is invalid if it violates either. By essential validity is meant the question whether the marriage is illegal because the parties are within the prohibited degrees of relationship, or because the marriage is prohibited by some other rule of law. The rule is subject to this exception: our Courts will not recognise any prohibition of the law of the matrimonial domicile which prevents marriage simply because one of the parties is of a certain religion or caste, MacDougall v. Chitnavis supra; Chetti v. Chetti 1909 P.67; Westlake Sec. 22; Cp. In re De Wilton 1900 2 Ch. 481. Thus when a Scotswoman was married in Scotland to a Hindu domiciled in India and pled in an action of nullity of marriage that he was not capable # by the law of his domicile of contracting a marriage outside Hinduism, it was held that this religious disability did not invalidate the marriage. But the marriage would pro-:bably be invalid if the place of celebration of the marriage was the country which imposed the prohibition or is in holy orders, ("Or suppose a priest or monk domiciled in a country where the marriage of sucha person is prohibited were to come to this country and marry an Englishwoman, could the Court be called on at the instance of the husband to/

to declare that the marriage was hull and to give a legal sanction to his repudiation of his wife?" Sottomayor v. De Barros (No.2)1879 5P. 94 per Sir James Hannen at p. 104, referred to with approval in Chetti v. Chetti supra, and MacDougall v. Chitnavis (supra) per The Lord Ordinary, Jamieson. See comment at end of last note or can only marry within a selected group of persons, "It is still the law in some of the United States that a marriage between a white person and a 'person of colour' is void. In some States the amount of colour that will incapacitate is undermined: in North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person. Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void?" Sottomayor v. De Barros (No.2) 1879 5 P.D. 94 per Sir James Hannen at p. 104. НΘ would have taken the case of a man domiciled in North Carolina had he regarded the question as one of essential validity instead of capacity. The Nazi Nuremberg Law of September 1935 prohibited the marriage of Germans and Jews and a marriage contracted abroad with the view of evading the law may be declared void at the instance of the Public Prosecutor. This prohibition would also be disregarded by our Courts. Contra Cheshire pp. 148,9. See comment at end of last note \_\_\_\_

The words of Lord Moncrieff in <u>Macdougall v. Chitnavis</u> 1937 S.C. 390 are appropriate to the whole of this class of exceptions to the applicability of the law of the matrimonial domicile. "If, however, in place of a parper question of 'capacity' to marry the question <del>would</del> be whether the law of the domicile allows its marriageable citizens to make selected marriages or to marry without consent, I may say,

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as at present advised, that I find no authority in these cases that directs me to regard such a question as being one upon which our Courts are bound to consult and apply the law of the domicile, or to enfroce any such restrictions or prohibitions as that law may impose. There is, in my opinion, a radical distinction between capacity to marry and liberty to marry; between the ius matrimonii of adult citizenship on the one hand and an imposition of fetters upon adult citizenships on the other. It is recognised that even the lex domicilii will not be allowed to operate in poenam" or that is penal. Westlake Sec. 22. In Scott v. Attorney General 11 P.D. 128, as explained in Warter v. Warter 15 P.D. 152, the prohibition against a divorced woman re-:marrying was penal and disregarded, but in any event it was a prohibition of the woman's domicile and not of the matrimonial domicile. A prohibition in a foreign law against adulterers remarrying should be regarded as penal (Fraser p. 1305) and denied effect. Beattie v. Beattie 1866 5 M. 181 is not conclusively against this view, because in that case the prohibition against knowing adulterers marrying was a prohibition both of the lex domicilii and the lex loci celebrationis. Other countries would probably classify the Scots Act 1600 c. 20 which prohibits adulterers from marrying as penal and disregard it, and accordingly the marriage of Scots adulterers in England would be held Walton (p. 331) puts the valid by the English Courts. question whether our Courts would hold the marriage in England of such parties as valid, but surely they could not, for the statute directly states that the marriage of these persons, named in a decree of the Scots Court is null, and our Courts are surely bound to apply this statute. But see Kynnaird v. Leslie (1866) L.R. 1 C.P. 389.

of the The law of the matrimonial domicile/prior marriage determines/

determines whether parties are prevented from marrying because of the subsistence of the prior marriage <u>[Martin</u> <u>v. Buret</u> (O.H.) 1938 S.L.T. 479; <u>Warter v. Warter</u> 15 P.D. 152. The question here is whether the prior marriage has been validly and finally dissolved.7 subject to the exception that if the prior marriage is dissolved according to the law of the matrimonial domicile of that marriage, our Courts will not recognise a penal restriction against remarriage imposed by that law on one of the parties. <u>Scott</u> v. <u>Attorney</u> <u>General</u> 11 P.D. 128; and see comment thereon in <u>Warter</u> v. <u>Warter</u> supra. Cp. penultimate note. 7

The <u>lex loci celebrationis</u> will determine any question as to whether consent has been precluded by duress, <u>Sottomayor v. De Barros</u> 1877 2 P. 81, revd. 1877 3 P. 1, 1879 5 P. 94; <u>Hussein v. Hussein 1938 P. 159; Korel v.</u> <u>Korel</u>, The Times May 28th 1921 7 or mistake, <u>MacDougall v.</u> <u>Chitnavis 1937 S.C. 390; Wilson v. Horn (0.H.) 1904, 41</u> S.L.R. 312; <u>Valier v. Valier 1925 133 L.T. 830; Mitford v.</u> <u>Mitford 1923 P. 130; Cheshire p. 346 7 but the over-riding</u> proviso is always present, that our Courts will not recognise a contract which contravenes an essential principle of justice or morality, and therefore they will not recognise a marriage, even although valid by the <u>lex loci celebrationis</u>, which has been brought about by what our Courts regard as coercion. <u>Kaufman v. Gerson 1904 1 K.B. 5917</u>

If the question is not whether the marriage is void, but whether the marriage is voidable, the issue is similar to that in a divorce case: The Courts of the domicile of the husband at the time of the action alone have jurisdiction, and they try the question by their own law. <u>Inverclyde</u> v. <u>Inverclyde</u> 1930 P. 29; <u>Administrator of Austrian Property</u> v. <u>Von Lorang</u> 1926 S.C. 598 per Lord President Clyde, 1927 S.C. (H.L.) 80. Not followed in <u>Easterbrook</u> v. <u>Easterbrook</u> 1944 P. 10; and <u>Hutter</u> v. <u>Hutter</u> 1944 P. 95; but the ratio of the two last mentioned cases is not one which affects Scotland/ Scotland - see supra p. The ground for avoiding a valid marriage which occurs most frequently in legal systems is impotency. The English Matrimonial Causes Act 1937 Sec. 7, however, introduces several new grounds for avoiding a marriage, namely :-

(1) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.
(2) that either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1927, or subject to recurrent fits of insanity or epilepsy.
(3) that the respondent was at the time of the marriage suffering/

suffering from venereal disease in a communicable form, (4) that the respondent was at the time of the marriage pregnant by some other person than the petitioner.

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These principles are always subject to two over-riding A marriage valid as to formalities, capacity. provisos. and essentials, by the several systems of law that determine these different questions, will not be recognised in or public policy Scotland if (1) contrary to religion and morality Fenton 3 m. Q. 497 v. Livingstone 1859 <del>21 D. (H.L.</del>); Beattie v. Beattie 1866 This question is dealt with under "Peral laws and "The Exelusion 5M. 181. Public Policy" f-a law that would normally be applicable."](2) a British <del>of a</del> statute is directly applicable to the issue that directs otherwise, for our Courts are bound to follow the statute. E.g. The Royal Marriage Act 12 George III c. 11 provides that no descendant of George III shall be capable of contracting matrimony without the previous consent of the Sovereign in Council, and that every marriage without such consent shall be null and void. A descendant of GeorgeTII married at Rome in accordance with the form was required by the lex loci without having obtained the necessary con-:sent. The marriage was held by the English Courts to be void and the children illegitimate. Sussex Peerage Case 1844 11 CL. & F. 85). The descendant in question was a domiciled Englishman and a British subject, but the English Courts would have had to hold the marriage invalid even if he had been domiciled in Italy [Dicey p. 749]. Foreign Courts would probably not give effect to this Act unless the descendant was domiciled in a British country. [Ibid].

While it is submitted that these are the correct general principles, it is a task of no little difficulty to expound the authority for them. There us little doubt (T) that the English text-writers are embodying the result of the majority of the English decisions [The Scottish cases are few and insufficient for the deduction of a complete set of/ (T) Dicey pp.732 et sequ.Westlake sec.21.Halsbury's Laws of

England Vl p. 286

of principles on this point. They are, in general, con-:sistent both with the statement of the English text-writers and with the view here expressed : <u>Beattie v. Beattie</u> 1866 5 M. 181; <u>MacDougall v. Chitnavis</u> 1937 S.C. 390; <u>Lendrum</u> <u>v. Chakravarti</u> 1929 S.L.T. 96 (in part over-ruled by above case); <u>Martin v. Buret</u> (0.H.) 1938 S.L.T. 479] when they state the law to be as follows:-

1. To be a valid marriage each of the parties must have the capacity to marry the other according to the law of his or her respective domicile <u>Brook v. Brook</u> 1861 9 H.L.C.193; <u>Mette v. Mette 1 Sw. & Tr. 416; In re De Wilton</u> 1900 2 Ch. 481; <u>In re Bozzelli</u> 1902 1 Ch. 751; <u>Sottomayor</u> <u>v. De Barros</u> (No.1) 1877 2 P.81. Revd. 1877 3 P.1; <u>In re</u> <u>Paine</u> 1940 1 Ch. 46; <u>Peal v. Peal</u> 1930 143 L.T. 768].

2. If the marriage is celebrated in England between persons of whom one has an English and the other a foreign domicile it is not invalidated by any incapacity which, though existing under the law of the foreign domicile does not exist under the law of the English [Sottomayor 1879 SP.94 v Letti 1908 P.67] v. De Barros (No. 2)(supre); Chetti (supre);

3. Capacity to marry the other means not only (that the party must have the necessary age and sanity,) but that there must be no prohibition in the domiciliary law of either against marriage with the other (e.g. on the ground of near relationship). <u>Brook v. Brook</u> (supra) did not say this, because the question there which was whether a marriage between a man and his deceased wife's sister was valid was treated as a question of the essential validity of the marriage. But <u>Sottomayor v. De Barros</u> (No.1) (supra) started the classification of this question of whether a marriage was invalid because of the relationship of the parties, as a question of capacity, and this attitude was maintained in <u>Sottomayor v. De Barros</u> (No.2) 1879 5 P.94, <u>Chetti v. Chetti</u> 1908 P.67, In re Paine supraf

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4. The requirement of parental consent for marriage is not a question of the capacity of the contracting parties but a formality of the ceremony, to be ruled by the <u>lex loci celebrationis</u>. <u>Sottomayor v. De Barros</u> (No.1) (supra) per curiam; <u>Chetti</u> (supra) at p. 82 and the earlier cases reconsidered in this light; <u>Compton v</u>. <u>Bearcroft</u> 1769 2 Hagg.C.444N; <u>Middleton v. Janverin</u> 1802 2 Hagg.C.437; <u>Scrimshire v. Scrimshire</u> 2 Hagg.C. 395; <u>Simonin v. Mallac</u> 1860 2 Sw. & Tr. 67; See <u>Ogden v. Ogden</u>

59.

1908 P.46

Principle 2 has rightly incurred the censure of Cheshire in these words: "If this is our contribution to the Science of Laterational Primete Law the reputation of England for insular pride and complacency is deserved. A domiciled Englishman is to remain subject to the English law of capacity in the event of a marriage abroad, but no respect is due to an incapacity affecting a domiciled foreigner who marries in England. That such an inelegant theory should be maintained destroys any affect-:ion which we might have felt for the doctrine that capacity depends on the <u>lex domicilii</u> of each party" [p. 228].

As to Principle 4 it is quite clear that in sound theory a rule of law that parental consent is required before a child can enter into marriage is a limitation of the capacity of the child and a question of capacity. It is admittedly desirable that the rules required by Continental systems of law as to parental consents should not obstruct the marriage here of persons of marriageable age, and that the old cases where the <u>lex loci celebrationis</u> was applied in this respect should be followed. But this does not require wrong classification. It is simple enough to say that the applicability of the law of the domicile of each party to the question of their capacity

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to marry is subject to the exception that when the parties are by the laws of their respective domiciles of marriageable age, our Courts will not recognise any incapacity attached by the law of the domicile through refusal of parents or guardians to consent to the marriage. And this method of stating the law harmonises with the rule that the law of the matrimonial domicile governs the essential validity of the marriage, except that our Courts will not recognise any prohibition that prevents marriage simply because one of the parties is of a certain religion or caste, or is in holy orders, or can only marry within a selected group of persons. Ignoring requirements for parental consent when the parties are otherwise marriageable is similar to ignoring rules that priests cannot marry or that a man may not marry out of his caste or marry a negress, and is done in the interests of liberty. There is no reason why it should not be freely admitted \_for the tendency is quite admirable, that our recognition of the applicability of the law of the domicile of each party to the question of capacity, and the applicability of the law of the matrimon-:ial domicile to the essential validity of marriage should 00. be limited in the interests of freedom, for the tendency is quite.

For a criticism of principle 3 it will be necessary to consider the nature of the various impediments to marriage.

## THE IMPEDIMENTS TO MARRIAGE.

There are a number of possible impediments to marriage: (1) Incapacity of the parties or one of them through nonage. In our law a marriage between persons either of whom is under the age of sixteen is void (Age of Marriage Act, 1929), and there is no need for parental consent. In other systems of law there is an age below which marriage cannot be con-:tracted and another age below which marriage can only be contracted with parental consent (e.g. the law of France). (2) Incapacity of one of the parties through insanity. (3) That the parties are within the prohibited degrees of/

of relationship.

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(4) That the parties are prohibited from marrying each other by virtue of some other rule of law e.g. many systems of law prohibit adulterers from marrying [For Scotland see The Scots Act 1600 c.20. In <u>Beattie v. Beattie</u> 1866 5M.181 where a similar rule in the law of Lower Canada was enforced; see also <u>Scott v. Attorney General</u> 11 P.D. 128] Similar rules which may, or might in the future, occur in the legal systems of foreign countries, are prohibitions against marriage with a person with a transmissible congenital defect, against marriage with mental defectives or with persons who have or have had venereal disease. [1st 2nd and 3rd of these are grounds for <u>avoiding</u> a marriage null <u>ab initio</u> Matrimonial Causes Act, 1937(7)]

(5) That there is a subsisting prior marriage.

(6) Consent may have been preculded by duress or mistake.

These impediments are not all of the same nature. One and two are questions of capacity to be governed by the law of the domicile of each of the parties. Three and four deal with the essential validity of the marriage, which is governed by the law of the matrimonial domicile. But Dicey [pp.732 et sequ] Cheshire [pp.218-233] and Westlake [Sec.21] treat both impediments resulting from nonage and from the parties being within the prohibited degrees of relationship as questions of the capacity of the parties to marry. This confusion seems to have commenced with Sottomayor v. De Barros (No.1) [1877 3 P.1] where the quest-:ion of the prohibited degrees of relationship wase sotreated, and it is present in the subsequent English cases E.g. In re Paine 1940 1 Ch.46; Sottomayor v. De Barros (No.2) 1879 5 P.94; Chetti v. Chetti 1908 P.67]. Ιt should be clear, however, that a woman aged twenty five and domiciled/

domiciled in Scotland, and a man aged twenty seven and domiciled in England, both have capacity to marry; it may be that A and B cannot marry each other, because they are brother and sister, but that is not a restriction on the capacity of A or B to marry, which is of the very fullest, but a rule of law prohibiting that particular marriage. [Cp. Walton 297]. The prohibition on the ground of relationship (3) is akin to the miscellaneous prohibitions [\*) such as the prohibition of adulterers marrying(4). Cases dealing with the prohibited degrees of relationship are authoritative on the kindred questions of the miscellaneous prohibitions and not, as they have been taken to be, on the totally different question of capacity to marry.

The true distinction between questions of essential validity and capacity hage received some judicial recognition, obiter, though usually the judges have been as indistinct in their pronouncements as the textwriters. Thus Lord Moncreiff has said, "It is, no doubt, in accordance with the law of Scotland, giving effect to international usage, but giving effect thereto by a sentence of its own, that (first) the essentials of what constituted marriage according to the moral law, in so far as the essentials so required do not conflict with its own view of moral principles, and (second) the matrimonial capacity of the parties to any action which it assumes jurisdiction to try, are alike questions that fall to be determined in our Courts upon an application of a law that may be other than our own, being the law of the domicile that is charged with the control of the marriage." [MacDougall v. Chitnavis 1937 S.C./at p.406]. Again, an English judge, commenting on the English case of Sottomayor v. De Barros (No.2) [1879 5 P.94] where the impediment/

impediment of the near relationship of the parties was described as a question of capacity, said:". . . . it may be questioned whether . . . . the question of capacity is really raised at all in sucha case, that is to say, where both the parties are capable of entering into a marriage but may not marry each other because such a marriage would be illegal in their own country. That is rather a question of illegality than of capacity." Ogden v. Ogden 1908 P.46 per Sir Gorell Barnes at p. 74. Further, some writers have made the distinction [Halsbury's Laws of England vi p. 285 et sequ; Foote 5th Ed. pp. 123-5, 376 et sequ; Bar p. 352; Savingy p. 291). It is particularly encouraging that the writers on that peculiar reliance has been placed in Scotland for the rules of the Law , namely Savingy and Bar, have made this Printe distinction.

Keeping the true nature of the various impediments in view it is clear that on principle questions of capacity to marry should be governed by the law of the domicile of each party, and questions of essential validity by the law of the matrimonial domicile.

Firstly, as to capacity: The law of the domicile having regard to differences of climate and national character, is best qualified to determine for its subjects at what age they are fit to marry.

Two alternatives to the law of the domicile of each party have been suggested, namely, the <u>lex loci cele</u>-<u>:brationis</u> and the law of the matrimonial domicile. That capacity to marry should be governed by the <u>lex loci</u> <u>celebrationis</u> has, as we have seen, the support of Story, [Sec.103] Fraser (Husband and Wife p. 1299. But contrast Fraser, Parent and Child pp. 715 et sequ] and the older cases/

cases <u>Compton v. Bearcroft</u> 1769 2 Hagg.Cons. 444 N; <u>Middleton v. Janverin</u> 1802 2 Hagg.Cons.437; <u>Scrimshire</u> <u>v. Scrimshire</u> 2 Hagg.Cons.395; <u>Gordon v. Pye</u> per Lord Meadowbank,Fergusson's Cons. Rep. App. at p.362] and also of <u>Simonin v. Mallac</u> [1860 2 Sw. & Tr. 67] and <u>Ogden v. Ogden</u> [1908 P.46]. But these opinions and cases must be regarded as either obsolete or as illustrations only of the exception to the applicability of the law of each party's domicile to the question of their capacity to marry; <u>Simonin v. Mallac</u> and <u>Ogden</u> are almost certainly illustrations of the limitation of the applicability of the law of the domicile, in spite of the sweeping language that is used.

The other alternative is suggested by Cheshire, namely that capacity to contract marriage is governed by the law of the matrimonial domicile (pp. 218-233). This attitude however, so far as regards capacity in its true sense, [Cheshire regards the cases dealing with prohibited marr-iages as questions of capacity] is inconsistent both with sound principle and with the authority of analogous cases dealing with marriage contracts. As to principle, it is difficult to see how a girl who has no capacity to marry can acquire capacity simply because by the law of the law of the domicile of her intended husband she would Girls marry in India at a very early have had capacity. If an Indian man of thirty purports to marry a age. Scottish girl of twelve, is that marriage valid? Of such a union Cheshire writes: "If an English girl of fourteen wishes, contrary to the law of England, to marry a foreigner domiciled in a country whose law permits marriage at this early age, it may justifiably be doubted whether there is any defensible ground upon which English law can regard the union as void. The social life of England is unaffected, for/

for the girl loses her connection with this country upon the acquisition of her husband's domicile. If the law of that place chooses to regard the union as valid, on what ground can English law interfere? Paternal government cannot be pushed to the extent of dictating to English people what they shall do when settled in a foreign country" [pp.220,1]. A contention more repugnant to commonsense or the spirit of the law could scarcely be imagined. An Indian's physical constitution may be suited to marriage at that age, but our lawconsiders that the physical constitution of Scottish persons is not so suited, and forbids the marriage of a person domiciled in Scotland below the age of sixteen, in the interest of that Scottish law is better able to determine when person. Scottish persons are capable of marriage than a foreign law made for a person of a different race, religion, and perhaps more backward ideas. It is the duty of govern-:ment to protect its subjects from, among other things, the folly of their own acts when, by reason of nonage, they are incapable of forming mature judgments. To perform that duty is not to push paternal government to the extent of dictation; but to refuse to perform it would be a shameful abdication of its duties in favour of a foreign legal system that might care nothing for the welfare of the subject. To say that "the girl loses her connection with this country upon the acquisition of her husband's domicile", begs the question. If the marriage is valid she acquires her husband's domicile. But is the marriage valid? If she does not have that capacity, she cannot marry in the first place. ------ The argument against the matrimonial domicile is even more convincing if you takes an instance when the matrimonial domicile is not the pre-marriage domicile of either party, but the place where they intend to live.

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For in that case both parties may have no capacity to marry by the laws of their respective domiciles, yet by contemplating residence in another country (that contem-:plation being a juridical act that they have no capacity to perform) they acquire capacity!

As to the authority of the analogous cases of marriage-contracts, in Cooper v. Coopers Trustees, [1885 12 R. 473 Revd. 15 R. (H.L.) 21 a minor woman domiciled in Ireland, who had no capacity by the law of Ireland to make a binding Marriage-Contract, entered into one with her intended husband, a domiciled Scotsman, whom she married in Ireland, and the plea was taken that Scots law, as the law of her matrimonial domicile, must govern her capacity. This plea was rejected. "It is said that . . . as both parties contemplated a Scottish married life, and as a consequence a Scottish domicile, the Ι principle have spoken of (the law of the domicile) does not regulate the contract relations of these two persons . . . But . . . the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails." per The Lord Chancellor, Halsbury at p. 25 ."It is difficult to suppose that Mrs, Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile." [Per Lord Macnaghten at p. 31]. It is just as difficult to see in the case of marriages as it is in the case of marriage contracts.

Consequently it is submitted that the law of the domicile of each party determines that party's capacity to marry.

ntial idity.

The rules of law with which this topic is concerned are prohibitions against marriages on the ground, that the parties are nearly related, or that they are adulterers or mental defectives. These rules are imposed by States in the public interest: For example, to avoid in the first case the evil result, in the children, if inbreeding, in the second the hurt to the morals of the community, and in the third the transmission of hereditary tendencies to mental deficiency. Only one state has an interest to enforce these rules, and that is the state in which the marriage is to subsist, namely the matrimonial domicile or domicile of the husband. Therefore it should be to the law of that country alone that reference should be made on these questions. "None of these matters concern the state to which the woman has up to that time belonged, and which she is now quitting. As the woman has in any view a right to emigrate, she has the power, by natural-: ising herself in a new country, (we should say, by acquiring a domicile) of denying effect to all these limitations imposed by the law to which she once belonged. Naturalisation as a preliminary to marriage would, however, in such cases be an empty form, and all the more so, as all states accord naturalisation directly to the wife of a citizen of the country ipso iure." [Bar p.353]. These rules are clearly distinguishable from the rules about the age at which a woman can marry, which are imposed in the interest of that woman and therefore governed by the law of her domicile, which is the best system to judge of her capacity and the only one that has duty toprotect her interests. It could/be said of a woman who was under age that, as she has a right to emigrate, she could domicile herself in her husband's country prior to marriage and therefore defeat the prohibitions of her own law, for being without capacity she/

she could not acquire a domicile elsewhere. [Although M. Schmitoff uses this argument in LVI L.Q.R. (1940) p.514 to support the view that the matrimonial domicile governs capacity]

The authority for the proposition that rules concerning the essential validity of the marriage are determined according to the law of the matrimonial domicile is of the very highest, and it is submitted that subsequent decisions which that are to a contrary effect misunderstand the leading cases, that they they are the decisions of inferior Courts, and are English decisions that are not binding in Scotland. The leading case is a decision of the House of Lords, Brook v. Brook 1861 9 H.L.C. 193 : a domiciled Englishman married his deceased wife's sister, a domiciled Englishwoman, in Denmark, by the law of which the marriage The marriage was invalid by English law. was valid. It held that the marriage was invalid, and the ratio decidendi was that this was a question of the essentials of the contract which must be governed by the law of the matrimonial domicile. "But while the forms of entering into the contract of marriage are to be regulated by the lex loci contractus, the law of the country in which it is celebrated, the essentials of the contract depend upon the lex domicilii, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated." Lord Campbell at p. 207] "It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of the domicile, if the contract is forbidden by the law of the place of domicile" [at p. 212]. "But I am by no means prepared/

prepared to say, that the marriage now in question ought to be, or would be, held valid in the Danish Courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined." [p.213] This ratio is consistent with the Scots cases, Beattie v. Beattie 1366 5 M.181; MacDougall v. Chitnavis 1937 S.C. 390, per Lord Moncreiff at p. 406 and with some of the later decisions of the inferior English Courts. (In re Bozzelli 1902 1 Ch.751; In re De Wilton 1900 2 Ch. 481; Mette v. Mette 1 Sw. & Tr. 416 professes to follow Brook, but it also contains this statement by Sir Cresswell Cresswell that is inconsistent with the <u>fatio</u> of Brook: "There could be no valid contract unless each was competent to contract with the other" (at p.423)). Unfortunately the facts in Brook did not raise the issue sharply enough, because the domicile of both parties was the same, and consequently the decision (although not the ratio) is equally consistent with the view that the law of the domicile of each party has to be satisfied as to essential validity. In Mette [supra] the domicile of the parties was different, the marriage being prohibited by the law of the domicile of the husband and permitted by the law of the domicile of the wife and the place of celebration. The marriage was held invalid. But/

But here again the decision is equally consistent with the application of the law of the matrimonial domicile or the necessity for satisfying the laws of both domiciles. The <u>ratio</u> swings between the two views; Sir Cresswell Cresswell professed to follow <u>Brook</u>, but his judgment contained this sentence: "There could be no valid contract unless each was competent to contract with the other." [at p.423].

In Sottomayor v. De Barros (No.1) (1877 2 P.81, Revd. 1877 3 P.1 the prohibition of a marriage on the ground of near relationship was treated as a question of capacity, and although, since the domicile of both parties was the same, the decision is just as consistent with the appli-:cation of the law of the matrimonial domicile as with the law of the domicile of each party, the attitude that prohibitions are a question of capacity inevitably led to the later decisions, where the domicile of the parties was different, in which it was held that the law of the domicile of both parties must be satisfied, 2.g. In re Paine 1940 1 Ch. 46. This decision of Bennet Justice is the only one in which the issue between applying the law of the matrimonial domicile on the one hand, or satisfying the law of the domicile of both parties on the other, was prominently raised by the facts. A domiciled Englishwoman married her deceased sister's husband, who was a German, in The marriage was valid by German but not by Germany. English law. It was held that the marriage was invalid. In all previous cases the marriage was declared invalid either because of an incapacity of the husband under his lex domicilii, or because of an incapacity of both under the law of a domicile common to both. But in this case the marriage was held invalid because of an incapacity of the wife under the law of her domicile, notwithstanding that the marriage was valid both by his domicile and the lex loci. see 52 J.R. 284 and L.Q.R. Jan. 1940 p. 22 . This case/

case therefore undoubtedly proceeds on the view that the lex domicilii of both parties must be satisfied. The case, however, cannot be regarded as authoritative, because it proceeds on the mistaken view that the question of the prohibited degrees of relationship is one of the capacity of the parties, and it is inconsistent with the ratio of the House of Lords decision in Brook. In anv event it is only the decision of an English Court of first instance, which is not authoritative in Scotland, or even of much persuasive authority. ----- It must also be recorded that the Colonial Marriages (Deceased Wife's Sister) Act, 1906 / 6 Edw. 7 c. 30 7 which was passed "for removing doubts" provides that where a man has married his deceased wife's sister, and at the date of the marriage each of the parties was domiciled in a part of the British Dominions in which at that date such a marriage was legal, the marriage, if legal in other respects, shall be legal for all purposes. This proceeds on the assumption that the law of the domicile of each party is concerned in the question.

In conclusion it is submitted that it is the law of the matrimonial domicile which must determine the essential validity of the marriage.

--- As stated in the general principles the <u>lex loci</u> <u>celebrationis</u> must also be satisfied along with the law of the matrimonial domicile (in questions of essential validity) and the law of the domicile of each party (in questions of capacity) before there is a valid marriage.

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## DIVORCE

urisdiction f<u>the</u> cottish burts

Our Courts have jurisdiction in divorce actions if the permanent domicile of the spouses is Scottish at the date of raising the action, irrespective of where the parties were domiciledat the time of the marriage, or at the time of the alleged marital offence, and irrespective of Awhere the marriage was celebrated, where the alleged marital offence was committed, where the spouses are residing, or what their nationality is; and conversely our Courts have no jurisdiction in divorce, subject to the exceptions to be mentioned, if the parties are not domiciled in Scotland at the date of raising the action. Le Mesurier v. Le Mesurier 1895 A.C. 517; Attorney-General for Alberta v. Cook 1926 A.C. 444; Pitt v. Pitt 1864 2 M. (H.L.) 28 per L.C. Westbury at p. 30; Bar pp. 381 - 385; Dicey Rules 62, 63

Since the domicile of the wife is always the same as that of her husband, so long as the marriage subsists, even although the parties are judicially separated, <u>Attorney-General for Alberta v. Cook</u>, supra<u>7</u> this in effect means that our Courts have jurisdiction if the husband is domiciled in Scotland at the date of the action and have no jurisdiction if this is not the case.

In divorce actions it is necessary for the pursuer to aver that the husband is a domiciled Scotsman, but that bare averment will not suffice: it must be supported by specific averments to justify it.  $\underline{/ \text{Horn v. Horn (0.H.) 1935 S.L.T. 589}}$  In an undefended action it is <u>pars judicis</u> to ensure that the Court has jurisdiction,  $\underline{/ e.g. Sellars v. Sellars 1942}$ S.C. 206\_7 and it is the pursuer's duty to put before the Court all relevant facts bearing on the husband's domicile, both those favourable to the contention that his/ his domicile is in Scotland and those unfavourable to it. <u>Erown</u> v. <u>Brown</u> 1928 S.C. 542 <u> </u>Even in a defended action when the defender takes no objection to the jurisdiction the Court will not exercise jurisdiction if it appears that the husband is domiciled abroad;  $\angle$  Walton p. 364  $\angle$  but if the husband appears to be domiciled here and the defender has appeared and not stated any objection to jurisdiction it is not pars judicis to enquire strictly into the husband's domicile. <u>Watts</u> v. <u>Watts</u> 1885 12 R. 894 J In one action of divorce brought by a husband it was held that the Scottish Courts had jurisdiction because the husband was domiciled in Scotland at the date of raising the action, although at the proof he said that he had gone to England and had then no intention of returning to Scotland. / Hunter v. Hunter (0.H.) 1893 30 S.L.R. 915 7

If the Court of Session has pronounced decree of divorce without having proper jurisdiction to do so, because it had been misled as to domicile, it will not entertain an action of reduction of the improper decree unless the defender is subject to the jurisdiction of the Court on one of the recognised grounds at the time of the action of reduction. / Acutt v. Acutt 1936 S.C. 386; Longworth v. Yelverton 7 M. 70 7 This may mean that the unfortunate spouse who has been wronged by the improper decree has no means of obtaining a complete remedy. Suppose a husband domiciledin England comes to Scotland and obtains a divorce by false representations that he is a domiciled Scot, then returns to England where he is beyond the reach of an action of reduction, the wife can not apply to the English Courts to which he is subject for declarator of marriage or reduction of the decree because one Court would not entertain an application for/

for the recission of a decree of another sovereign Court; <u>Acutt</u>, supra; <u>Jack v. Jack 1940 S.L.T. 122</u>. Contra <u>Armitage v. Attorney General</u> 1906 P.135\_7 she can not apply to the Scots Courts; in any proceedings in England or elsewhere in which reliance is placed on the decree of divorce she could have it set aside for the particular purposes of that action, because it was not granted by a Court having jurisdiction; but there is no way in which she could obtain a general declarator that for all purposes the divorce is null.

Domicile as the only ground of jurisdiction in

<u>History of</u> <u>divorce</u> <u>jurisdiction</u> in Scotland

divorce has only come to be recognised in Scotland within the last 100 years. Before 1862 very much less than a permanent domicile in Scotland was recognised as sufficient. The domicile required was considered to be the "forensic domicile" which is acquired by 40 days residence within the jurisdiction. It was not sufficient if the only connection with Scotland was that a husband pursuer had resided for 40 days in Scotland before the raising of the action, Ringer v. Churchill 1840 2 D. 307; Blake v. Blake 1826 4 S. 795; <u>Allison</u> v. <u>Catley</u> 1839 1 D. 1025\_7 or that a defending wife had resided for that period in Scotland, / Bennie v. Bennie 1849 11 D. 1211 but jurisdiction was sustained (in the teeth of the permanent domicile of the husband and ignoring it) when both parties had been residing in Scotland for 40 days and the offence had been committed in Scotland; [Oldaker v. Goldney 1834 12 S. 468; Forrester v. Forrester 1844 6 D. 1358; Christian v. Christian 1851 13 D. 1149 7 when the defending wife was residing in Scotland, where they had married and formerly lived together; [Shields v. Shields 1852 15 D. 142; Scott v. Scott 1859 21 D. 285; Buchanan v. Downie 1837/

1837 16 S. 82 7 when the husband defender had been residing for 40 days in Scotland and was personally cited there and the offence had been committed, <u>Levett</u> v. <u>Levett</u> 21st Dec. 1816 F.C.; <u>Walker</u> v. Walker 1844 17 J. 87; Utterton v. Tewsh 1811 Ferguss. Cons. Rep. 23; Forbes v. Forbes 1817 Ferguss. Cons. Rep. 209; Rowland v. Rowland 1817 Ferguss. Cons. Rep. 226; Shaw v. Shaw 1851 13D. 8197 or the marriage celebrated, <u>Wyche</u> v. <u>Blount</u> 27th June 1801 F.C.; Forbes v. Forbes, supra 7 in Scotland. It is interesting to notice that the Commissary Court in the second decade of the 19th century considered that a real and permanent domicile was necessary to establish divorce jurisdiction, and that they were "corrected" on this by the Court of Session. <u>Utterton</u> v. Tewsh, Forbes v. Forbes, Rowland v. <u>Rowland</u>, supra 7 Jurisdiction was also sustained when the permanent domicile of the husband was in Scotland,  $\overline{/ \text{Pirie v} \cdot \text{Lunan}}$  1796 Mor. 4594 $\overline{/}$  even when he was pursuer and the wife the resident abroad;  $\angle$  Warrender v. Warrender 1835 II S. and McL. 154; <u>Tulloh</u> v. <u>Tulloh</u> 1861 23D. 639; French v. Pilcher 13th June 1800 F.C./ but jurisdiction was not sustained simply on the ground that the defending husband's domicile of origin was Scots. / Morcombe v. McLelland 27th June 1801 F.C.; Tovey v. Lindsay 1813 1 Dow 117\_7

These grounds of jurisdiction were very lax and the judges occasionally seemed to regret that matters were in this state.  $\angle$  See e.g. Lord Mackenzie in <u>Walker v. Walker</u> 1844 17J. 87 at p. 88; Lord Glenlee in Oldaker v. <u>Goldney</u> 1834 12 S. at p. 469\_7

In 1862 the whole Court reconsidered the question of jurisdiction in divorce in <u>Jack v. Jack / 1862 24D</u>. 467 7 and laid down that the basis of jurisdiction was the "matrimonial domicile" of the spouses, an attitude which/ which had been foreshadowed by the earlier case of Shields  $\boxed{1852 \ 15 \ D. \ 142 \ 7}$  Jack v. Jack was an action of divorce by a husband against his wife for adultery. His domicile of origin was Scots. They were married in Scotland in 1853 and lived here as spouses for two years. He averred that he then left her because of her adultery and went to America where he had since resided and become a minister of religion. She pleaded no jurisdiction because he had become domiciled in America. He admitted that he continued to reside in America "without any present intention of returning". The Court held that the matrimonial domicile was in Scotland when he left her and had not altered by his going to America leaving his wife in Scotland, and that in consequence of the matrimonial domicile being in Scotland the Court had jurisdiction. Lord Justice Clerk Inglis defined the conception thus: "But the true enquiry, I apprehend, in every such case is, where is the home or seat of the marriage for the time, - where are the spouses actually resident if they be together, - or if from any cause they are separate what is the place in which they are under obligation to come together, and renew, or commence, their cohabitation as man and wife?" [at p. 484] Lords Neaves and Mackenzie expressed themselves thus: "In order to found jurisdiction in cases of divorce, we do not think it always necessary that the parties should have a domicile in Scotland sufficient to regulate succession. We think there may be a residence or domicile founding jurisdiction such as would not regulate succession, as where a husband and wife have been for years resident in Scotland as married parties, but where the husband, from being a foreigner, and only in Scotland on the public service, may never have acquired a domicile of succession in/

in this country". Lord President McNeill and Lords Ivory and Curriehill drew a distinction between the domicile of the married pair as such and the husband's domicile. Her offer to prove that the domicile of the husband was in America was not allowed because it was immaterial, since America could not be the domicile of the married pair as such, which they held was the ground of jurisdiction. What has now been held to be the fallacy of these opinions, and the views of the minority of the Court, are expressed in these words of Lord Deas, who held that there was no jurisdiction because the pursuer had acquired a new domicil in the United States: "The phraseology appears to me to be calculated to mislead. It is figurative, and wants judicial precision. There is no third domicil involved apart from the domicil of the husband and the domicil of the wife. Domicil belongs exclusively to persons. Having ascertained the domicil of the husband and the domicil of the wife, the inquiry into domicil is exhausted" [at p. 473] Jack was followed in two cases in 1862. / Hook v. Hook 1862 24 D. 488 and Hume v. Hume 1862 24 D. 1342  $\overline{7}$  Thereafter the doctrine has a curious history. The Court of Session applied it in the same year in Pitt v. Pitt [1862 1 M. 106] and upheld jurisdiction in the action of divorce, but on appeal to the House of Lords the respondent's counsel declined to support the decision on the ground of matrimonial domicile and contended that the true domicile of the husband was in Scotland. The House of Lords found that the true domicile was not in Scotland and overturned the decision of the Court of Session, the Lord Chancellor Westbury remarking that counsel's concession was right in law. What then was the law? Jack was followed to the extent that the older lax cases were considered/

considered to be no longer law, <u>Stavert</u> v. <u>Stavert</u> 1882 9 R. 519  $\overline{/}$  put it was a moot point as to whether matrimonial domicile or the permanent domicile of the husband was the test. There is no future Scottish case in which jurisdiction was upheld on the ground of "matrimonial domicile". In a case in 1872 <u>Wilson</u> v. <u>Wilson</u> 1872 10 M. 573 J Lord Ormidale expressed the view that the result of Pitt was that a matrimonial domicile must be held to be unknown to the law, but in the Inner House Lord President Inglis made an obiter re-affirmation of the opinion that he had expressed in Pitt and Jack that "for the purposes of divorce there may be a matrimonial domicile different from the absolute domicile which will rule succession." The theorywas also championed by Lord Fraser in "Husband and Wife" Zii, p. 1276; a similar doctrine appears in the English case of Miboyat v. Niboyat 1878 4 P.D. 1\_7

On the other hand there were many obiter judicial opinions against the theory of matrimonial domicile <u>Stavert</u> v. <u>Stavert</u> 1882 9R. 520 per Lords Deas and Shand; Low v. Low 1891 19R. 115 per Lord Trayner; Dombrowitzki v. Dombrowitzki 1895 22R. 906 per Lord Trayner 7. There was therefore considerable doubt about "matrimonial domicile" when the whole question was reviewed by the Privy Council in Le Mesurier v. Le Mesurier  $\_$  1895 A.C. 517  $\_$  in an appeal from Ceylon. The plea that jurisdiction in divorce could rest on "matrimonial domicile" was rejected and the opinion expressed that the doctrine was not accepted in either Scots or English law. There can be no doubt of the finality of this decision of the Frivy Council and that the doctrine of matrimonial domicile is now completely discredited, [See Light v. Light (O.H.)/

(0.H.) 11 S.L.T. 100; <u>Mackinnon's Trustees v. Inland</u> Revenue 1920 S.C. (H.L.) per Viscount Haldane at p.174\_7 although the curious position exists that a decision of the whole Court in favour of it has not been regularly overturned.

urisdiction f foreign ourts

A decree of divorce pronounced by a foreign Court is accorded recognition here if the foreign countrywas the domicile of the parties at the date of the action. [In countries where the Courts do not grant divorce, an Act of the legislature declaring the parties to be divorced would, if the legislature were that of the parties domiciled, be recognized in the same way as a decree of Court. 7 Such a decree is equivalent to a Judgment in rem and if it has been obtained without fraud or collusion, See Bater v. Bater 1906 P. 209 7 and accords with Scottish notions of substantial justice, See Scott v. Scott (0.H.) 1937 S.L.T. 632 (no intimation to the other spouse of the foreign action) 7 is accepted as conclusive in the Scottish Courts even in questions between persons whoware not parties to the foreign action. <a>[Administrator of]</a> Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; Bater v. Bater 1906 P. 209; Bar p. 382 / There is always in addition of course the over-riding principle that the decree must not be repugnant to morality. <u>Humphrey</u> v. <u>Humphrey's Trs.</u> 1895 (0.H.) 33 S.L.R. per Lord Moncreiff at pp. 100,101\_7 The foreign decree is valid here ex proprio vigore and it is unnecessary and incompetent to bring an action of declarator in the Scottish Courts of the validity of the foreign divorce; / Arnott v. L.A. (0.H.) 1932 S.L.T. 46. A different attitude appears in Armitage v. Attorney General 1906 P. 135; De Massa v. De Massa, The Times March 31, 1931; Galene v. Galene 1939 P. 237; and Sasson/

Sasson V. Sasson 1924 A.C. 1007 7 although when itwis desired to have the register of marriages here altered after a foreign divorce, the Lord Ordinary, Lord Moncreiff, sustained an action of declarator that the husbandwis domiciled in the foreign country at the date of the decree of divorce: he opined however that the proper procedure would be by petition to the nobile officium, Z Arnott v. L.A., supra\_7

A foreign country may claim to exercise divorce jurisdiction on other grounds, but although a divorce pronounced by a foreign country where the parties are not domiciled at the time may be valid in that country, it will not, subject to a few exceptions to be mentioned, be accorded extra-territorial recognition and regarded here as valid. / Le Mesurier, supra; Scott v. Scott (0.H.) 1937 S.L.T. 632; Jack v. Jack (0.H.) 1940 S.L.T. 122; <u>Calder v. Calder</u> (O.H.) 1901 8 S.L.T. 330; C.D. v. A.B. 1908 S.C. 737; Bar pp. 382,3; Shaw v. Gould 1868 L.R. III E. and I.A. 55\_7

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There must be one jurisdiction to dissolve about divorce marriages and the decrees of the appropriate jurisdiction must be universally regarded as conclusive in order to prevent the difficulties inconveniences and scandals which would arise if a man and woman could be held to be married in one country and not married in another, Wilson v. Wilson L.R. 2 P. and D. 442 per Lord Penzance; Ogden v. Ogden 1908 P. 46 per Lord Gorell Le Mesurier, supra, at p. 540\_7 and as this at p. 82; is a question of status it is appropriate that that one jurisdiction should be the Court of the domicile of the parties.

What law applied

When a Court has jurisdiction to divorce it applies its own divorce law, irrespective of the law of the domicile of the parties at the commencement of the marriage/

marriage, the lex loci celebrationis, and the lex loci delicti. [Bar pp. 381, 384] A decree of divorce pronounced by the Courts of the country where the parties are domiciledat the time, is valid although by the law of the country where the marriage was entered into and where the spouses were domiciledat the time of the marriage, a marriage is indissoluble. <u>/ Warrender v. Warrender</u> 1835 II S. and McL. 154; Gordon v. Pye Ferguss. Cons. Rep. App. 276; Edmonstone v. Edmonstone etc. June 1st 1816 F.C.; 7 Our Courts will divorce persons domiciled in Scotland on grounds not sufficient by the law of the place of celebration of the marriage or of the domicile of the parties at the time of the marriage, but sufficient according to our law: [Warrender v. Warrender, Gordon v. Pye, Edmonstone v. Edmonstone etc. supra; Carswell v. Carswell 1881 8 R. 901 / And conversely our Courts will recognise as valid a decree pronounced by the Courts of the domicile even although the grounds on which itwas pronounced would not be sufficient for divorce according to our law, and that even in the case of marriages entered into in Scotland between persons whoware at the time domiciled Scots people. <u>Humphrey</u> v. <u>Humphrey's Trs.</u> (O.H.) 1895 33 S.L.R. 99; Harvie v. Farnie 1880 6 P.D. 35; Pemberton v. Hughes 1899 1 Ch. 781; Mezger v. Mezger 1936 3 All E.R. 130\_7

Certain countries recognise the right of one spouse to divorce the other at will or by mutual consent, with only one formal interponing of authority by the Courts, or with only formal requirements of registration of the divorce or even without further formality at all. It is quite clear that if the faculty of divorcing in this way is part of a polygamous marriage law, we will not recognise it as divorcing a monogamous marriage.

[The/

The Hammersmith Marriage Case 1917 1 K.B. 6347 Where the faculty of divorcing in this way is part of a monogamous marriage law, it is an undecided question whether such a divorce, obtained in the country of the domicile, would be recognised here. It was opined obiter in The Hammersmith Marriage Case / Rex v. Hammersmith Superintendent Registrar of Marriages 1917 1 K.B. 634\_7 that we will not recognise a foreign divorce unless it has been decreed by a competent Court [by four of the six judges at pp. 642, 652 and 653, 661, and 662 and 663  $\overline{7}$ ; and Lord Brougham stated: "If there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there ... It may safely be asserted that so absurd a proposition never could for a moment be entertained "  $\sum Warrender v$ . Warrender 1835 II S. and McL. at p. 203 / And so mere repudiation by one spouse without the interponing of judicial authority, although a valid divorce in the domicile, would not be recognised here. [Contra Seni Bhidak v. Seni Bhidak, The Times Newspaper 3rd December 1912; Cheshire p. 365. An act of the legislature of the country of the parties' domicile declaring the parties to be divorced, would, of course, be just as valid as a decree of  $Court_{..}$  There have also been obiter opinions which would support the view that even if there has been a decree of the Court of the domicile, if it proceeded on nothing but repudiation by one of the spouses or on mutual agreement to have a divorce, it would not be recognised here, or at least would not be recognised in the case of marriages which were originally Scottish, / Birt v. Boutinez 1868 1 P. and D. 487; Hammersmith Marriage Case 1917 1 K.B. per Viscount Reading C.J. at p. 642; Dicey p.939; Walton/

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Walton p. 371, 425 7 but this is a more doubtful opinion. There is clearly no ground for refusing to recognise a divorce pronounced by a foreign Court on the ground of repudiation of a marriage celebrated in that foreign country by persons domiciled there, for the law of the foreign country is the only one which ever did have or could have anything to do with the status of the couple, and that law could not fairly be recognised as joining the couple without being recognised as disjoining them. Now the marriage which is formed in a country where marriage is dissoluble by repudiation or mutual consent is marriage as we know it, it creates the same status and is the same thing as a marriage in this country, [Nachimson v. Nachimson 1930 P. 217] so there is no reason to distinguish between the validity of a divorce by the Courts of the foreign country, on the ground of repudiation, of a marriage celebrated -there, and the validity of a divorce by the Courts of the foreign country, on the ground of repudiation, of a marriage celebrated here. It is possible however that effect might be refused to a foreign decree of divorce pronounced on the ground of repudiation because of the over-riding principle which is always present that to do so would be contrary to morality or the distinctive policy of our law. / In Humphrey v. Humphrey's Trs. 1895 33 S.L.R. Lord Moncreiff at pp. 100, 101 adds "provided always that the ground of divorce is not repugnant to the standard of morality recognised by a civilised and Christian state".JForeign divorces have been recognised when the ground was "violent and ungovernable temper", <u>Pemberton</u> v. Hughes 1899 1 Ch. 781 ] and "insulting behaviour and incompatibility of temper". Z Mezger v. Mezger 1936 3 All E.R. 130 ]

Exceptions/

Exceptions to the rule that our Courts have jurisdiction only when the parties are domiciledhere.

There is one certain exception to the rule that our Courts only have jurisdiction when the domicile of the spouses is Scottish at the date of the action and other possible exceptions.

<u>The</u> <u>Matrimonial</u> <u>Causes (War</u> <u>Marriages)</u> Act <u>1944</u>

In view of the large number of marriages which took place between British girls and foreign soldiers in this country during the recent war with Germany the Matrimonial Causes (War Marriages) Act 1944 / 7 and 8 Geo. 6 c. 43. Cp. the Act passed in 1919 as a result of the first World War, 9 and 10 Geo. 5 c.  $28_{\overline{7}}$  provided that in the case of certain marriages to which the Act applies the Court of Session should have jurisdiction in relation to proceedings for divorce or for nullity of marriage as if both parties were at all material times domiciledin The marriages concerned are marriages Scotland. celebrated on or after 3rd September 1939 but before the day to be appointed by Order in Council where the husband was, at the time of the marriage, domiciledoutside the United Kingdom, and the wife was, immediately before the marriage, domiciled in Scotland. This extension of jurisdiction does not apply to any marriage if, since it was celebrated, the parties thereto have at any time resided together in the country in which the husband was domiciledat the time of the residence, and for the purposes of this proviso the whole of the United States of America, the whole of India and the whole of any British possession outside India shall be treated as one country. The Act does not extend or alter the jurisdiction of the Court of Session in relation to any proceedings for divorce or for nullity of marriage where, at the commencement of those proceedings, the parties are domiciled anywhere in the United Kingdom.  $\sum$  Sec. 27

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The words of the Act cover actions at the instance of the husband as well as those at the instance of the wife. A divorce under this Act would not be recognised in any non-British foreign country which acts on the rule in <u>Le Mesurier</u>.

The following exceptions have been said to exist :-

It is said that when a married pair are domiciled in Scotland the husband cannot, after the commission of a marital offence, deprive his wife of her right to a divorce or compel her to seek it in a foreign Court by changing his domicile to another country, and in these circumstances the Court of Session is certainly wont to assume jurisdiction and grant decree of divorce. /Hannah v. Hannah (0.H.) 1926 S.L.T. 370; Lack v. Lack (0.H.) 1926 S.L.T. 656; Forbes v. Forbes (0.H.) 1910 2 S.L.T. 425; Stewart v. Stewart (0.H.) 1906 13 S.L.T. 668; Pabst v. Pabst (0.H.) 1896 6 S.L.T. 117; Robertson v. Robertson (O.H.) 1915 2 S.L.T. 96, see 1916 2 S.L.T. 95; Redding v. Redding (0.H.) 1888 15 R. 1102: Manderson v. Sutherland 1899 1 F. 621 per Lord Moncreiff at p. 629; Buchanan v. Downie 1837 16 S. 82; Crabtree v. Crabtree (0.H.) 1929 S.N. 116; Bar p. 385; Walton, Husband and Wife p. 361; Duncan and Dykes p.168. There are doubtless many unreported Outer House cases to the same effect. 7 This rule has been held applicable not only when the marital offence was the act of desertion by which the husband left the wife to go abroad but also when the marital offence was adultery. / Stewart v. Stewart, supra; Manderson v. Sutherland, per Lord Moncreiff, supra 7 and even when the adultery was committed outside Scotland. / Hannah v. Hannah, Crabtree v. Crabtree, supra 7 The limits of the doctrine have been defined. It has been observed that the doctrine only applies when a wife, against/

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against whom a matrimonial offence has been committed by her husband, is left by her husband in Scotland where he was previously domiciled, and that it would not apply when the parties have never resided together in Scotland and she was deserted while she was in Australia and the country he had gone to, namely Ireland, so far from being a strange country to her was the domicile of origin of both parties.  $\sum Kelly v. Kelly (0.H.)$  1927 S.N. 132; Cp. Robertson v. Robertson 1915 2 S.L.T. 96; 1916 2 S.L.T. 95\_7 In one case the Lord Ordinary appears to have considered that this doctrine not only justified the Scottish Courts in decreeing divorce, but gave them the sole jurisdiction to divorce and invalidated divorce proceedings brought by the husband in his new domicile on different grounds which emerged later. [Crabtree v. Crabtree, supra 7 The cases in which this doctrine was laid down are mostly later in date than Le Mesurier, /1895 A.C.  $517_7$  and the principle of that case is usually fully in the mind of the Court. Moreover, in Mackinnon's Trs. v. The Inland Revenue / 1920 A.C. (H.L.) 1717 in which it was held that the wife's domicile follows that of her husband even when there has been a contract of voluntary separation and he has lost the right to require her to adhere by committing adultery, Viscount Cave remarked "... and there is no doubt authority (which it is not now necessary to examine) for the proposition that, in such a case, the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights." [at p. 180. Quoted in Attorney-General for Alberta v. Cook 1926 A.C. at p. 458 7 The theory of the doctrine has been variously stated to be "that the husband could not destroy the jurisdiction to entertain an action founded on desertion by the very act of desertion/

desertion which constituted the ground of action" /Jack v. Jack 1862 24 D. 467 at p. 473 per Lord Leas who held the modern opinion that the only jurisdiction in divorce is based on the permanent domicile of the spouses. Cp. Lord McLaren in Redding v. Redding, supra; 7 that it would be a hardship to compel a wife against whom a matrimonial offence had been committed to follow her husband to another country in order to obtain a remedy, / Kelly v. Kelly (0.H.) 1927 S.N. 132 per Lord Constable; Armytage v. Armytage 1898 P. 178 per Gorell Barnes J. at p. 1857 and that to hold differently might deprive the wife of the remedy to which she has become entitled, either because he might keep changing his domicile, or might obtain a domicile in a country where divorce is not recognised on the grounds which hade emerged, / Ogden v. Ogden 1908 P. at p. 78 per Sir Gorell Barnes; Bar pp. 385, 6 7 A similar doctrine to the present appears in certain obiter dicta in English cases which have not recently been followed, but these obiter dicta and cases deal with a slightly different position and it is fair to distinguish them. In Armytage v. Armytage / 1898 P. 178 at p. 185 7 Gorell Barnes J. said: "The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in that case, without necessarily resorting to the American doctrine which in such circumstances a wife may acquire a domicile of her own in the country of the/

the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciledin this country." [Cp. the same judge in Ogden v. Ogden 1908 P. at p. 78, and Brett L.J. in Niboyet v. Niboyet 1878 P.D. at p.14 7 In recent cases in England this dictum has not been followed, and it has been held that since the decisions of the House of Lords in Mackinnon's Trs. v. The Inland Revenue / 1920 S.C. (H.L.) 171 7 and Attorney General for Alberta v. Cook / 1926 A.C. 444 7 that there can only be a single matrimonial domicile of the husband and wife in which proceedings can be maintained to dissolve the married status, no exception to that general rule can be admitted in the case of a wife deserted by her husband in the original matrimonial domicile; under such circumstances the wife cannot be allowed to assert for the purpose of maintaining proceedings that the original domicile of the husband is still subsisting and that the English Court retains jurisdiction to dissolve the marriage when the husband has acquired a domicile of choice elsewhere. / H. v. H. 1928 P. 206; Herd v. Herd 1936 P. 205 7 A different situation is involved here from that with which the Scottish cases deal. In England at the time of these cases divorce for desertion was not competent and the actions were for divorce for adultery which was committed some time after the desertion and when the husband was domiciled in his new domicile. These cases do not affect the possibility of there being a rule that a husband can not deprive his wife of her right to divorce by acquiring a domicile elsewhere after the offence has been committed. In England the Matrimonial Causes Act 1937, / 1 Edw. 8 and 1 Geo. 6 c. 57/

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c. 57 sec. 13\_7 which also introduced divorce for desertion in England, has now provided that where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the Court shall have jurisdiction for the purpose of divorce and nullity of marriage and judicial separation notwithstanding that the husband has changed his domicile since the desertion or deportation. This statutory provision restores the older dicta which had not been followed, and is also wide enough to be the statutory English counterpart of the supposed Scottish doctrine, which is said to be part of the Scottish common law.

It is submitted that the supposed Scottish common law exception to the exclusive jurisdiction of the Courts of the domicile is not conclusively settled, and although it would be acted upon in the Outer House, if the matter were tested in the highest Courts it might be held that no such exception is recognised. The considerations against the exception are :-

The fact that it was considered necessary to have statutory provision in England is an indication that the doctrine does not exist under the common law and therefore will not exist in Scotland where there is no statutory provision. The doctrine is contrary to the rule laid down by <u>Le Mesurier</u> that the Courts of the domicile have exclusive jurisdiction in divorce, and there is no reservation in <u>Le Mesurier</u> to the effect that such an exception might exist. Application of the doctrine would entail that a divorce granted in Scotland would not be recognised elsewhere. Our Courts would certainly not/ not recognise a divorce granted abroad on these grounds of jurisdiction if it were shown that the domicile at the time of the action was in Scotland. The precedents which support the doctrine are more numerous than weighty: most of them are Outer House cases. It has only once been upheld in the Inner House, in a case which is most scantily reported, / Robertson v. Robertson 1915 2 S.L.T. 96, 1916 2 S.L.T. 95 7 except for a case in 1837 when the law of jurisdiction in divorce was in a most uncertain state; <u>Buchanan</u> v. Downie 1837 16 S. 82 7 and on the only other occasions on which it has been mentioned with approval in the Inner House the opinions were obiter. <u>Manderson</u> v. <u>Sutherland</u> 1899 1 F. 621 per Lord Moncreiff at p. 629; Jack v. Jack 1862 24 D. per Lord Deas at p.467\_7 It has been said / e.g. Stewart v. Stewart (0.H.) 1906 13 S.L.T. 668 7 that the doctrine is supported by a dictum of Lord Chancellor Westbury in Pitt v. Pitt / 1864 2 M. (H.L.) at p. 32 7 but on examination it will be found that the case Lord Chancellor was dealing with was an action of divorce at the instance of the husband. As for the Outer Houses cases, in five of the reported cases in which the doctrine was approved, the opinion was obiter. [Redding 1888 15 R. 1102; Stewart 1906 13 S.L.T. 668; Kelly 1927 S.N. 132; Hannah 1926 S.L.T. 370; Forbes 1910 2 S.L.T. 425 7 The actions in which the doctrine was upheld were undefended.

There is more to be said for the doctrine if it is confined to divorces for desertion and stated in this form: a husband can not by deserting his wife in Scotland where they were previously domiciled, deprive her of her right to have recourse to the Scots Courts for divorce for desertion or compel her to seek that remedy in a foreign country where he has become domiciled after the desertion. [See Fraser ii p. 1289]7 The two reported/ reported Outer House cases in which it was necessary to decide on the doctrine and in which the doctrine was upheld, are both cases of desertion. <a>[Pabst v. Pabst</a> (0.H.) 1898 6 S.L.T. 117; Lack v. Lack (0.H.) 1926 S.L.T. 656\_7 In such circumstances there is this additional argument for the doctrine "that the husband could not destroy the jurisdiction to entertain an action founded on desertion by the very act of desertion which constituted the ground of action." / Jack v. Jack 1862 24 D. 467 per Lord Deas\_7 To say that the doctrine applies to adultery as well as desertion is simply to say that when the wife is pursuer the general rule is that jurisdiction in divorce is based on the domicile of the parties at the time of the marital offence, whereas the general rule clearly is that jurisdiction is based on the domicile of the parties at the time of the action.

However if the matter were tested in the highest Courts the doctrine might be held not to exist, even in the case of desertion. It is quite clear of course that if a wife averred that at the time she was deserted, her husband had been domiciled in Scotland, and that he had simply disappeared and that she did not know where he was, even although she thought that he might have gone overseas, the Scottish Courts would sustain their jurisdiction with perfect justice. But the principle of that would be that the husband's domicile must be presumed to continue Scottish until it has been proved that he has acquired another domicile. One way in which some of the decisions could be justified by principle is by saying that the husband's domicile presumably continued Scottish until the date of the The case in which the doctrine was upheld in action. the Inner House / Robertson v. Robertson 1915 2 S.L.T. 96, 1916 2 S.L.T. 95 7 was an undefended action for divorce for desertion in which the husband's address was unknown/

unknown to the pursuer, and that may be a better way of supporting the decision.

Turisdiction x necessitate

It has been held in certain English cases that when a wife is domiciled in England before marriage, marries a foreigner in England, and the marriage is valid according to English law but is declared null by the Courts of his domicile so that the woman is considered to be married in this country but not married in the country of her husband's domicile, if grounds of divorce arise against her husband (e.g. as a result of his marrying again in his own country) the English Courts should exercise jurisdiction in an action of divorce at the instance of the English / Stathatos v. Stathatos 1913 P. 46; de Montaigu wife. v. de Montaigu 1913 P. 154; following the suggestion of Lord Gorell in Ogden v. Ogden 1908 P. at p. 82; Dicey p. 285 7 This jurisdiction is said to arise ex necessitate: the wife is not married by the law of her husband's domicile and so cannot have recourse to its Courts for divorce, and is entitled to divorce according to our law; the English Courts are the only Courts to which she can turn; the reason for the Courts of the domicile having exclusive jurisdiction to divorce, namely that this avoids the scandals and inconvenience of a person being married in one country and not in another, not only does not justify the exclusive jurisdiction of the Courts of the domicile in these circumstances, but supports the exception to However this doctrine of that jurisdiction. exercising jurisdiction ex necessitate forms no part of the law of Scotland. / Acutt v. Acutt 1936 S.C. 386; Mangrulkar v. Mangrulkar 1939 S.C. 239; Attorney-General for Alberta v. Cook 1926 A.C. 444; Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80. Cp./

Cp. Dicey pp. 925 - 934, Baty, Polarized Law p. 68\_7 The answer to the problem is that the situation does not really arise because when the Courts of the domicile of the parties have pronounced a decree of nullity of marriage, that decree, being pronounced by a Court of competent jurisdiction, is equivalent to a judgement in rem and is binding everywhere, / Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80 7 even in this country when the grounds of the foreign decree of nullity would not have been sufficient for nullity in the view of our Courts. / De Massa v. De Massa The Times Newspaper March 13, 1931; Galene v. Galene 1939 P. 237; Cp. Cheshire p. 359; Dicey objects to this method of solving the problem by saying that it would not solve it when the wife has never lived in her husband's country of domicile, and so has never acquired his domicile either in fact (by living there with him) or by operation of law (because there was a valid marriage) - p. 287. The reply is that when a marriage celebrated here is valid by our view but is declared null by the Courts of his domicile, the marriage must be regarded as a voidable and not a void one, and so she always takes his domicile by operation of law because a valid marriage was subsisting until the decree of the foreign Court was pronounced. 7

Actions at husband's instance

When the wife is the guilty party, in spite of a doubt expressed by Lord Chancellor Westbury in <u>Pitt v. Pitt</u> "whether the domicile of the husband is to be regarded in law as the domicile of the wife, either by construction or by attraction, so as to compel the wife to become subject for the purposes of divorce to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile", <u>(1864 2 M. (H.L.) at p.32</u>] it is now settled/

settled that no exception exists here to the rules that which the Courts of the domicile of the married pair at the time of the action have jurisdiction to divorce, and that her domicile always follows his.  $\int Carswell v$ . Carswell 1881 8 R. 901\_7 It is no objection that one of the main reasons for the husband acquiring a domicile in Scotland was to obtain a divorce, provided that he has acquired a bona fide Scottish domicile. / Ibid; Stavert v. Stavert 1882 9 R. 519 per Lord President Inglis\_7 But if, while the parties were domiciled in country A she committed an act which gave him no right to divorce, and he changed his domicile to B where such an act gave a right to divorce, guid juris? In Carswell v. Carswell / supra 7 two Canadians married in Canada; she deserted him in Canada where desertion. was not a ground of divorce; he came to Scotland, acquired a domicile in Scotland and obtained a divorce on the ground of her desertion. The issue was before the Court in a very marked manner, because the pursuing husband admitted that one of the main reasons for his coming to and settling in Scotland was to obtain a divorce, and the four years period of desertion prior to the action which had to be proved occurred mainly in Canada. Further the wife's address was unknown to the pursuer.

It may be, however, that the rule in <u>Carswell</u> only applies where the marital offence is desertion by the wife. Lord Young justified the decision with these considerations: "Her duty as a wife is to be with her husband here, and I cannot accept the language of the Lord Ordinary that the pursuer's domicile in Scotland was acquired as a domicile not for her, but as a domicile against her. It is a domicile for her, assuming that he has made Scotland his home .... I cannot say, in such

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a state of facts, that the law of Scotland is an unfair law to govern the domestic relations of a man who has adopted this country as his home. The duty of his wife is to be here, and subject to the same law as her husband . Now, it is because she has gone away from him that she does not know he is here, and is not here with him if indeed she is ignorant, which I have already said I consider extremely doubtful." / at p. 909 7 These considerations would not apply to a marital offence like adultery, sodomy, bestiality or any other act which simply occurred and had no continued existence. There is probably justice in the Bar's opinion: "If, then, something took place which is no ground for divorce by the personal law of the spouses at the time, but is a ground for it by a personal law which they afterwards acquire, and if the thing which took place had no continued existence, happened once for all - if, for instance, by the earlier law simple adultery by the husband is not a ground on which the wife can sue for divorce, but must be accompanied by some other qualification, while by their subsequent law simple adultery is enough a change of nationality (or domicile) cannot elevate to the rank of a ground for divorce the circumstance which took place under the dominion of the former law. We may say that if the spouse must put up with this conduct, without being able to raise an action of divorce, it is regarded, so far as the marriage is concerned, as non-existent." [Gillespie's translation p. 385; Cp. Baty, Polarized Law, p. 63 7

Suppose a wife commits adultery in country A, where the parties are domiciled, and that adultery is a ground of divorce there, but action must be brought within twelve months of the offence, and suppose the parties come to Scotland and acquire a domicile here, where there is/

is no twelve months' limitation, and the husband brings an action of divorce after the expiry of the twelve months' period, quid juris? Probably the action of divorce could proceed here, and the foreign rule of 12 months' limitation could be disregarded as a rule of practice and procedure which should be governed by the lex fori. / Fraser, Parent & Child p. 73, Cp. the ratio of Fenton v. Livingstone 1859 21 D. (H.L.) 10 7 However if the limitation to 12 months' occurred in the very statute which gave the right of divorce it might be considered a limitation of the right itself which entered into it ab initio and therefore a matter of substance, Cp. Goodman v. L.N.W.R. (O.H.) 1877 14 S.L.R. 449\_7 and if that was the nature of the limitation then there having been no right to divorce when the parties left the former domicile there would be no right of divorce in Scotland. Similarly it is submitted that if the wife committed adultery while they were domiciled in country A and the husband condoned it, condonation being an answer by the law of Country A, and the husband subsequently acquired a domicile in country B where condonation was no answer, he would not thereby acquire a right to divorce from the Courts of country B. Contra Fraser Parent & Child p. 737

## Exceptions to the rule that we will only recognise divorces granted by the Courts of the domicile.

If a divorce is granted by the Court other than the Court of the domicile, and that divorce is recognised in the country of the domicile, we should on that ground recognise and give effect to the divorce, and that even although the grounds for which the divorcewas granted with not sufficient for divorce either according to the law/ law of the domicile or the law of this country. <u>Armitage</u> v. <u>A.G.</u> 1906 P. 135; <u>Cass</u> v. <u>Cass</u> 1910 102 L.T. 397\_7

Divorces granted under certain Imperial statutes raise further exceptions. The Indian and Colonial Divorce Jurisdiction Act 1926 / 16 and 17 Geo. V c. 40 7 enacts that Courts in India shall have jurisdiction to divorce, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children and costs where the parties are British subjects domiciled in England or Scotland, provided that the petitioner resides in India at the date of the petition and the place where the parties last resided together was India, and the marriage was solemnised or the offence committed in India and provided that the petitioner shows that by reason of official duty poverty or other sufficient cause he or she cannot proceed in the Courts of the domicile. The grounds of divorce are those recognised in England. The Act provides that a divorce granted under these provisions after being registered in England or Scotland, whichever is the domicile of the parties, shall have the same force and effect as if made by the High Court in England or Court of Session in Scotland. Thus a divorce pronounced by a court other than the Court of the domicile of the parties is by statute to be recognised as effective here. The Act may be applied by Order in Council to any part of His Majesty's Dominions other than a self-governing Dominion [Sec. 2] and by Order in Council has been made to apply to Kenya, /S.R. & O. 1928 No. 635 7 Straits Settlements, /S.R. & O. 1931 No. 851\_7 Jamaica / S.R. & O. 1932 No. 475\_7 Hong Kong [S.R. & O. 1935 No. 836\_7, Ceylon. /S.R. & O. 1936 No. 562 7 If the rule suggested above is correct, that when a divorce is recognised as effective/

effective by the Courts of the domicile it is just in the same position as a divorce granted by the Courts of the domicile, then divorces granted under the Act which have been properly registered, will be held binding by foreign Courts which recognise the <u>Le Mesurier</u> rule.

The Matrimonial Causes (War Marriages) Act 1944  $\sqrt{7}$  and 8 Geo. VI c. 43 7 as well as the provisions above-mentioned about the jurisdiction of the Court of Session, have a similar extension of the jurisdiction of the High Court in England, so divorces granted in England under that Act will be recognised as effective in Scotland although not granted by the Courts of the domicile. / Sec. 4 7 The provision in the English Matrimonial Causes Act 1937 which is quoted above, to the effect that when a wife is deserted by her husband and the husband has been domiciled in England immediately prior to the desertion the High Court in England should have jurisdiction to divorce notwithstanding that the husband has changed his domicile since the desertion may raise another exception to the rule that we only recognise divorces pronounced by the Courts of the domicile, for it may be proper that our Courts should recognise divorces pronounced under the authority of a statute which is passed by the United Kingdom Parliament.

#### JURISDICTION IN QUESTIONS INCIDENTAL TO DIVORCE

If our Courts have jurisdiction to pronounce decree of divorce they have jurisdiction to deal with these questions which are incidental to the divorce proceedings, namely (1) custody of children (2) aliment, and (3) patrimonial rights resulting from the divorce as regards moveables wherever situated and immoveables within the jurisdiction, <u>Manderson</u> v. <u>Sutherland</u> 1899 1 F. 621\_7 but/ but not immoveables situated abroad <u>Cathcart v. Cathcart</u> 1904 12 S.L.T. 182\_7 notwithstanding that the defender may reside outside the jurisdiction and not be subject to the jurisdiction on any of the usual grounds in personal actions such as possession of heritage and arrestment of moveables in Scotland, and on the question of the custody of the children notwithstanding that the children are resident outside the jurisdiction. <u>Philips</u> v. <u>Philips</u> 1944 LX T.L.R. 395\_7

In an action in our Courts for the patrimonial rights consequent to a divorce pronounced in our Courts, our Courts will not, while the decree of divorce stands, and appeal from it or reduction of it is competent listen to objections that the divorce was pronounced without jurisdiction. <u>Manderson</u> v. <u>Sutherland</u>; <u>Catheart</u> v. <u>Catheart</u>, supra\_7

If we recognise a foreign Court as being a Court of competent jurisdiction in divorce and give effect here to its decrees of divorce, and if it has dealt with any of these ancillary matters in the divorce action we will recognise it as being a Court of competent jurisdiction for these matters and give effect here to its decrees regarding them; otherwise we will not give effect to its decrees on these incidental matters, even although the defender was subject to the jurisdiction of the foreign Court in respect of residence or some other common ground of jurisdiction in personal actions. Thus when a divorce and order for maintenance of the wifewas pronounced in the United States in respect of a couple whowere really domiciledin England so that the decree of divorcewis invalid, itwas held that the ancillary maintenance order was also invalid. <u>Simons</u> v. <u>Simons</u> 1939 1 K.B. 490\_7 It was argued that although the decree of divorcewas invalid because itwas a decree in rem and not pronounced by the only Court of competent jurisdiction, the maintenance/

maintenance orderwiss valid, being a decree <u>in personam</u> and pronounced by a Court that had jurisdiction <u>in personam</u> because both parties hade submitted to the Court which pronounced it by presenting cross petitions for divorce. This plea was **reje**cted because the Court only orders maintenance because it has ordered divorce and if the decree of divorce falls the ancillary order for maintenance has to suffer the same fate.

The position as regards expenses and damages in a divorce action is different. In a divorce action the Court will award expenses against one of the spouses notwithstanding that the spouse is not subject to the jurisdiction in personal actions, provided that the Court has jurisdiction in respect of the divorce. But the converse is not also true. When a wife brings an action of divorce against her husband and his plea of no jurisdiction is sustained the Court has power to award expenses against the husband although they have no power to deal with the merits of the case against him, <u>Stavert</u> v. <u>Stavert</u> 1882 9 R. 519; Cp. <u>Westergaard</u> v. Westergaard 1914 S.C. 977; Pike v. Pike 1899 6 S.L.T. 331 7 and that even although the husband is not subject to the jurisdiction of the Court for personal actions. <u>Linder</u> v. <u>Linder</u> 1902 4 F. 465\_7 The test probably is whether the wife reasonably thought that the Court of Session was the proper forum, in which case the wife will be allowed expenses. In one case when the defending husband stated a plea of no jurisdiction and a preliminary proof was allowed on the question of domicile the Lord Ordinary granted an interim award of expenses to the wife. The defender reclaimed against the competency of this award, but the Inner House, in sending the case to the Summar Roll, granted a further interim/

interim award to meet the expenses in the Inner House, and later, when disposing of the reclaiming motion after debate, affirmed the award made by the Lord Ordinary.  $\sum Linder v \cdot Linder$ , supra\_7

In an action of divorce for adultery in the Court of Session the paramour can only be called as a codefender (which is done only when there is a conclusion for expenses or damages against the paramour) if the paramour is subject to the jurisdiction in one of the recognised ways in personal actions, such as residence within Scotland or the possession of heritage or arrestment of moveables in Scotland, and it will not do to say that because there is jurisdiction in the divorce action on the ground of the domicile of the parties there is therefore jurisdiction for the incidental purpose of citing the paramour as codefender and making him or her liable for expenses and damages. [Fraser v. Fraser and Hibbert 1870 8 M. 400] The position is different in England, where the paramour does not need to be subject to the jurisdiction of the English Courts in personal actions before being cited as a co-defender, because the Matrimonial Causes Act 1857 provided that a husband who petitions for divorce or damages must make the alleged adulterer a corespondent to the petition  $\angle$  Secs. 28 and 33  $\angle$  and that the petition should be served on the co-respondent whether within or without Her Majesty's Domisions  $\angle$  Sec. 42. The present provisions are secs. 176, 177 and 189 of the Supreme Court of Judicature (Consolidation) Act 1925 15 and 16 Geo. 5 c. 49; See Rayment v. Rayment 1910 P. 271; Rush v. Rush 1920 P. 242; Dicey p. 282\_7

We would not give effect to a decree for damages awarded by a foreign Court against a co-defender who was not subject to the jurisdiction of the foreign Court, even although the foreign Court had jurisdiction in/

in the action of divorce between the spouses on the ground that the spouses were domiciledin the foreign country. <u>Phillips</u> v. <u>Batho</u> 1913 3 K.B. per Scrutton L.J. at p. 29, 30; <u>Rayment v. Rayment</u> 1910 P. 271; Contra Dicey p. 427 <u>Phillips</u> v. <u>Batho</u> [Supra] decided that the Courts of England would enforce a decree for damages against the co-respondent regularly pronounced according to the law of the Court which pronounced it although the Court did not have, according to the principles of International Private Law, jurisdiction over the co-respondent, where the Court that pronounced it was also a Court of the British Sovereign, because the English Courts, which did have jurisdiction over the co-respondent according to the principles of International Private Law, could not have granted that decree for damages, not having jurisdiction over the divorce. This case therefore is of no authority in Scotland where a separate action for damages against the paramour is competent even although the Scots Courts have no jurisdiction to divorce.

# Jurisdiction in actions for the dissolution of a marriage on the ground of the presumed death of one of the spouses.

The Scottish Courts would presumably only have jurisdiction to entertain a petition for the dissolution of a marriage on the ground of the presumed death of one of the parties  $\langle$  under sec. 5 of the Divorce (Scotland) Act 1958, 1 and 2 Geo. 6 c. 50\_7 where the husband was a domiciled Scotsman, and a decree of dissolution on this ground by a foreign Court which was the Court of the domicile would be regarded as a conclusive decree <u>in rem</u>. In short the proceeding

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is analogous to divorce. This principle is in harmony with that applicable to presumptions of death in the case of succession.  $\sqrt{q} \cdot \mathbf{v} \cdot \sqrt{2}$ 

## Jurisdiction in Actions of Declarator of Marriage and Actions of Declarator of Nullity of Marriage.

The Scottish authorities on declator of marriage The Scottish authorities as to jurisdiction in actions of declarator of marriage are to the following effect :-

The Scottish Courts have jurisdiction if (1) the parties are domiciled in Scotland at the time of the action <u>memelland</u> v. <u>McLelland</u> 1942 S.C. 502 <u>7</u> or (2) if the alleged marriage was celebrated in Scotland <u>and</u> the defender (either man or woman) was present in Scotland when cited. <u>Murison</u> v. <u>Murison</u> 1923 S.C. 624; <u>Wylie v. Laye</u> (Whole Court) 1834 12 S. 927, over-ruling <u>Dodds</u> v. <u>Westcomb</u> 1745 M. 4793, and <u>Mackenzie</u> v. <u>Mackenzie</u> 8th March 1810 F.C.; <u>Wilson</u> v. <u>Horn</u> 1904 (O.H.) 41 S.L.R. 312; <u>Tallarico</u> v. <u>L.A.</u> 1923 S.L.T. 272; <u>Scruton</u> v. <u>Gray</u> M. 4822; <u>Key</u> v. <u>Key</u> Fraser Husband and Wife 2nd Ed. p. 1272\_7

<u>Scottish</u> <u>authorities</u> <u>on declator</u> <u>of nullity</u> <u>of marriage</u> The Scottish authorities as to jurisdiction in actions of declarator of nullity of marriage are to the effect that the Scottish Courts have jurisdiction if (1) the parties are domiciled in Scotland at the date of the action <u>Administrator of Austrian Property</u> v. <u>Von Lorang</u> 1927 S.C. (H.L.) 80; <u>Martin v. Buret</u> (0.H.) 1938 S.L.T. 479; <u>A.B. v. Y.Z.</u> 1900 (0.H.) 38 S.L.R.559; <u>A.B. v. C.B.</u> 1884 11 R. 1060, 12 R. (H.L.) 36. <u>7</u> or (2) if the marriage was celebrated in Scotland. <u>MacDougall</u> v. <u>Chitnavis</u> 1937 S.C. 390; <u>Lendrum</u> v. <u>Chakravarti</u> (0.H.) 1929 S.L.T. 96; <u>Miller v. Deakin</u> (0.H.) 1912 1 S.L.T. 253\_7 The Court has not insisted on service on the defender when within Scotland to validate/ validate the second ground of jurisdiction.

nglish uthorities in declator f nullity f marriage

The English authorities as regards declarators of nullity / There is no counterpart in England of the Scottish declarator of marriage Z are to the effect that the English Courts have jurisdiction if (1) the parties are domiciled in England at the time of the suit / Inverclyde v. Inverclyde 1931 P. 29; Von Lorang, supra  $\int$  or (2) the place where the marriage is alleged to have been celebrated is in England (without necessity for the respondent to be in England when cited) <u>Simonin</u> v. <u>Mallac</u> (1860) 2 Sw. & Tr. 67; <u>Sottomayor</u> v. <u>De Barros</u> (No. 1) (1877) 3 P.D. 1; (No.2) 1879 5 P.D. 94; Ogden v. Ogden 1908 P. 46; Hussien v. Hussien 1938 P. 159; Linke, Van Aende 1894 10T.L.R.426; Valier V. Valier 1925 133L.T. 8307 or (3) the parties are resident in England at the time of the suit / Roberts v. Brennan 1902 P. 143; Cp. Mitford v. Mitford 1923 P. 130 or (4) the petitioner is resident and domiciled in England at the time of the suit.  $\sum White v \cdot White$ 1937 P. 1117---

The <u>locus celebrationis</u> is a competent jurisdiction not only when the ground is  $_{\lambda}^{\text{that}}$  formalities of the marriage have not been properly observed, but also when it is that the parties have no capacity or that the marriage is essentially invalid <u>Sottomayor</u> v. <u>De</u> Barros (Nos. 1 and 2), supra <u>7</u> One case held that there was a distinction between suits for nullity in void marriages on the one hand and voidable marriages on the other; that the Courts of the <u>locus celebrationis</u> had jurisdiction to annull a marriage which was said to be void <u>ab initio</u>, on the ground for example, of non compliance with the formalities of the <u>lex loci celebrationis</u>, but that only the Courts of the domicile of the spouses could annul/ annul a voidable marriage on the ground for example of the impotence of one of the spouses, because such a marriage was valid until annulled, and the process of nullity in that case was more akin to an action of divorce / Inverciyde v. Inverciyde 1931 P. 29; following the distinction made by Lord President Clyde in Administrator of Austrian Property v. Von Lorang 1926 S.C. at p. 616; Cp. White v. White 1937 P. 111; contrast <u>Mitford</u> v. <u>Mitford</u> 1923 P. 130 7 However this distinction has not been followed in the most recent cases which have held that the locus celebrationis has jurisdiction to annull on the ground of impotency as on any other ground / Easterbrook v. Easterbrook 1944 P. 10; <u>Hutter</u> v. <u>Hutter</u> 1944 P. 95\_7 The ratio of the case which supports the third ground of jurisdiction is that the jurisdiction of the English Ecclesiastical Courtswips based on the residence of the parties, and in suits for nullity the Probate Division follows the practice of the Ecclesiastical Courts as prescribed by sec. 22 of the matrimonial Causes Act 1857; this case however is of no assistance or authority in Scotland. The case which supports the fourth ground of jurisdiction is a sympathetic judgment in an undefended case by a single judge. In it the domicile of the parties is not the same because the woman did not live with the man after the ceremony and so did not in fact acquire his domicile and since there is no valid marriage she did not acquire his domicile by operation of law. It is curious that the Court should have sustained its jurisdiction because England was the domicile and residence of the female petitioner. It would not have been so unreasonable if the Court of the place where the respondent was domiciled and resident had assumed jurisdiction. But in the circumstances/

circumstances of the case the marriage, and the status and the person of the respondent were all completely beyond the jurisdiction of the English Court. There was no circumstance which subjected him to the jurisdiction of the English Court. In <u>Ogden v. Ogden</u> the English Courts would not recognise a decree of the French Courts pronounced when the petitioner was domiciled and resident in France, the respondent being domiciled and resident in England. <u>/ 1908 P. 46 / It is submitted that the case</u> which supports the fourth ground of jurisdiction can be disregarded also.

The principle issue is whether the Courts of the domicile of the parties have exclusive jurisdiction, as in divorce, or whether the Courts of the locus celebrationis also have jurisdiction. The difficulty of having two jurisdictions competent to declare or annull a marriage is that in <u>Von Lorang</u> \_ supra \_ The House of Lords held that a decree of nullity of marriage is equivalent to a judgment in rem, and when pronounced by a Court of competent jurisdiction, will be accepted as conclusive everywhere. Now suppose a Frenchman married a Scotswoman in Scotland without the parental consent required by his law. According to our principles the marriage is valid, but French law classifies the necessity for consent as a question of capacity to be governed by the personal law, and since by the personal law of the man, French law, consent is necessary, the marriage is invalid according to French principles, therefore an action of nullity in the Scots Courts would fail but in the French Courts would succeed. If each Court is a competent forum is the decision of each conclusive everywhere? Does the conclusive determination of the question depend on whether the irate French parents can obtain a French decree of nullity before the designing Scotswoman can obtain/

obtain a decree of declarator? It will not do to suggest that the Courts of the domicile have a jurisdiction that entitles their decrees to be recognised everywhere and that the Courts of the <u>locus celebrationis</u> have a con-:current jurisdiction whose decrees are only recognised within the <u>locus celebrationis</u>, because the Scotswoman might obtain a declarator of marriage in the <u>locus</u> <u>celebrationis</u> here while the French parents were obtaining a declarator of nullity in the Courts of the domicile, and our Courts would be at the same time bound by the decision of our Courts and by the contradictory decision of the Courts of the domicile which would, on the authority of <u>Von Lorang</u>, be conclusive here.

The Scottish authorities which acknowledge that the locus celebrationis is a competent jurisdiction, do not conclusively establish that rule. most were decided before Von Lorang, and do not have in view that the decision is one affecting status; they proceed on principles applicable to personal actions. This criticism can be directed at <u>murison</u> v. <u>Murison</u>, /1923 S.C. 624 7 where the competence of the locus celebrationis was affirmed in the Inner House after a very full debate, and also of the decision of the whole Court in the early case of wylie v. Laye. 2 1834 12 5. 927 Further, in both these cases the Court held that there was no jurisdiction because the defender was not present in Scotland when cited, which the Court held was also necessary where the ground of jurisdiction was that Scotland was the locus celebrationis, and accordingly the opinions that the Scots Courts have jurisdiction when Scotland is the locus celebrationis were obiter. There are only four reported cases where the fact that Scotland was the locus celebrationis was held to give the Scottish Courts jurisdiction; three of these are Outer House decisions / Key V. Key Fraser Husband and Wife/

Wife 2nd Ed. p. 1272; <u>Lendrum v. Chakravarti</u> 1929 S.L.T. 96; and <u>Miller v. Deakin</u> 1912 1 S.L.T. 253\_7 and in the one Inner House case <u>MacDougall</u> v. <u>Chitnavis</u> 1937 S.C. 390\_7 which was decided in 1937, the Court observed that the question was not free from difficulty and that the general question whether the Court of the domicile has not exclusive jurisdiction in actions of nullity might require to be reconsidered. The case was an undefended one, the Court had heard argument on the whole case and was deciding against the pursuer and appellant on the merits, and accordingly did not feel bound to go into the question of jurisdiction with any particularity.

If, as the judges thought in Murison and Wylie v. Laye, jurisdiction can be founded ratione contractus coupled with service on the defender while within Scotland, which is simply one of the normal grounds for founding jurisdiction in personal actions, there seems to be no reason why jurisdiction should not also be founded by the other normal grounds in personal actions, namely residence of the defender within the jurisdiction for at least 40 days, the possession of heritage in Scotland, or the arrestment of moveables in Scotland, Lord Hunter said in Murison: "The Court (in Wylie v. Laye) were of opinion that, although the alleged marriage between the pursuer and the defender was stated to have been contracted in Scotland, the locus contractus did not lay a foundation for a jurisdiction over a foreigner, unless he had been cited in this country, or in some cases, unless his funds had been arrested here jurisdictionis fundandae causa. The latter ground of founding jurisdiction may be left out of account, as it has been decided that jurisdiction cannot be constituted by the arrestment of funds belonging to a foreigner, when the action on which the/

the arrestment was used raised a question of status -<u>Morley v. Jackson</u> 16 R. 78" It is curious that it did not occur to Lord Hunter that jurisdiction founded <u>ratione contractus</u> plus service on the defender within Scotland should also now be left out of account on the ground that jurisdiction cannot be founded thus when the action raises a question of status.

The English authorities which affirm the competence of the <u>locus celebrationis</u> are of little or no assistance in Scotland because they proceed on the ratio that the English Probate Division by sec. 22 of the Matrimonial Causes Act 1857 [Now Sec. 32 of The Supreme Court of Judicature Act 1925] has, in all suits and proceedings other than proceedings to dissolve any marriage to proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief, and the Ecclesiastical Courts used to give relief in cases other than those in which the parties were domiciled in England.

It has been argued for the <u>locus celebrationis</u> that since the <u>lex loci celebrationis</u> must govern all questions as to the formalities of the marriage ceremony it is logical that the Courts of the <u>locus</u> <u>celebrationis</u> should have a jurisdiction at least over those questions; <u>Cheshire p. 340\_7</u> but this is a dangerous method of reasoning: the Courts of the domicile may not apply the <u>lex loci celebrationis</u> to questions of formality, or if they do, they may not agree with our view that the question in issue is one of formality. <u>See Ogden v. Ogden 1908 P. 46\_7</u>

But one cannot go so far as to say that the Courts of the domicile should have exclusive jurisdiction, as in divorce. In a divorce action there is juris-:diction when the domicile of both the parties is in this/ this country at the time of the action, but a divorce action proceeds on the assumption that there is a valid marriage, and the parties always have the same domicile in consequence of the marriage, so that there is only one Court, namely the Court of the domicile of the husband, which is concerned with and can alter the status of the parties. In actions of declarator or nullity, however, the woman's domicile is not always the same as his. If there was no marriage her domicile would not be the same as his by operation of law. Tn many actions of nullity her domicile is in fact the same as his because she has in fact lived with him in his country, and this was the case in Von Lorang. But in many cases also she has not lived with her "husband" in his domicile and so has not acquired his domicile. <u>MacDougall</u> v. Chitnavis 1937 S.C. 390; Ogden v. Ogden 1908 P. 46; White v. White 1937 P. 111 / In Von Lorang Lord Phillimore said "for the purpose of pronouncing upon the status of parties ... The Court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively." / 1927 S.C. (H.L.) at p. 97 7 The qualification is important. This leaves room then for the locus celebrationis to function.

It is suggested that if the matter is reconsidered by a fuller Court or in the House of Lords these rules might emerge.

If both parties have the same domicile the Scots Courts have jurisdiction only if Scotland is the common domicile. The fact that Scotland is the <u>locus</u> <u>celebrationis</u> would not give the Scots Courts jurisdiction - even to pronounce a decree which is Falcon bridge Lill L.QR.248;effective only within Scotland.  $\sum_{ralcon bridge Lill L.QR.248;}$ court is a competent Court, still more if it is the only competent Court - and in my opinion the Wiesbaden Court/ Court was the only competent Court for these parties -... " per Lord Phillimore in Adminstrator of Austrian Property v. Von Lorang 1927 S.C. (H.I.) at p. 98\_7 If both parties have the same domicile, which is in a foreign country, the decrees of that common domicile are equivalent to judgments in rem, and, if they have been obtained without fraud or collusion and accord with Scottish notions of substantial justice, will be accepted as conclusive by the Scottish Courts Adminstrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 807 even if the same decision would not have been given if the case had been tried in this country; <u>De Massa</u> v. <u>De Massa</u> The Times newspaper March 13, 1931; Galene v. Galene 1939 P. 237. In Von Lorang the validity of a marriage celebrated in Paris was decided by the Courts of Wiesbaden where the parties were domiciled. The ground of nullity was that the French requirements of residence and publication had not been observed and the Wiesbaden Court took evidence of French law on this topic and applied French law on the principle that as to the formalities of marriages locus regit. Our Courts would have proceeded in the same way. But in Ogden v. Ogden 1908 P. 46, the Court of Appeal was faced with the validity of a marriage celebrated in England between an Englishwoman and a Frenchman which was said to be invalid according to French law because of lack of the consent of the Frenchman's parents. According to our principles parental consent is a formality which is ruled by English law as the lex loci celebrationis, (alternatively, as suggested below, it is a question of capacity which English law would have disregarded) and since according to the English <u>lex</u> <u>loci</u> <u>celebrationis</u> lack of consent is not in the circumstances a bar, the English/

English Courts would have held the marriage valid, but the French Courts had already annulled the marriage, holding that parental consent pertained to capacity that was governed by French law which held that he did had not had capacity. The Court of Appeal refused to recognise the French decree and sustained the validity of the marriage. Sir Gorell Barnes, President, said that if the question was compliance with the formalities of celebration the decision of the Court of the domicile can not be binding on the Court of the place of celebration. "It certainly would be somewhat startling if this Court, having come to the conclusion that the marriage in question between the appellant and pursuer was valid in England, should yet hold that the French decision that it was not a valid marriage was binding upon it." (pp. 80, 81) If France had been the common domicile of the parties this attitude would have been wrong. However the decision in Ogden was correct because of the special circumstances of the case: the woman had never in fact acquired her husband's French domicile so that the French Court not being the Court of the common domicile was not a Court of competent jurisdiction within the meaning of Von Lorang - see Lord Phillimore in Von Lorang, 1927 S.C. (H.L.) at p. 97 7 with possibly this exception that we will not recognise a decree of nullity of a foreign Court which declares null a marriage celebrated according to the Foreign Marriage Act 1892, even if that country is the common domicile of the parties, / Hay v. Northcote 1900 2 Ch. 262; Dicey p. 438\_7 If both parties have the same domicile the decrees of any foreign Court other than that of the domicile will not be recognised here. <u>Clayton</u> v. <u>Clayton</u> 1932 P. 45; <u>Scrimshire</u> v. Scrimshire/

Scrimshire 1752 2 Hag. Cons. 395; Sinclair v. Sinclair 1798 1 Hag. Cons. 294; contra Mitford v. Mitford 1923 P. 130\_7

If the above rules are not held to be the law, and if it is decided that our Courts have jurisdiction when Scotland is the locus celebrationis, it is submitted that the Courts of the domicile would still be held to have exclusive jurisdiction in actions to declare null a voidable, as distinct from a void marriage, for the process is more akin to divorce. The distinction that is taken between void and voidable marriages in Inverclyde v. Inverclyde / 1931 P. 29; see also Administrator of Austrian Property v. Von Lorang 1926 S.C. per Lord President Clyde at p. 616; White v. White 1937 P. 111\_7 is sound. This distinction has been rejected in two recent English cases / Easterbrook v. Easterbrook 1944 P. 10; and Hutter v. Hutter 1944 P. 95 7 but the ratio of the rejection is that the English Ecclesiastical Courts made no distinction and the English Divorce Court has by statute to follow the practice of the English Ecclesiastical Courts; and this is reasoning that will not have any influence in Scotland. A voidable marriage being a good marriage until annulled by the Court, the woman can be said to have the same domicile as her husband by operation of law, so that there will always be a common domicile, as in divorce, / Cp. Dicey p. 298 7 which makes that domicile very appropriate and convenient to be the competent and only competent jurisdiction.

In two English cases <u>De Massa</u> v. <u>De Massa</u>, The Times March 31 1931, and <u>Galene</u> v. <u>Galene</u> 1939 P. 237\_7 decrees of nullity have been granted by the English Courts on production of a decree of nullity of the Courts of the domicile, the decree being pronounced because/ because of the principles of <u>Von Lorang</u>. The Scots Courts however would probably regard such a confirmatory decree as unnecessary and therefore incompetent, because the foreign decree is universally valid <u>ex proprio</u> <u>vigore</u>, <u>Arnott</u> v. <u>L.A.</u> 1932 S.L.T. 46\_7

If both parties have not the same domicile the Scots Courts will have jurisdiction in actions of nullity or declarator of marriage if this country is the locus celebrationis, at least when the question is one concerning the formalities of the marriage. The qualification is perhaps unnecessary because the place of celebration has an interest when the question is the essential validity of the marriage because it is submitted that the rule is that for a marriage to be valid as regards essentials it must satisfy the requirements of the law of the matrimonial domicile and of the lex loci celebrationis; and when the issue is capacity the locus celebrationis has an interest because it is submitted that for a marriage to be valid as regards capacity each party has to have capacity by his or her domiciliary law and by the Even when the ground of lex loci celebrationis. nullity is bigamy the Courts of the locus celebrationis can claim this interest, that they must see that their The main basis of the registers are correct. jurisdiction, moreover, is not its appropriateness but that the defender is subject to it ratione contractus 7 Their decision however will not be equivalent to a judgment in rem since the res, that is the status of the parties is not within its jurisdiction. The res is not within any one jurisdiction and so there is probably no jurisdiction that can give a judgment in rem.

The next question is whether the Scottish Courts have jurisdiction simply on the ground that Scotland is the/ the <u>locus celebrationis</u> or whether the defender must in addition have been in Scotland when cited. It is clear that the same rule should apply in actions of nullity and in actions of declarator of marriage, for the two actions try the same question, the validity of a marriage, and the only difference is as to which party is the pursuer. Indeed there may be cross actions of declarator and nullity which have been conjoined.  $\sum E \cdot g \cdot \underline{Longworth} v \cdot \underline{Yelverton}$  1864 2 M. 161, 2 M. (H.L.) 49\_7

In a declarator of marriage the defender is subject to the jurisdiction <u>ratione contractus</u>, because by the very act of entering into the contract he impliedly submitted to the jurisdiction of the Courts of the <u>locus contractus</u> on any question relating to the contract.

It has been suggested that the same does not apply in an action of nullity, for there the pursuer's argument is that there is no contract; but this distinction is illusory: it is equally valid to say that if two parties commit equivocal acts, by those very acts they impliedly submit themselves to the jurisdiction of the Courts of the locus on any question as to what those actsamount to in law. But if there were anything in this distinction one would have expected that the requirement that the defender must be in Scotland when cited would be present in nullity cases when there could, on this argument, be no jurisdiction ratione contractus, and would not be required in declarators where there could be jurisdiction ratione contractus. But the decisions are that presence in Scotland is required in declarator but not in nullity. Since presence in Scotland is required in declarator, if there is any difference between declarators and nullities then a fortiori it should be required in nullities./

nullities. The principle that the defender must be in Scotland when cited has been affirmed after full consideration in two cases of declarator of marriage, [ Wylie v. Laye 1834 12 S. 927; Murison v. Murison 1923 S.C. 624 7 and it is submitted that this principle is good both for declarator and nullity of marriage. Of the three cases of nullity where presence of the defender in Scotland was dispensed with, two were Outer Houses cases, and one of them / Miller v. Deakin 1912 1 S.L.T. 253\_7 was later doubted by the judge who decided it when he held in Murison v. Murison that presence in Scotland was necessary for declarators; [1923 S.C. at p. 647 per Lord Hunter 7 and the only Inner House case where jurisdiction in nullity was sustained without the defender being in Scotland, the question of jurisdiction was not fully argued, and Murison was not quoted, [MacDougall v. Chitnavis 1937 S.C. 390 7

If both parties have not the same domicile our Courts may have jurisdiction in actions of declarator and nullity on the ground that the defender is domiciled in Scotland, / Reid v. Reid (0.H.) unreported, December 29th 1905; Fraser ii, 1271; Duncan & Dykes p. 189\_7 or has simply been resident in Scotland for more than 40 days before the raising of the action,  $\sum$  Residence of the defender in Scotland for more than 40 days seems to have been assumed to be a valid ground of jurisdiction in Forrest v. Funstone 1789 Mor. 4823. Contra Fraser, ii 1275, 6; Duncan & Dykes p. 185\_7 or even on the ground of prorogation of the jurisdiction / Tallarico v. The Lord Advocate 1923 S.L.T. 272; Murray v. Lindley 1805 Mor. For. Comp. App. No. 5; Duncan & Dykes p. 190; Dicey p. 297; Contra Fraser ii pp. 1276, 1294\_7 This possibility arises because jurisdiction founded ratione contractus/

<u>contractus</u> plus service on the defender when within the jurisdiction is simply one method of founding jurisdiction in personal actions. Why should other methods of founding jurisdiction in personal actions not be equally valid? The justice of allowing our Courts jurisdiction when the defender is residing here appears from the consideration that if the parties do not have the same domicile and if before jurisdiction can be founded <u>ratione contractus</u> the defender must be served while  $in_{\hat{\lambda}} \frac{\text{Scotland}}{\text{Scotland}}$ , there may be no other jurisdiction to which the pursuer can have recourse.

But the English case which upheld jurisdiction when the <u>pursuer</u> was domiciled and resident in England <u>White</u> v. <u>White</u> 1937 P. 1117 is unsupportable -<u>actor sequitur forum rei</u>. And jurisdiction can not be founded on the possession of heritage or arrestment of moveables in Scotland because the conclusion is not a monetary one <u>Scruton</u> v. <u>Gray</u> 1772 Mor. 4822\_7

However if the validity of the marriage affects rights in or succession to Scottish heritage, the Scots Courts have jurisdiction to entertain an action of declarator or nullity which is associated with an action or another conclusion in the same action dealing with the heritable question. <u>Shedden v. Patrick</u> 1849 11 D. 1333

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### Jurisdiction in actions of separation.

The Scottish Courts have jurisdiction in actions of separation when the parties are domiciled in Scotland at the date of the raising of the action, even although the defender is not residing in Scotland and is not subject to the jurisdiction of the Scottish Courts on any of the other usual grounds, <u>Hood</u> v. <u>Hood</u> 1897 24 R. 973; Bar pp.381, 384; and normally the Scottish Courts have no jurisdiction if the parties are not so domiciled. <u>Linder v. Linder</u> (0.H.) 1904 11 S.L.T. 777; Bar, ibid\_7 The decrees of the Courts of the domicile in actions of separation affect status <u>Jelfs v. Jelfs</u> (0.H.) 1939 S.L.T. 286 per Lord Keith at p. 290\_7 and are equivalent to judgments <u>in rem</u> and are entitled to extra territorial recognition.

The Scottish Courts have also jurisdiction in actions of separation when the parties are resident in Scotland (even although domiciled elsewhere) and the exercise of the jurisdiction is necessary for the protection of one of the spouses. <u>Le Mesurier v.</u> <u>Le Mesurier 1895 A.C. at pp. 526, 527 and p. 531;</u> <u>Jelfs v. Jelfs (O.H.) 1939 S.L.T. 286; Wingrave v.</u> <u>Wingrave 1918 35 Sh. Ct. Rep. 97\_7</u> In <u>Le Mesurier, 1895 A.C. 517\_7 Lord Watson in giving</u> the opinion of the Court said "there are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the

ius gentium, may be administered by the Courts of the country in which the spouses, domiciled elsewhere, are for the time resident. If ... the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence/ residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties [ \_ at pp. 526, 7; see also p. 531\_7

Jurisdiction is only exercised on the ground of residence ex necessitate, and for the protection of the complaining spouse. Thus when a wife brought an action of separation for cuelty in the Scottish Courts against her husband who was domiciled in England but temporarily resident in Scotland, and the husband was on the point of departure for England at the time of the service of the summons and left three days later, the Court refused to exercise jurisdiction because there was no necessity for it to interfere: it was only when necessary that the Courts of the residence would exercise the jurisdiction which properly belonged to the Courts of the domicile. / Jelfs v. Jelfs (0.H.) 1939 S.L.T. 286 / For the Courts of the residence to interfere, the acts complained of would have to be committed within the country.

A decree granted by the Courts of the place of the parties' residence is not entitled to extraterritorial recognition, and is only effective while the parties are within the jurisdiction which pronounced it; such decrees have a purely local and temporal effect, and will not affect the status of the parties.

The law which our Courts will apply when they have jurisdiction in an action of separation whether on the ground of domicile, or residence <u>ex necessitate</u>, is Scots law.  $\sum$  Cheshire p. 374; Walton p. 373 $\sum$ 

The English cases on jurisdiction in actions of separation are not authoritative in Scotland. In England the Courts of the residence are held to have jurisdiction because the English Courts are bound by sec. 22 of the Matrimonial Causes Act 1857 to apply the practice/ practice of the English Ecclesiastical Courts, which was to grant decrees of divorce <u>a mensa et thoro</u> when the partiesware resident in England, irrespective of the domicile of the parties: <u>Armytage</u> v. <u>Armytage</u> 1898 P. 178; <u>Anghinelli</u> v. <u>Anghinelli</u> 1918 P. 247; <u>Graham</u> v. <u>Graham</u> 1923 P. 31; <u>Sim</u> v. <u>Sim</u> 1944 P. 877 thus in England the function of the Courts of the residence is not limited to interference <u>ex necessitate</u>, the offences complained of need not have been committed in England, <u>Armytage</u> v. <u>Armytage</u> 1898 P. 1787 and it has been opined that decrees of judicial separation do not affect status <u>Anghinelli</u> v. <u>Anghinelli</u> 1918 P. 2477

## Jurisdiction in Actions of Adherence

The Scots Courts have jurisdiction in actions of adherence when the defender is resident in Scotland,  $\angle AB$  V. CD 1845 7 D. 556; Gordon v. Gordon 1847 9 D. 1293. "It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment" - Le Mesurier 1895 A.C. at p. 531\_7 or when the parties have been domiciled in Scotland and the defender has deserted the other here and left the country.  $\angle$  Ersk. Inst. 1, 6, 44\_7

## Jurisdiction in Actions of Aliment

The Scots Courts have jurisdiction in actions of aliment on any ground on which there would be jurisdiction against the defender in an action for payment of a debt. <u>M'Neill</u> v. <u>M'Neill</u> (O.H.) 1919 2 S.L.T. 127; <u>Bell v. Bell</u> 22nd February 1812 F.C.; Walton p. 378

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In addition, if the action is one for separation and aliment and the domicile of the parties is Scottish the Scots Courts have jurisdiction for both parts of the action irrespective of whether the defender is subject to the jurisdiction for a debt. <u>Jelfs</u> v. <u>Jelfs</u> (0.H.) 1939 S.L.T. 286; <u>Linder v. Linder</u> (0.H.) 1904 11 S.L.T. 777\_7 It is submitted that the rule that whatever is ancillary to a consistorial action follows the jurisdiction in the main part of the action applies here as it does in divorce. <u>Contra</u> Duncan & Dykes p. 183, 197\_7

# Jurisdiction in actions of damages for breach of contract to marry.

This type of action is in the same position, as regards jurisdiction, as an action on an ordinary contract, / Sinclair v. Smith 22 D. 1475; Bald v. Dawson 1911 2 S.L.T. 459 7 and an action for damages for seduction is in the same position as one on any other delict. [Buchan v. Grimaldi 1905 7 F. 917] Whether an action for breach of promise to marry is competent depends on the lex fori. If competent, the law to be applied depends on whether the issue is the existence of a valid engagement to marry, or the consequences which ensue from a breach. It is submitted that the former is governed as regards capacity, formal validity and essential validity by the same systems of law as govern these matters in the case of marriage; [Rabel i, p. 199 7 and the latter by the law of the matrimonial domicile. [Hansen v. Dixon (1906) 23 T.L.R. 56. But see Rabel, 1, pp. 199 et sequ. / The law of the matrimonial domicile will determine what "separable heads of claim", if any, are allowable. / See/

[See "Remedy - Damages". The obiter remarks at the end of <u>Hansen</u> v. <u>Dixon</u> are wrong: whether damages are due is not a matter of remedy, but of substance.]

#### The Property Rights of Spouses

# (A) Where there is no marriage contract

# (i) Moveables

when there is no marriage contract the property rights of the spouses inter se, so far as moveables are concerned, are governed by the law of the domicile of the husband. There has occasionally been a suggestion that this rule should be stated more broadly, and that the property rights of the spouses should be governed by the "matrimonial domicile", which would normally be the domicile of the husband, but, if the parties at the time of the marriage intended to settle in a different country, and did settle there, would be that country. Thus Lord Shand states: "Where there is no marriage contract between spouses the rights of the parties in respect of property belonging to either or both will be determined according to the law of the domicile of the husband, or rather the marriage domicile, i.e. the place where the parties intend to settle as their future domicile." - Corbet v. Waddell 1879 7 R. 200 at p. 208. This seems reasonable, although there is no direct authority for it. Contra Dicey p. 598, Cheshire p. 492. It will only arise where there is a real community of goods in which the wife has a proprietary interest which she san enforce during her lifetime, because otherwise, the property rights of the spouses being regulated by his domicile for the time being y see post - their property rights would be regulated by the law of his domicile until they went to the new country, and thereafter by the law of the new country in accordance with the general rule. Thus if a woman domiciled in countryA marries a man domiciled in country B without a marriage contract, the question whether her moveable property falls to him or under his ius mariti, and if so, Egerton v. Forbes Nov. 27th 1812 F.C.; Lashley v. what property, Moreland 21st Dec. 1809 F.C.; Clark v. Newmarsh 1836 F.C. XI 395; Newlands v. Chalmers Trustees 1832 11 S. \$5 ] and the

question of what rights she has in any property so falling, <u>[Duchess of Buckingham v. Winterbottom</u> 1851 13 D. 1129\_7 the question whether gifts between the spouses are prohibited, or revocable, <u>[Walton p. 349\_7</u> and the liability of the husband for his wife's antenuptial debts, <u>[Walton p. 350; Contra De</u> <u>Greuchy v. Wills</u> 1879 4 C.P. 362 (<u>lex loci celebrationis</u>) are determined by the law of country B.

According to the law of some countries, e.g. England, marriage revokes a previous will. The question is held to be one as to the effect of marriage of the patrimonial rights of the spouses, and accordingly the law of the domicile of the husband at the time of the marriage governs. <u>Westerman's</u> <u>Executor</u> v. <u>Schwab</u> 1905 8 F. 132; <u>Loustalan</u> v. <u>Loustalan</u> L.R. 1900 P. 211\_7 If that law has no such rule about revocation of wills by marriage, the will is not revoked, <u>Westerman's</u> <u>Executor</u> v. <u>Schwab</u>; <u>In the Goods of Reid</u> 1866 L.P. 1 P. & D. 74; <u>In re Groos</u> 1904 P. 269\_7 and if it has, the will is revoked. <u>/Eattye's Trustees</u> v. <u>Battye</u> 1917 S.C. 385\_7

Suppose the husband changes his domicile after marriage, will the property rights of the spouses inter se be regulated by the new or the old domicile? When rights are conferred on the husband, such as a rule that all his wife's moveable property is assigned to him by the marriage, without a real community of goods being created in which the wife has a proprietary interest which she can enforce during her lifetime, the answer is the new domicile: the husband's rights change with a change in his comicile. But when the property rights of the spouses inter se can be regarded as an implied contract, creating a real community of goods in which the wife has a proprietary interest which she can enforce during her lifetime, the answer is the old domicile. Thus parties married in Scotland, where, although the wife's moveable property was assigned to the husband by the marriage a community of goods did not exist in which the wife had a proprietary interest which she could enforce during her lifetime; the parties later became domiciled in England; the question whether a deposit receipt in a Scotch bank/

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fell under the husband's ius mariti or not had to be determined by the law of England. | Hall's Trustees v. Hall 1854 16 D. 1057 similarly the right to ius relictae, and legitim from the deceased father's estate, which are now the only relics of the Scottish community of goods, depend on the law of the husband's last domicile: if the husband died domiciled in Scotland they are due from his whole estate wherever situated, otherwise not. | Hog v. Hog 1791 Mor. 4619, 3 Pat. 247; <u>Nisbett v. Nisbett's Trustees 1835 13 S.</u> 517; Robinson v. Robinson's Trustees 1930 S.C. (H.L.) 20; Manderson v. <u>Sutherland</u> 1899 1 F. 621 The husband can change the domicile from Scotland to England, and if he does the wife is without ius Steel v. Steel 1888 15 R. 896 per Lord Fraser at p.904 relictae. On the other hand a French man and a Frenchwoman married in France without any 'contract, so that according to French law their rights inter se as to property were subject to the law of the community of goods, which constituted "an actual binding partnership proprietary relationshop fixed by the law," Lord Chancellor at p. 29 whereby the wife was not only entitled to half of the common property on the husband's death, but could sue during the subsistence of the marriage if her dower was in danger for a separation of the estates; they came to England where they acquired a domicile; the husband left an English will by which he disposed of all his property; it was held that as to moveable goods the rights of the wife under French marriage law were not affected by the change of domicileand that the widow was entitled to the share of her husband's personal estate to which she would have been entitled if Curlier De Nicols v, 1900 they had remained domiciled in France. A.C. 21

This state of the law is not satisfactory. On principle the answer should always be that the property rights of the spouses <u>inter</u> <u>se</u> should be regulated by the law of the husband's domicile at the tome of the marriage. The wife had in mind when she married that she would have to live with him in his domicile, and that their property rights would be regulated by that law. There is There is therefore an implied contract that their rights inter se should be regulated in that way, and it is most unfair that a husband, who determines the domicile of the married pair, can, by changing the domicile, ear obtain greater rights from his wife's estate than she understood at the time of the marriage that he would have, and the converse also holds. Molinaeus, <u>Conclusiones Dr Statute Et Consultations Lecalibus</u> --see Cuttrie's Savigny, Appl at pr.455,6 <u>Bommentary on the Gode 1,1</u> That the law does not accord with principle is due to two conflicting decisions of the House of Lords on the community of go ods.

---- The first was Lashley v. Hog Mor. 4619, 1792 3 Pat. 247 where the facts were as follows: Mr. Hog, a native of Scotland, acquired a domicile in England and married there. By English law the moveable property of the wife was assigned to the husband by marriage, but she had no rights to this property either during the marriage or after her husband's death. Later Mr. Hog re-acquired hi Scots domicile. By the old Scots common law which applied at that time, there was a community of goods between spouses. Marriage assigned the moveable property of the spouses <u>ipso iure</u> to the husband as a fund to be under his uncontrolled power ( ius mariti ) during the marriage for the maintenace of the parties and their children. If the marriage were dissolved within a year and a day and without a child being born the parties were restored as nearly as possible to their former estate. If the marriage had subsisted for a year and a day, or a child had been born of it which had been heard to cry, the fund was distributed on the dissolution of the marriage thus: if the wife predeceased and there were children of the husband by this or a former marriage a third might go according to her will or to her children or other next of kinas her representatives, but the other two thirds remained with the husband as his own, subject only to his children's claim for legitim on his death; if there were no children of the husband of this or a former marriage, one half went to the wife's next of kin or legatees, and the other to the surviving husband. If the husband predeceased, the surviving widow took a third, called ius relictae, a third called dead's part went according to the husband's

when the wife predeaceased the husband can not be explained except by community of goods. It can not be explained as an incident of succession, because the husband who paid was still alive. It is interesting to note a comment of Lord Macnaghten in De Nicoos v. Curlier: It is not, I think, to see how the principle that Lord Eldon In <u>Hog</u> v. <u>Lashley</u> selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicile be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next of kin of hiswife." There is no need to "extend" Lord Eldon's principle to decide that, because that was exactly what was decided in Hog v. Lashley. Mrs. Lashley claimed that as soon as her mother died sha was entitled to a share of the goods in communion. She did not put forward the claim until after her father had also died, bat that circumstance could not affect the basis of her claim. And in <u>Kennedy v. Bell</u> 1864 2 M. 587, and 1866 6 M. (H.L.) 69 / children obtained payment of part of the goods in communionfrom their father during his lifetime, although he had been domiciled in Jamaica, where English law applied at the time of the marriage. -

----- Further, it is difficult to explain the rule that legitim can be discharged in the antenuptial marriage contract of the spouses on any ground other than that legitim is an incident of the matrimonial law and not the law of succession, and is derived from the community of goods.

The true position is that there was community of goods in [Baty, Folarized Low, pp. 93-a seque. Sufferts it and signations be Nicols v Scots law and <u>Hog v. Lashley</u> was simply a bad decision. It is <u>Curved</u>] binding however and because of it the unfortunate distinction which was made at the beginning of this chapter has to be made. Had <u>De</u> <u>Nicols v. Curlier</u> come first, the rule would propably have been established that all property rights of the spouses <u>inter se</u> should be regulated by the domicile of the husband at the time of the marriage, and <u>ius relictae</u> and legitim from a deceased father's estate being historically part of the matrimonial law and relics of the community of goods should have been so regulated.

since the statutory abolition of the right of the wife's next of kin or executors to a half or third of the goods in communion on her predecease  $\left[ 18 \text{ Vict. c. } 22 \text{ sec. } 6 \right]$  and the abolition of the assignation of the wife's moveable property to the husband  $\left[ \text{Married Women's Property Act 1881} \right]$  the only relics of the scots community of goods which are left are so similar to incidents of the law of succession that they do not seem to be inappropriately governed by the law of the last domicile. Conformably to this attitude, the statutory right to <u>ius relicti</u> and legitim from the estate of a deceased woman were given to the husband and children respectively of a woman who died domiciled in Scotland. Married Women's Property Act 1881 Secs 6 & 7

Where there is no marriage contract the law of the domicile of the husband at the time determines what effect divorce has on the property rights of the spouses as regards moveables, wherever situated. [<u>Manderson v. Sutherland</u> 1899 1 F. 621] If our Courts have granted a decree of divorce they will not, in an action for enforcement of the patrimonial rights emanating therefrom, entertain an averment that the domicile of the husband is not Scottish ( even if that is a probable view from the pursuer's averments ) while the decree of divorce stands and appeal from it or reduction of it is compete nt. <u>Funderson v. Sutherland</u>, supra

While the law of the domicile determines whether property has fallen under the <u>ius mariti</u>, the law of the situs of the property determines the nature of the property and whether it is vest in the wife. <u>Egerton v. Forbes</u> 27th Nov. 1812 F.C.; <u>Lashley v.</u> <u>Moreland</u> 21st Dec. 1809 F.C.; Cp. <u>Grant's Trustees v. Ritchie's</u> <u>Executor</u> 1886 13 R. 646; <u>Milligan v. Milligan</u> 1826 4 S. 432; <u>Smith v. Lauder</u> 1834 12 S. 646 ] In particular, the law of the situs determines whether the property is moveable or immoveable. <u>See infra p.</u>

# (11) Immoveables

The property rights of the spouses as regards immoveables where there is no marriage contract are governed by the <u>lex situs</u> of the immoveables. <u>Welch v. Tennent</u> 1889 16 F. 876; Hevd. 18 F. (H.L.) 72\_7 For example terce is payable to the widow of the proprietor of Scottish lands even when the deceased was domiciled in another country. <u>Train v.</u> <u>Train's Executrix</u> 1899 2 F. 146\_7

In he De Nicols / 1900 2 Ch. 410 7 an English Court held that when a French couple married so that the French rule of community of goods applied to them, which the House of Lords said was "an actual binding partnership proprietary relation fixed by the law;" / De Nicols v. Curlier 1900 A.C. per the Lord Chancellor at p. 29 7 and they subsequently became domiciled in England where the husband acquired English leaseholds, the wife was entitled on her husband's predecease to the half share of this immoveable property allowed by French law, notwithstanding that she had no such right under the lex situs. On the marriage of these French people there was an implied contract defined by reference to the French 6ode, which had the same binding effect as an express contract. This result however could not occur in the case of Scottish land, for even if it were admitted that the principle of In re De Nicols was sound, on the ground that a "contract" relating to land which is formally valid by the lex loci actus is valid, and therefore that the Scots requirement of formal writing for a contract relating to land need not be satisfied, yet the lex fori, Scots law, would still govern as regards evidence, and a contract relating to land can not be proved without writing of some kind. The solemnity of writing which is required by Scots law to constitute the contract may not be necessary since that solemnity is not required by French law, but writing of some kind is still necessary to prove the contract. But in any event the principle of this English case is doubtful. The French Civil/

Civil Code has no force to extend beyond the boundaries of France so as to affect immoveable property situated in another country. Story concludes "that in the case of a marriage without any express nuptial contract, the <u>lex loci contractus</u> (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immoveable property within that country, and as to property in other countries, it will govern mevables, but not immovables, the former having no situs, and the latter being governed by the <u>lex rei sitae</u>." [Sec. 158; <u>Contra</u> J.L. Falconbridge 1937 LIII L.Q.F. 540.]

(B) Where there is a marriage contract

When the parties have made a valid marriage contract to settle what their property rights shall be, the marriage contract governs the property rights comprehended in it, not only when the parties are domiciled in the original domicile, but wherever they may become domiciled, <u>Duncan v. Cannan</u> 18 Beav. 128; <u>De Nicols v. Curlier</u> 1900 A.C. 21 per Lord Drampton at p. 46\_7 and no matter where it is put in suit. <u>Anstruther v. Adair</u> 1834 2 My & K. 512\_7

Capacity to enter into a marriage contract depends on the party's domicile. Each party must have capacity by the law of his or her domicile. [See "Capacity"]

A marriage contract is formally valid if executed either in accordance with the <u>lex loci contractus</u> or "the proper law of the contract", that is the law which governs its construction and essential validity, which is determined as aftermentioned. <u>Bushby</u> v. <u>Rennie</u> 1825 4 S. 110. See Contract ... Formal Validity\_7

The construction and essential validity of a marriage contract Construction. In construing a contract and determining the rights of the parties' thereunder, the object is to ascertain what the parties intended, and when a marriage contract involves

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a foreign law this principle is logically carried out. The construction is governed, and the rights of parties under the contract are ascertained, by the law by which the parties intended. The parties' intention as to which law should apply may be expressed in the marriage contract, and if so that law will be applied. / Earl of Stair v. Head 1844 6 D. 904; Montgomery v. Zarifi 1918 S.C. (H.L.) 128; Bayley v. Johnstone (0.H.) 1928 S.N. 153; Drummond v. Bell-Irving 1930 S.C. 704; Corbet v. Waddell 1879 7 B. 200 per Lord Shand at p. 208. Contrast Gordon v. Worlie 1633 Mor. 4460 7 Two examples may be given to show how fully this principle has been applied. Firstly, in a marriage contract there may be an ultimate destination to the heirs or next of kin of one of the spouses of funds contributed by that spouse in the event of failure of the children of the marriage and of the death of both spouses. Such an ultimate destination is/many respects like a will by the person concerned, / Lister's J.F. v. Syme 1914 S.C. 204 7 but nevertheless the bequest is to be construed by the same law as that by which the parties said that the marriage contract was to be construed. [Earl of Stair v. Head, supra; Lister's J.F. v. Syme, supra 7 Secondly, when there is a declaration in a marriage contract that its provisions should be construed, and the rights of parties under it regulated, according to a certain law, that law will determine the parties rights under it in the event of divorce. / Montgomery v. Zarifi 1918 S.C. (H.L.) 128; Drummond v. Bell-Irving 1930 S.C. 704; Bayley v. Johnstone (0.H.) 1928 S.N. 153\_7

where the parties do not expressly state in the marriage contract the law by which they intend it to be construed and their rights under it to be governed, their contract is governed by the law by which the parties impliedly intended it to be governed. There is a presumption that they intended it to be governed by the law of the matrimonial domicile ( which has already been defined as the law of the domicile of the husband at the time of the marriage, unless another the parties intend to and do settle immediately in a country, when it is that country ). Corbet v. Waddell 1879 7 R. 200 per Lord shand at p. 208; <u>Brown v. Brown</u> (0.H.) 1913 2 S.L.T. 314: Cp. In re Fitzgerald, Surman v. Fitzgerald 1904 1 Ch. 575 per Cozens Thus Hardy L.J. at p. 588, and Vaughan Williams L.J. at p. 594 the presumption in favour of the law of his domicile has been held to exclude the lex rei sitae of heritable property. Brown v. Brown (0.H.) 1913 2 S.L.T. 314 domicile of the husband was held to apply where the law of the domicile of the wife was different, but in both cases there was a supporting feature that the contract was expressed in the language Eadie's Trustees v. Henderson 1919 of the law of his domicile. **¢**annan 18 Beav. 128 1 S.L.T. 314 253; Duncan V .

The presumption that the law of his domicile applies is not a very strong one. It is not to be compared to the presumption that a will is meant to be construed according to the law of the domicile of the deceased. | One English judge indeed said ( although his statement is not adopted ) that the presumption is for the lex loci contractur, and not for the lex domicilii of the husband -Chamberlain v. Napier 1880 15 Ch. 614 per Hall V-C. The only reported cases where the domicile of the lady before marriage and the domicile of the husband were different, and in which their antenuptial marriage contract was construed according to the law of his domicile, had the supporting feature that the contract was expressed Eadie's Trustees v. in the language of the law of his domicile. 1919 1S.L.T. 253 18 Bear. 128; Henderson, supra; Duncan v. Cannan, supra Most of the reported cases where the domicile of the parties were different are examples

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of the rebutted of the presumption. Corbet v. waddel, In re Fitzgerald, supra; In re Bankes 1902 2 Ch. 333 | The other circumstances which are taken into account, either in support or rebuttal of the law of the husband's domicile, to determine the intention of the parties as to the law which is to govern, are the law of the domicile of the lady before marriage, if different from that of the husband, Corbet v. Waddel, In re Fitzgerald, In re Bankes, supra the country in which the trustees reside, Corbet v. Waddel, supra the legal language in which the contract is expressed, Chamberlain v. Napier, supra the place of execution of the contract, Corbet va Waddel, supra; Ramsay v. Cowan 1833 11 S. 967; Chamberlain v. Napier, supra 1 the fact that the contract contains a clause of . consent to registration in the Books of Council and Session, Corbet v. Waddell, supra the situs of the property comprehended by the contract, particularly if it is heritage. Ogilvie v. Dundas 1826 2 W.&S. 214; Chamberlain v. Napier, Brown v. Brown, For example, an antenuptial marriage contract in Scots 🕏 supra. form was executed in Scotland. The lady was a domiciled Scotswoman. The groom was a domiciled English man, as was his father, who was also a party. The trustees were Scotch. It was held that the law of Scotland had to govern its construction and escential validity. Corbet v. "addel, supra

The truste of the husband's property may be apperable from the trusts of the wife's property, and thus governed by a different law. A marriage contract dented into in Scotland, where the marriage took place, by a domiciled Englishman described as residing in England Scotland and a domiciled Scotswoman. Trusts were declared of English real property of the husband in English form, and of moveable property of the wife in Scotch form. It was held that the trusts of the husband's property were to be construed by English law, and the trusts of the wife's property by Scots law. (Chamberlain <u>Va Napier</u> 1880 15 CK.).614

Where the marriage contract is expressed in non-technical language, any Court seised of the problem of construction which speaks that language may interpret the contract for itself.

Cp. the rule with regard

Construction of a marriage contract includes the question whether funds or property have been assigned by it, but the nature of the property, as transmissible or not, is to be determined by the law of the situs of the property. [<u>Grant's Trustees v. Ritchie's Executor</u> 1886 13 R. 643; Cp. <u>Egerton v. Forbes</u> 27th Nov. 1812 F&C.: <u>Lashley</u> v. <u>Moreland</u> 21st Dec. 1809 F.C.; <u>Milligan v. Milligan</u> 1826 4 S. 43?; <u>smith v. Lauder</u> 1834 12 S. 343] The nature of the property as moveable or immoveable, is determined by the law of its situs. [See p.]

<u>marriage</u> contract governs its essential validity. Under the heading of "essential validity" come such questions as whether the marriage contract is revocable or not, <u>[Ramsay v. Cowan, Eadie's Trustees v.</u> <u>Henderson</u>, supra ] or whether an alimentary liferent in favour of a man is a valid provision. <u>[Corbet v. Waddel</u>, <u>In re Fitzgerald</u>, <u>valid</u> supra ] where the provision in question is by one of the possible laws and not by another, that is an element in favour of the first law being the <del>law</del> applicable law, because the parties prosumably did not intend to make an invalid stipulation, and a deed must be construed, <u>ut valeat, magis quam pereat</u> <u>[Corbet v. Waddel, In re Fitzgerald</u>, supra ]

Where the question is the revocability of a marriage contract, a distinction sometimes has to be made between the question of the essential nature of the marriage contract, i.e. whether it is <u>sua</u> <u>nature</u> revocable, on the one hand, and the question of the capecity of one of the spouses to revoke, on the other. This distinction is admirably illustrated by <u>Sawrey-Cockson v. Sawrey-Cockson's</u> <u>Trustees</u>,  $\begin{bmatrix} 1905 & F. & 157 \end{bmatrix}$  where a minor Scotswoman, in contemplation of marriage with a domiciled Englishman, executed a unilateral trust deed. It was held (1) from all the circumstances the deed was a Scots deed, and the question whether it was <u>sua natura</u> revocable **must** be determined by Scots law; (2) the question whether as a married woman domiciled in England she had capacity to revoke it must be determined according to the law of England; (3) consequently an avenment that by the law of England the effect of marriage is

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is to incupacitate a wife from revoking rights created by her by any unilateral deed in contemplation of marriage as relevant, but that the encuiry as to the law of England must be limited to the question of the wife's capacity to revoke, and should not include any question as to the revocable nature of the deed itself. This case can be contrasted favourably with an English decision on similar facts, where the distinction was not made and the whole question treated as one of capacity. [Viditz v. O'Hagan 1900 ? Ch. 87 (A.C.) Critised by Cheshire p. 227

If the appropriate law of a marriage contract is the law of country B, and the Courts of country A interpret the contract for themselves because it  $\frac{doc}{doc}$  not contain technical words, the essential validity of the contract is still governed by the law of country B. [Boe v. Anderson 1862 24 D. 732 - analogous case of a will]

The Effect of Divorce on the Property Rights of the Spouses. where there is a marriage contract, the law which governs its construction and essential validity determines what effect the divorce has on the parties' rights thereunder. Montgomery v. Zarifi 1918 S.C. (H.L.) 128; Drummond v. Bell-Irving 1930 S.C. 704; Bayley v. Johnstone (O.H.) 1928 S.N. 153; Cathcarty. Outhcart (0.H.) 1904 42 S.L.T. 182 -- where there is no marriage contract, the law of the domicile of the husband rules as to moveables, wherever situated, and the lex situs as to immoveables. Manderson v. Sutherland 1899 1 F. 621; Cathcart v. Cathcart 1904 12 S.L.T. 182 \_\_\_\_Lord Moncreiff said in one case; Manderson v. Sutherland, supra at p. 629 Now, according to our law, a husband cannot, after committing adultery in Scotland, deprive the wife of her remedy of divorce and her patrimonial rights consequent upon it by changing his domicile." It is submitted that this is a wrong view. Assuming it to be sound that our Courts have jurisdiction in divorce in exceptional cases where the husband was not domiciled in Scotland at the time of the action, on the ground that when the husband was formerly domiciled in Scotland the wife had acquired a vested right to divorce, she could not have acquired a vested right to the patrimonial consequences of divorce according to Scots law, for the patrimonial consequences do not follow from the adultery but from the divorce. She may have acquired an indefeasible right to divorce from the Scots Courts when he was domiciled in Scotland and committed the adultery, but she only acquired the patrimonial rights which follow from divorce when she obtained the divorce, and then he was domiciled elsewhere. Further, Lord Moncreiff's dictum rests on the assumption that our law says that legal rights ar prestable on divorce: what our law says is that the guilty party is to be treated as dead, and it is only if the guilty party did in fact die domiciled in Scotland that legal rights emerge.

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# THE RIGHTS AND DUTIES OF THE SPOUSES OTHER THAN PROPERTY RIGHTS

The power of the husband over his wife and the right of either party to adherence can not be greater than that conferred by the law of the husband's domicile nor greater than that conferred by the law of their residence. [Cp. paternal power over children: See 'Custody of Children'; Fraser p. 1318; Dicey p. 548 7 "Would a husband in this country be permitted to keep his wife in an iron cage, or beat her with rods of the thickness of a Judge's finger, because he had married her in England, where it is said this may be done?" [Gordon v. Fye Ferg. Cons. Rep. App. 276 per Lord Meadowbank at p. 361\_7 The lex loci celebrationis is left entirely out of account. Thus it was no answer to a demand for adherence which was valid by the law of the place of residence and of the matrimonial domicile that under the lex loci celebrationis the parties would have been separated under sentences because the marriage had been a clandestine one. [ Herbert v. Herbert (1819) 2 Hagg. Cons. 263; Westlake 33 7

In questions of aliment the law of the domicile of the spouse whose obligation is in question governs. <u>Macdonald</u> **v.** <u>Macdonald</u> **1846** 8 D. 830 (liability to aliment children) Cp. Aliment of Children\_7

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#### LEGITIMACY, LEGITIMATION AND ADOPTION

#### LEGITIMACY

To determine whether a child is legitimate or not there are two stages of the enquiry. First, were his parents lawfully married according to our principles of International Private Law at the time of his birth? If the answer to this question is in the affirmative the child is legitimate and no further inquiry is needed. The validity of the marriage must be tested according to our principles of International Private Law, and it will not do to say that because the marriage is valid and therefore the child is legitimate according to the law of the domicile of origin of the child, or the law of the domicile of the parents, or the law of the domicile of the father, therefore we must regard the marriage as valid and the child legitimate, Shaw v. Gould 1868 3 E. & I. App. 55; In re Paine 1940 Ch. 46 (see 1940 L.Q.R. p. 23)/ although some dicta point to such a rule. [ Fenton v. Livingstone 1859 21 D. (H.L.) 10; In re Don's Estate (1857) 4 Drew 194, per Kindersley V.C. at pp. 197, 8; In re Goodman's Trusts (1881) 17 Ch. D. 266 per Cotton L.J. at p. 292; Cheshire pp. 376 et sequ. /

If the answer is in the negative the second stage of the enquiry begins. The child is not necessarily illegitimate. Some countries, e.g. Scotland and France, recognise the doctrine of putative marriage by which, although the parents may not be lawfully married, owing, e.g., to a subsisting prior marriage affecting one of them, if one parent is in <u>bona fide</u> ignorance of the impediment, the children are legitimate. If the parents are not married according to our principles of International Private Law the children are legitimate if the doctrine of putative marriage/ marriage is recognised by the law of the parent's domicile and the requirements of the doctrine according to that law are fulfilled, / moore v. Saxton (1916) 90 Conn. 164. In Shaw v. Gould 1868 3 E. and I. Appeals 55 the doctrine of putative marriage was recognised by the law of the parents' domicile, but the requirements of the doctrine according to that law were not fulfilled because the ignorance was ignorance not of fact but of law - see pp. 79, 97, -Cp. In re Stirling 1908 2 Ch. 344 7 and otherwise are not legitimate. If the domicile of one parent differs from that of the other (that can happen if the parents are not married) the law of the domicile of the parent who is in bona fide ignorance of the impediment rules. [Smijth v. Smijth 1918 1 S.L.T. 156] The function of the law of the domicile of the parents in determining a child's legitimacy is limited to determining whether the doctrine of putative marriage is applicable or not, and there is no general rule that the legitimacy of a child is to be tested by the law of the domicile of origin of the child, [ It is impossible to say what is the law of the domicile of origin of a child whose legitimacy is in question because his domicile of origin depends on whether he is legitimate or not - the domicile of origin of a legitimate child is that of his father and the domicile of origin of an illegitimate child is that of his mother ] or the law of the domicile of the parents or of the father at the time of the child's birth, [Smijth v. Smijth 1918 1 S.L.T. 156] as has been suggested. / Fenton v. Livingstone, In re Don's Estate, In re Goodman's Trusts, Cheshire, supra 7 What has been said above applies only to marriage as we understand it. In the case of polygamous "marriages"/

"marriages", if the children are legitimate by the law of the father's domicile they will be recognised as such, <u>In re Ullee</u> 1885 53 L.T. (N.S.) 711; <u>Seedats</u> <u>Executor v. The Master</u> (South African Case) 1917 App. Div. 302, 1932 48 L.Q.R. 344n. and 349 <u>7</u> and on the death of their father intestate entitled to succeed to his estate in accordance with the law of his domicile. <u>In re Abdul Majid Belsah</u>, Times Newspaper December 16th, 18th 1926, January 14th, 18th 1927\_7

#### LEGITIMATION

According to some systems of law an illegitimate child may be legitimated by (1) the subsequent marriage of his parents or (2) by recognition or acknowledgment, which in many countries, e.g. Germany, Italy, Switzerland and Holland requires a formal declaration and an order by a competent authority, but in, e.g. California requires no such formalities. [F.A. Mann in 1941 LVII L.Q.R. 112]

## Legitimation by subsequent marriage

It is quite clear that if the father of the childwas domiciled at the time of the child's birth and of the subsequent marriage in a country which recognised legitimation by by subsequent marriage, and if the requirements of that law for legitimation are fulfilled, the child is everywhere considered to be legitimated, <u>Dalhousie v. M'Douall</u>, <u>Munro v. Munro</u> 1840 1 Robin. 475; <u>Doe v. Vardill</u> 1830 2 J. 431; <u>M'Douall v. Adair</u> 1852 14 D. 525; <u>Udny v. Udny</u> 1869 7 M. (H.L.) 89; <u>Aikman v. Aikman III McQ. 854;</u> <u>In re Goodman's Trusts</u> 1881 17 Ch. D. 266; <u>In Re</u> <u>Don's Estate</u> (1857) 4 Drew. 194; <u>In re Andros</u> 1883 24 Ch. D. 637; Fraser, Parent and Child p. 57;

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and if the fatherwis domiciled at these times in a country where legitimation by subsequent marriage is not recognised, the child can not be legitimated. Rose v. Ross 1830, 4 W. and S. 289; Fenton v. Livingstone 1859 21 D. (H.L.) 10; Strathmore Peerage Case 6 Pat. 645; Shedden v. Patrick 5 Pat. 194; Fraser, Parent and Child p. 54 / Both the English and the Scottish authorities are agreed on this and it has more than once been laid down in the House of Lords. But difficulty arises when the father is domiciled in different countries at the time of the birth and of the subsequent marriage, and when one country recognises and the other does not recognise legitimation. The point has never been directly decided in Scotland or in the House of Lords but there are strong indications in the Scots cases to the following effect, and it is submitted that this is the rule :- When the domicile of the father is different at the time of the birth and of the marriage it is his domicile at the latter time which counts and a child is legitimated if legitimation per subsequens matrimonium occurs according to the law of his father's domicile at the time of the subsequent marriage and otherwise is not legitimated. [ Dalhousie v. M'Douall and Munro v. Munro 1840 Robin 475, per L.J.C. Boyle and Lords Meadowbank, Fullerton, Jeffrey and Cunninghame at p. 504, Lords Glenlee, Medwyn, Moncreiff and Cockburn at p. 542, Lord Corehouse at pp. 570 and 574, Lord Brougham at p. 612 (contra Lord Medyn at p. 487 and Lord Chancellor Cottenham at p. 611); Udny v. Udny 1869 7 M. (H.L.) 89 per Lord Chancellor Hatherley at p. 94; Bar p. 474; Savigny p. 302; Fraser, Parent and Child pp. 61 and 62/

The English Courts however decided that before a child could be legitimated its father had to be domiciled both at the time of the birth <u>and</u> of the marriage in a country/

country which recognised legitimation by subsequent marriage. / In re Goodman's Trusts 1881 17 Ch. D.266; In re Grove 1887 40 Ch. D. 216; In re Wright's Trust (1859) 2 K. and J. 595; Udny v. Udny 1869 7 M. (H.L.) 89 per Lord Chancellor Hatherley at p. 94; In re Luck's Settlement Trusts 1940 1 Ch. 864; Dicey Rule 1467 This curious rule is justified thus: legitimation by subsequent marriage is based on the civil and canon law which applied the fiction that at the time of the conception or birth of the child the parents enter into a contract to marry which is implemented by the subsequent marriage and that by the subsequent marriage they are married retroactively to the conception; this is supposed to make the date of birth a tempus inspiciendum. Then it is said that a child must have acquired at birth from the law of the domicile of its putative father a capacity of being legitimated, which is carried into effect if he is legitimated according to the law of his father's domicile at the time of the marriage, and must not have acquired an incapacity for being legitimated. /E.g. In re Grove (1888) 40 Ch. D. 216 at p. 233\_/ To allow the domicile of the father at the time of the birth to influence the issue is contrary to the principle which is adopted in intestate succession, divorce and many other issues of status, namely that it is the domicile of the parties for the time being which determines status, and that if the domicile changes the law affecting the issue of status changes too.

A further reason for looking only at the domicile of the father at the time of the marriage is given by Bar "Legitimation of bastards, .... is nothing but a legal equalisation of certain children, illegitimately begotten,/

begotten, with legitimate children. The law which rules the rights of legitimate children must therefore regulate the legitimation of bastards; and as the former are subject to the actual personal law of the father, the latter must be determined also by the personal law of the father at the date when the fact said to infer legitimation took place. If, then, there is a question of legitimation per subsequens matrimonium, the child is legitimate, if that is the result of the personal law which the father enjoyed at the time of the marriage." [Bar, Gillespie's transl. 2nd Ed. p. 434 As to the idea that a child acquires at birth a capacity or incapacity to be legitimated Bar says "it might as reasonably be maintained that if the law of the place where the child is born forbade marriages between cousins, and thus pronounced a child incapable of such a marriage this child could not, in consequence of his original incapacity, contract a marriage in that degree after he has acquired a new domicile, the law of which is ignorant of the prohibition." [Gillespie's transl. p. 435; Cp. F.A. Mann in 1941 LVII L.Q.R. at p. 115, 121/

The true reason of course for the English Courts adopting the rule they did was their reluctance to admit legitimation by subsequent marriage, which was not part of the English common law, in any case where the parties hat had some connection with England. The situation has now changed in England. Section 1 of the Legitimacy Act 1926 [16 and 17 Geo. 5 c. 60]7 introduced legitimation by subsequent marriage in the case of persons whose fathers were at the date of the marriage domiciled in England or Wales, and the same Act provides that where the parents of an illegitimate person marry or have married one another, whether/ whether before or after the commencement of the Act, and the father of the illegitimate person was or was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of the Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law. [Sec 8 (1)] This Act does not apply to Scotland. The legislature has recognised that the soundest rule is to look only at the father's domicile at the time of the marriage. Now it may be argued that the English cases before the Legitimacy Act 1926 are persuasive authority in Scotland to the effect that at common law the domicile of the father at both times must concur; this rule has been altered by statute in England, but, it may be said, since there is no statute applicable to Scotland to alter the common law rule, in Scotland that rule remains, to the effect that the domicile of the father at both times must concur. [ Cp. the reasoning in Re Luck's Settlement Trusts 1940 1 Ch. 864\_7 However it is submitted that it would be very foolish for our Courts to follow these English precedents, which are not binding on them, in favour of a rule which is contrary to principle and is no longer the law in England, particularly when the obiter dicta in the Scottish cases on the point are in favour of the rule which accords with principle, and with the law as now established in England, namely that only the/

the father's domicile at the time of the marriage counts.

# Legitimation by recognition or acknowledgment

It is submitted that the same rule applies here as in legitimation by subsequent marriage, namely that the law of the domicile of the father at the date of the recognition or acknowledgment alone governs. There are no cases in Scotland on the subject. There is one decision of the Court of Appeal in England in 1940 to a different effect.  $\sqrt{In}$  re Luck's Settlement Trusts 1940 1 Ch. 864 7

In <u>re</u> Luck's Settlement Trusts

A domiciled Englishman had an illegitimate child in California. Later he acquired a domicile in California and signed a declaration that he publicly acknowledged the child as his, that he received him into his home with the consent of his wife, and that he in all respects treated him as legitimate and adopted him as such. By Californian law this operated to legitimate him from birth. In the Court of Appeal Sir Wilfrid Greene M.R. and Luxmoore L.J. (Scott L.J. dissenting) held that the child was not legitimated. Their reasoning was that in the case of legitimation by subsequent marriage according to the English common law, the law of the domicile of the father both at the birth and at the time of the subsequent marriage had to permit legitimation, and that legitimation by recognition must have been subject to the same rule at common law, namely that the law of the domicile of the father both at the birth and at the time of the recognition had to permit legitimation; the Legitimacy Act 1926 had altered the common law in respect of legitimation by subsequent marriage, and had provided that the domicile of the father at the time of the marriage alone governed, but that Act had not altered the/

the common law as to legitimation by recognition, which therefore remained to the effect that the law of the domicile of the father at both times has to concur.

However if we are right in saying above that at common law in Scotland legitimation by subsequent marriage is governed solely by the law of the domicile of the father at the time of the marriage, then the reasoning of <u>In re Luck's Settlement Trusts</u> does not apply. For Scotland presumably the rule in regard to legitimation by recognition will be the same as in the case of subsequent marriage, namely that the law of the domicile of the father at the date of recognition alone applies. The general rule as regards legitimation may therefore be put thus :- The law of the domicile of the father at the date when the act occurred which is said to legitimise alone governs the question of legitimation.

# Adoption

An adoption order can not be made under the Adoption of Children (Scotland) Act 1930 20 and 21 George 5, c. 37 ] in favour of any applicant who is not resident and domiciled in Scotland or in respect of any child who is not a British subject and so resident. [Sec. 2 (5) 7 There is no authority as to the circumstances in which an adoption order pronounced under a foreign law would be recognised here as a valid adoption, but it is submitted that it would be treated as valid if made according to the law of the domicile of the adopter and of the adopted at the time of adoption, or (when the countries of the adopter and adopted are different) if made according to the law of the domicile of the adopter at the time and if adoption in a similar manner was competent in the/

the country of the adopted's domicile or if the adoption would be there regarded as valid.  $\angle$  Cp. F.A. Mann in 1941 LVII L.Q.R. at p. 123\_7

The law of the adopted's domicile must be considered. Under some systems of law the effect of adoption is that the child ceases to be considered a child of its real parents and takes the status and patrimonial rights of a child of the adopting parents. The usual case of adoption is the adoption by A, an entire stranger to B, of the child of B. Now it is possible to disregard the law of the legitimated child's domicile in a question of legitimation [ See comments of Court of Appel on Farwell J.'s judgment in Re Luck's Settlement Trusts 7 because the child is already connected with the father by the fact of paternity, and legitimation can only work to the benefit of the child, but adoption may interfere with the whole status of a complete stranger and may affect the child's interests either beneficially or adversely. The situation is in some respects similar to marriage, where the domiciliary law of both parties has to be regarded. [F.A. Mann, ibid, p. 124]

# The effects of legitimation and adoption

Legitimation creates the status of legitimacy. That is is not a different status is clear from English cases which recognised legitimation at a time when legitimation was not known to English law, <u>[In re Don's</u> <u>Estate</u> (1857) 4 Drew 194; <u>In re Goodman's Trusts</u> 1881 17 Ch. D. 266; <u>In re Andros</u> 1885 24 Ch. D. 637\_7 and when there was a clear rule, as there still is, that Courts take no cognisance of a status unknown to their own law, as least in regard to transactions occurring wholly or partly outwith the territory of the law which confers the unknown status. <u>[See 'Status']</u> The rights and/ and duties which attach to the father of a legitimated child, and the corresponding rights and duties of the child, and the rights of succession of the child are not immutably fixed by the law of the domicile of the father at the time of legitimation but change if the domicile or residence of the father changes just as in the case of a normal father and child, and if the domicile is changed to a country where legitimation is unknown the rights and duties which attach to the father and the rights of succession will be the same as in the case of a normal father in that country.

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In one exceptional instance full effect is not given to legitimation according to the law of the father's domicile. It has been held that an illegitimate son of a domiciled Scotsman, born abroad, who was legitimated by the subsequent marriage of his parents and was thus considered to be legitimate as from birth, was nevertheless not a natural born British subject. The ratio of the decision was that if a subsequent marriage rendered him not only legitimate but a natural born subject of His Majesty, a party might be made in invitum a subject of His Majesty. He might be lawfully fighting against this country, but the subsequent marriage would make him a traitor. Law so anomalous as this could never have been contemplated by the legislature. / Shedden v. Patrick 1854 17 D (H.L.) 18; Abraham v. Attorney General 1934 P.177 Legitimation according to the law of the father's domicile will be recognised even when the question is succession to immoveables, and the child would not be legitimate if the question of legitimacy were tested by the lex situs / Fenton v. Livingstone 1859 21 D. (H.L.) 11 is a doubtful authority to the contrary 7 This is subject to the proviso that the lex situs does not have a rule of succession to the effect that/

that only persons who are legitimate in a certain manner can succeed. In Doe (or Birtwhistle) v. Vardill / 1830 2 J. 431; 1840 1 Robin 627; Cp. In re Don 1857 3 Jur. N.S. 1192 7 a domiciled Scotsman had an illegitimate child and subsequently married its mother. By Scots law this legitimated the child for every purpose including the taking of land. It was held however that the child could not succeed to land in England, for although his status was ruled by the law of the domicile and he was considered legitimate in England, English law as the lex situs ruled the question of succession to English land, and the English rule of succession was that the child, to succeed, had not only to be legitimate but had to be born in lawful wedlock. This case recognised the legitimation and was decided against the child only because of a peculiar rule in the English law of succession to land.

Doe v. Vardill only applied to the inheritance of real estate in intestacy or under a settlement in favour of "heirs". It never of course applied to intestate succession to personalty / In re Goodman's Trusts 1881 17 Ch. D. 266 7 or to a bequest of personalty, for a bequest of personalty in an English will to the children of a foreigner means to his legitimate children and "those children are legitimate whose legitimacy is established by the law of the father's domicile", / In re Andros 1883 24 Ch. 637 per Kay J. at p. 642; In re Goodman's Trusts 1881 17 Ch. D. 266 7 and it never even applied to a devise of realty to "children" under an English will. / In re Grey's Trusts 1892 3 Ch. 88\_7 Further, the effect of Doe v. Vardill has now been almost completely removed by recent English statutes: firstly, Sec 45 (1) of the English Administration of Estates Act 1925 abolished "all existing modes, rules and/

and canons of descent"; <u>See 1927 XLIII L.Q.F. 22</u>; Dicey p. 560 n. (k) 7 and, secondly, Section 3 (1) of the English Legitimacy Act 1926 provided that a legitimated child is entitled to take, in like manner as if he had been born legitimate, any interest in the estate of an intestate dying after the date of the legitimation, under any disposition coming into operation after the date of legitimation, or by descent under an entailed interest created after the date of legitimation; so that <u>Doe</u> v. <u>Vardill</u> only operates now in certain curious exceptional instances which have been allowed to survive. <u>C</u>Legitimacy Act 1926 secs. 10 (1) and 3 (3) 7

The position in adoption is different. Adoption according to our law transfers all the rights and liabilities as regards the custody, maintenance and education of the child from the real to the adopting parents, but it does not deprive the child of his rights of succession to his real parents' estate, nor does it confer on him any right of succession as a child of the adopter. [Adoption of Children (Scotland) Act 1930 20 and 21 Geo V c. 37 sec. 57 In other countries the adopted child becomes a child of the adopters in all respects including the reciprocal rights of succession between adoptans and adoptatus, and the adoptans may or may not retain a right of succession to his blood relations. It is submitted that a change of domicile subsequent to adoption should not change the effect of adoption to that of an adoption under the new law, but that the questions whether the adopted child is a relative of the adopter's family and whether he remains a relative of his own family should be immutably governed by the law of the domicile of the adopting parents at the time of the adoption. Where this law says that the child/

child remains a relative of the former parents the child's rights of succession in the former parents' estate are governed by the law of the domicile of the former parents' at death, and the former parents' rights of succession in the child's estate will be those by the law of the domicile of the child at the date of the child's death, and where this law says that the child becomes a relative of the new parents the child's rights of succession will be those of his new parents' domicile at death, and so on. Suppose for example that A adopts B in France when they are domiciled there. According to French law the adoptatus becomes in all respects a child of the adoptans, including the reciprocal rights of succession between adoptans and adoptatus. A later acquires a domicile in England where the same view is taken of adoption as in Scotland, and dies there intestate. B will be entitled to succeed to such share of A's estate as the English law of intestacy allows a child. Another way of putting the matter is to say that the law of A's last domicile determines what class of persons such as his children - are to take, while the law governing the adoption determines whether or not B comes within the class of children entitled to succeed. [Cp. In re Goodman's Trusts 1881 17 Ch. D. 266 7 A different solution of the question has been suggested: B is not entitled to succeed, because the question is not one of adoption but succession to A's estate, which is to be governed by English law as the law of his last domicile and by the English municipal law of succession / Not the English law of adoption, which, on no view of the matter can affect the issue. 7 children adopted abroad and children legitimated abroad before 1927 are excluded.

[F.A. Mann/

F.A. Mann in 1941 LVII L.Q.R. pp.129 et sequ.
This view requires the rejection of <u>In re Goodman's</u>
<u>Trusts</u>, and the resurrection of the cases which it
over-ruled. It derives some support from <u>Doe</u> (or
<u>Birtwhistle</u>) v. Vardill 1830 2 J. 431; 1840 1 Robin.
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The rights and powers of an adopting parent over his adopted child and his duties of care and aliment of the child will of course vary according to the adopting parents domicile and residence for the time being, as in the case of a normal parent and child relationship, and no matter what kind of adoption is entailed.

### CUSTODY OF CHILDREN

The custody of a child is a question of status. [ Radoyevitch v. Radoyevitch 1930 S.C. 619 per Lord President Clyde at p. 624; Jelfs v. Jelfs (0.H.) 1939 S.L.T. 286 per Lord Keith at p. 290 / The Scottish Courts have jurisdiction to determine questions of custody and access when the domicile of the child is Scottish [Maquay v. Campbell 1888 15 R. 606; Fenwick v. Hannah's Trs. 1893 20 R. 848 7 even when the children are residing outside the jurisdiction, [1944 LX T.L.R. 395] and when they exercise jurisdiction they apply Scots law, but if the domicile of the child is foreign they have no jurisdiction. [ Barkworth v. Barkworth 1913 S.C. 759] In making an order as to custody the Scots Courts will, if circumstances make it desirable, include a recommendation to foreign magistrates to assist in the carrying out of the order, / Muir v. Milligan 1868 6 M. 1125 - the child had been removed to an unknown address contrary to the orders of the Court 7 The Court of course will, without deciding the question of status, entertain a process for the delivery of a child resident in Scotland brought by a father domiciled abroad, / Marchetti v. Marchetti 1901 3F. 888 7 or, in the case of an illegitimate child, by a mother domiciled abroad, / Goadby v. Maccandys, July 7th 1815 F.C. 7 or by any person who by the law of the domicile of the child has the right of custody of the child, [The Bute Guardianship Case 1861 4 McQ. 1 ] if the person against whom the process is directed obtained possession of the child clandestinely or by force, [ Marchetti, supra, The Bute Guardianship, supra for could not have any title to custody. [Goadby v. Maccandys, supra 7 Before ordering delivery the Court may enquire first whether any harm either physically / Marchetti, supra 7 or patrimonially / Moncreiff 1891 18 R. 1029 7 would result to the child by making the

order/

order, and if so will refuse to order delivery

A decree of a foreign Court on a question of custody or access, if that Court is the domicile of the parents, is a judgment in rem, entitled to universal recognition, and will be given effect to by our Courts which will accept it as conclusive and will not enquire into the questions of custody and access which it has determined. [Westergaard v. Westergaard 1914 S.C. 977; Radoyevitch v. Radoyevitch 1930 S.C. 619; The Bute Guardianship Case 1861 4 McQ. 1 The Scottish Courts however have the power and the duty of protecting children of foreign parents resident in Scotland and although one parent have the right to custody by a decree of the Courts of the domicile, if harm to the children is alleged the Court will order inquiry before enforcing that right, and in a proper case might refuse to enforce that right. [Westergaard, Radoyevitch, supra; but see The Bute Guardianship case, supra 7 For example in Radoyevitch v. Radoyevitch [1930 S.C.619 7 a decree of divorce and for custody of the child of the marriage had been obtained in the Serbian Courts by a domiciled Serbian; the child, a girl of 8, was resident with her mother in Scotland. In a petition to the Court of Session by the father for custody the Court held that while the petitioner's right to custody of the child had already been settled by a competent Court, they were entitled before ordering delivery of the child, to be informed of the petitioner's arrange-:ments for the conveyance of the child to Serbia and for her reception there. The mother having subsequently averred that the child's health precluded her removal to Belgrade, the Court remitted to two doctors to report on this matter. Thereafter on receipt of their report, and/

and on an undertaking by the petitioner regarding the proper conveyance and maintenance of the child, the Court granted the prayer of the petition.

As to the paternal power which may be exercised over a child resident in Scotland, Bar's opinion appears "... a father or mother has no more right to be sound: of correction than is warranted by the law of their own home, and no more than the law of the place, in which it is proposed to exercise that right, permits" [Gillespie's transl. 2nd Ed. p. 431] Lord Justice Clerk Boyle remarked in one case: "... there cannot be a doubt, that, if in regard to the relation of parent and child, there existed in any modern state any institution similar to the patria potestas of that of Rome, the natives of such state would not be permitted to exercise here that which might be lawfully used as their privilege at home. And so in the case of guardian 9. Polydore v. Prince, Ware 402, 3 Beales Cases p.2 per Ware J. ad p. 5 and ward." [Edmonstone v. Edmonstone 1st June 1816 F.C.

The Scots Courts have jurisdiction in actions for aliment of children on any ground on which there would be jurisdiction against the defender for payment of a debt. / <u>Macdonald</u> v. <u>Macdonald</u> 1846 8 D. 830. Cp. juris-:diction for aliment in consistorial actions (q.v.)\_7 The law to be applied is the law of the domicile of the parent, whose obligation is in question; and the domicile at the time of the action, and not at the time of the marriage or birth of the child. / <u>Macdonald</u>, supra; criticised by Baty, Polarized Law p. 78\_7 The question whether the parent has the use and enjoyment

of his minor children's property, in addition to the right of administration, is also governed by the law of the domicile of the parent for the time being. <u>Gambier v. Gambier</u> 1835 7 Sim. 262\_7

The Guardianship (RefugeeChildren) Act 1944  $\boxed{7}$  and 8 Geo 6 Chap. 8.7 which is to last as long as the/

the Emergency Powers (Defence) Act 1939 / 1944 Act sec. 3 (3) 7 provides that the Secretary of State may appoint a guardian of any person who is for the time being resident in England if the ward arrived in the United Kingdom after 1936 in consequence of war or of religious, racial or political persecution, and has not at the time of his arrival attained the age of 16 years, and provided that no parent of the ward is in the United Kingdom and that the ward has not attained 21 years of age and, in the case of a female, has never been married. Where such a guardian is appointed he shall have the same powers and duties if he had been appointed guardian of the person of the ward by the High Court, and the ward shall be treated, for the purpose of any question arising in respect of the guardianship in Scotland or Northern Ireland, as if he were domiciled in England. [Sec. 1] The Secretary of State may appoint a tutor to any person who is for the time being in Scotland who arrived in the United Kingdom after 1936 in consequence of war or of religious, racial or political persecution, provided that no parent of the child is in the United Kingdom and that the ward is under 14 in the case of a male and 12 in the case of a female. Such a tutor shall have the same powers and duties as he would have if he had been appointed tutor to the pupil by the Court of Session, and the pupil shall be treated, for the purpose of any question arising in respect of the tutorship in England or Northern Ireland, as if he were domiciled in Scotland. / Sec. 27

# CUSTODY OF LUNATICS

Statutory provision exists for the recapture and restoration to custody of lunatics in England who escape to Scotland or Ireland, and vice-versa / Lunacy Act 1890 Secs. 86 - 89 7

## GUARDIANSHIP OF THE PROPERTY OF CHILDREN AND LUNATICS

The Scottish Courts have jurisdiction to appoint factors <u>loco tutoris</u> or curators <u>bonis</u> when the ward is (a) domiciled in Scotland <u>Murray</u> v. <u>Baillie</u> 1849 11 D. 710; 7

(b) resident in Scotland <u>Reid</u> v. <u>Reid</u> 1887 24 S.L.R. 280\_7

(c) has property in Scotland. [Sawyer v. Sloan 1875 3 R. 271; Burns 1851 14 D. 311; Donaldson v. Brown 1627 Mor. 4647; Hay 1861 23 D. 1291 7 It is recognised however that the Courts of the domicile have the pre-eminent interest in this matter, and as a result an appointment will not be made, in the case of moveables, if a guardian has already been appointed in the country of the domicile. "I do not think the principle of International Law admits of any doubt. It is quite unnecessary that a fresh guardian should be appointed to manage personal estate, even when situated in another country" / Sawyer v. Sloan per Lord President Inglis at p. 272. Contrast the English practice - Johnstonev. Beattie 1843 10 Cl. and F. 7 Further, the appointment of a factor or curator on the ground that there is property situated in Scotland or that the ward is resident in Scotland will be recalled on the subsequent appointment of a guardian in the domicile. [Sawyer v. Sloan 1875 3 R.271] The appointment of a curator bonis to a domiciled Englishman on the ground that he was present in Scotland when he became insane and that he had a small amount of property here, was in one case specifically declared to be an interim appointment so that embarrassment might not be caused in the event of proceedings being taken in the domicile for the appointment of a permanent guardian. [ Reid v. Reid, supra ]

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A person resident outwith the jurisdiction will not be appointed a factor or curator bonis by Scots Courts, / Robertson 1846 9 D. 210; Napier 1902 IX S.L.T. 439; but see Scott 1851 13 D. 951 7 but such a person may be appointed in an action of choosing curators, [Lord Macdonald v. His Next of Kin 1864 2 M. 1194; Fergusson v. Dormer 1870 8 M. 426 7 or in a petition by a widow under the Guardianship of Infants Acts for the appointment of a co-tutor to act along with herself [Sim v. Robertson 1901 3 F. 1027 7 provided that it is shown to be necessary or desirable to appoint a person resident outwith the jurisdiction and the foreigner prorogates the jurisdiction. In an old case it was held that a United States subject who was curator-in-law of his brother, a lunatic in Scotland, was not entitled to uplift sums due to the lunatic in Scotland. / Miller v. Allen 1792 Mor. 4651 7

By statute [Judicial Factors (Scotland) Act 1889 52 and 53 Vict. c. 39 sec. 13] an official extract of the appointment of any judicial factor, trustee, tutor, curator or other person judicially appointed shall have throughout the British Dominions, as well out of Scotland as in Scotland, the full force and effect of an assignment or transfer, executed in legal and appropriate form, of all funds, property, and effects situated or invested in any part of the British Dominions, and belonging to or forming part of the estate under his charge; and all debtors and others holding such funds, property, or effects, shall be bound, on production of such official extract, to pay over, assign or transfer the same to such judicial factor, trustee, tutor, curator, or other person.

Extent of title of Scots guardian in British countries abroad

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This will depend on the effect given to his appointment in the foreign country, but a Scots factor or curator is bound to account to the Court of Session for any portion of the pupil's estate situated abroad, and recovered by him, either by voluntary payment made to him as factor or curator or by force of a title acquired and legal proceedings adopted in the country in which the funds are situated, and which may be necessary, either to compel payment, or to entitle him to receive it; and in the event of the factor being unable to account his cautioner is liable for his defalcations no matter where the property in question was situated. [Simpson v. Doud and McCaul 1855 17 D. 314; Fergusson v. Menzies 1830 8 S. 782 / In appointing a curator or factor the Court will not limit his authority so as to exclude property situated abroad even although it is said that a guardian is being appointed abroad so as to deal with property situated there. / Earl of Buchan v. Harvey 1839 2 D. 275 ]

The Scots Courts will recognise the title of a. foreign guardian, provided that he is the guardian according to the law of the domicile, and, if that law requires appointment by the Courts, provided that he has been so appointed, [Seddon 19 R. 101 and 20 R. 675; Elder, 1903 5 F. 307; see also Webb v. Cleland's Trs. 1904 6 F. 274 7 to moveables in Scotland belonging to the ward. <u>Rose</u> v. Grant 1835 7 J. 403 J Such a foreign guardian can uplift moveable funds due to the ward, and his receipt is a valid discharge. [ Ogilvy v. Ogilvy's Trs. (O.H.) 1927 J.L.T. 83; Grant v. Thomson 1835 13 S. 878; Gordon v. Earl of Stair 1835 13 S.1073; Seddon, Elder, supra 7 and can sue on behalf of his ward in reference to moveable property. [Gordon v. Earl of Stair, supra; Nasmyth v. Nasmyth 1624 Mor.4455; Duncan/

Duncan & Dykes p. 243; contra Baynes v. Earl of Sutherland 1750 1 Pat. 454, which would probably not be followed now 7 As Lord President Inglis said in the passage quoted above, it is not necessary to appoint a fresh guardian here to administer moveable property here when there is a guardian appointed by the Courts of the domicile. [ See also Nasmyth v. Nasmyth, supra 7 The practice is similar to that adopted in bankruptcy and in contrast to the position of executors. , where the foreign guardian has not been properly appointed as such by the Courts of the domicile but he is the father, or presumably any other relative properly having custody of the children, the Court may order payment of income from funds in Scotland to the foreign guardian for behoof of the children. [ Webb v. Clelland's Trs. 1904 6 F. 274; Edmiston v. Miller's Trs. 1871 9 M. 987 ]

Immoveables

The position of heritage is different. <u>Sawyer</u> v. <u>Sloan</u> 1875 3 R. 271 per Lord President Inglis at p.272 <u>7</u> A foreign guardian has no right to Scotch heritage belonging to the ward, and if it is conveyed to him he cannot grant a valid discharge therefor. <u>Cordon</u> v. <u>Earl of Stair</u> 1835 13 S. 1073; <u>Murray</u> v. <u>Baillie</u> 1849 11 D. 710; <u>Young v. Thomson</u> 1831 9 S. 920; <u>Allen</u> v. <u>Robertson</u> 1855 18 D. 97; <u>Ogilvy v. Ogilvy's Trs</u>. (O.H.) 1927 S.L.T. 83\_7 The practice is to make another appointment in Scotland of a <u>factor loco tutoris</u> or a <u>curator bonis</u> to deal with the Scotch heritage. <u>Ogilvy</u> v. <u>Ogilvy's Trs</u>. supra; Fraser, Parent and Child p.750\_7 This factor or curator will not be the guardian appointed

by the domicile since our Courts only appoint persons to be factors or curators who are resident in Scotland and thus subject to the jurisdiction of the Scots Courts. This factor or curator may, in a petition at the foreign guardians/ guardian's instance, be authorised to pay income to the foreign guardian for the upkeep of the ward.  $\angle$  Murray v. Baillie, Allen v. Robertson, supra\_7

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In McFadzean's case [1917 S.C. 142] a petition was presented to the nobile officium by a person domiciled in Alberta, Canada, as guardian and adminis-:trator-in-law of his pupil son who resided with him, for authority to complete a title in the pupil's name to heritage in Scotland which had become the pupil's through the death, intestate, of his mother. The heritage was a one-sixth share of property for which an offer had been received and which the co-owners wanted to sell and which it was expedient to sell. The father wanted authority to complete title and sell. The Court, on production of evidence that the petitioner had been duly appointed guardian and administrator-inlaw according to the law of Alberta, and that he was a person of substantial means, granted the prayer of the petition. This was a commonsense view in the circumstances, but a stricter attitude would have been to appoint a factor loco tutoris and give him power to sell. Another method would have been to have the Albertan Court make an order that the sale was expedient and the Court of Session would have assisted in carrying out this order, as is done in trust petitions. /Allan's Trs. 1897 24 R. 718; Pender's Trs. 1903 5 F. 504; Harris's Trs. 1919 S.C. 432 7 The powers of a guardian as regards moveables are governed by the law of the country which appointed him; and, by the law of the place where the property in question is situated, / Morison 1901 4 F. 144 (contrast Mathieson 1857 19 D. 917) Contra Dicey p. 574 ] and his privileges and liabilities will be determined by the law of the country which appointed him. Section

131/

131 (3) of the English Lunacy Act 1890 enacts that a curator bonis appointed to a lunatic in Scotland who has personal property in England, "shall have all the same powers as to such property .... as might be exercised by the Committee of the estate of a lunatic" in England, but this enactment has been treated by the Court of Session as not only unnecessary, but as failing to express the full powers which a curator bonis has over property in England, and the Court of Session has held that a curator bonis has powers of sale of sale of moveable property in England greater than those given in England to the committee of the lunatic, the extent of the power being determined by Scots law, the law of the Court which appointed him. [ Morison, supra] The same Act provides that the English or Irish committee of the estate of a lunatic who has property in Scotland shall have all the same powers as to such property as might be exercised by a tutor at law after cognition or a duly appointed curator bonis to a person of unsound mind in Scotland. But this Act only extends to England, and if Morison [ supra ] is correct our Courts should hold that, notwithstanding the enactment, the powers of an English and Irish committee in Scotland are merely those of an English or Irish committee. The enactment may be regarded as extending the committee's title to funds in Scotland but not as enlarging his powers over such funds to an extent which he does not have over funds in England.

The powers of a foreign father over the moveable property of his child will be those which the law of his domicile gives him.  $\angle$  Fraser, Parent and Child p. 731 $\angle$ 

Since there must always  $be_{\Lambda}^{a}Scots$  factor or curator to deal with Scots heritage, no conflict arises in regard to powers here, the powers of the Scots factor/ factor or curator being those of Scots law.  $\angle$  Young v. <u>Thomson</u> 9 S. 920 is a curious misunderstanding of the principles of this department of the law\_7 The powers of a foreign father over the Scots heritage of his child will be those of Scots law  $\angle$  Fraser, Parent and Child p. 752\_7

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#### BANKRUPTCY

## The Jurisdiction of the Scottish Courts

equestration may be awarded by the Scottish Courts in the following dreumstances -

First, in the case of a living debtor subject to the jurisdicnon of the Supreme Courts of scotland:

(A) On his own petition. with the concurrence of a sufficient cred-

(6) On the petition of a sufficient creditor provided the debtor be notour bankrupt, and have within a year before the date of the presentation of the petition resided of had a dwelling place house or place of business in Scotland; [See <u>Gairdner v. MacArthur</u> (0.H.) 1918 2 S.L.T. 123] or in the case of a company being notour bankrupt if it had within such time carried on business in Scotland, and any partner had so resided or had a dwelling house or if the company have had a place of business in Scotland.

second, in the case of a deceased debtor who at the date of his death was subject to the jurisdictionof the Supreme Gourts of scotland:

(A) On the petition of a mandatory to whom he has granted a mandate to apply for sequestration;

(B) On the petition of a sufficient creditor. [Bankruptcy(Scotland) Act 1915 sec. 11 . sec. 15 of the Bankruptcy Act of 1856 is in the same terms, so decisions under it are still valid.]

"Subject to the supreme Courts of Scotland" means subject in Pespect of residence within the jurisdiction for at least forty days, <u>doel v. Gill</u> 1859 21 D.929] by the possession of scots heritage, <u>(joel v. Gill</u>, supre) Groil 1863 1 H.509] or by carrying on business at some definite place in wootland. (woudyp 115] The grounds of limited jurisdiction, such as is founded by arrestment, <u>Groil</u>, supra; <u>Joel v. Gill</u>, supra, per L.J.G.Inglis at p.938] reconvention, or ratione contractus [L.J.C. Inglis, ibid] do not suffice for an award of sequestration. That the debtor is in Scotland is also insufficient if he is resident abroad and has no heritage here, <u>Strickland</u> (0.H.) 1911 1 S.L.T. 212]

# The Unity and Universality of Bankruptcy

3.

Rankruptcy or sequestration is a legal process whereby the property of an insolvent person is vested in a trustee for behoof of the creditors. Bankruptcy in most foreign countries has the same effect as here, namely that the whole moveable property of the bankrupt, wherever situated, is vested in the Goetze & Sohn v. Aders 1874 2 R. 150; Bar pp. 1011 trustee. et sequ.; In the U.S. however the prevailing rule is that an assignment under a state insolvent law operates only upon property within that state - Cheshire p. 478, Beale p. It is desirable therefore that there should be only one bankruptcy, and that its effect should be recognised in every country. These two desiderata have been called the unity and universality of bankruptcy. In Scotland the unity and universality of bankruptcy are both recognised to a large extent, and the International Law of bankruptcy in Scotland, although incomplete in parts through lack of judicial precedent, is generally satisfactory and consistent. The position is very different in England, where the universality of bankruptcy is recognised but not the unity of bankruptcy. [ Cheshire p. 473; XIX L.Q.R. 295

### The Unity of Bankruptcy

Two methods of securing the unity of bankruptcy have been advocated: first, bankruptcy can only be declared in the country of the debtor's domicile; second, the rule of submission to the country in which bankruptcy was first declared. The first view has been advocated by jurists, [Bar p. 1017; Savingy p. 258] and there are some equivocal passages in some of the Scots cases which might give the impression that this principle is recognised here. For example -

"The great principle that moveables follow the law of the owner's domicile is not more firmly settled in the case of intestate succession than in the case of bankruptcy. Hence, whenever the Court of the domicile has by proceedings in bankruptcy vested the moveable estate in a trustee or assignee for the prose of equal distribution among his creditors, no part of the pveable estate, wheresoever situated, can be touched ob affected except through the bankruptcy proceedings and by the orders of the Court of that country in which those proceedings take place. The jurisdiction of that Court is exclusive." (Phosphate Sewage 0. v. Lawson's Trustee 1878 5 R. 1125, per Ld. Pres. Inglis at p.1138

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"Suppose a sequestration be issued against a man not domiciled in Scotland, this cannot receive effect in England; and in the same manner, although a commission of bankruptcy be ever so fairly obtained, yet if it be produced here, and we are satisfied that the party was not domiciled in England but in Scotland I should hold, in that case, that we are not bound to give effect to the commission." (<u>Royal Bank v. Scott Smith Stein&Co</u>, Buchanan 320, per Lord Lannatyne at p. 338. Gp. Lord Robertson. 20th Jan. 1813 F.C.

These dicta are very misleading. It is quite clear that Scots law does not test the validity of a foreign bankruptcy by whether the debtor was domiciled in the country which awarded it. In the first place our Courts award sequestration under the bankruptcy statutes when the debtor is not domiciled hereand it has been held under these statutes that the mere fact that the debtor is domiciled here is not sufficient to warrant sequestration when he is not otherwise subject to the jurisdiction. | Strickland 1911 1 S.L.T. 212 | Secondly, our Courts recognise and give effect to foreign sequestrations of domiciled Scotsmen. ( Obers v. Patons Trs. 24 R. 719 The word "domicile" inthe above passages does not mean "domicile of succession" but simply " forensic domicile". Obers v. Paton's Trs. supra, per 1d. pres. Robertson at p. 752 The very misleading words of Lord President Inglis which have been quoted should be read with reference to what he said in a previous case: "It is clear that the term "domicile" as used by all jurists in this branch of the law, means no more than the place of residence for the time, whether permanent or temporary .... There is no question of status involved in the proceedings." IJoel v. Gill 1859 21 D. 929 at pp. 938;9

Unity in bankruptcy is secured in Scotland not by applying the principle of domicile, but by applying the rule of priority. When sequestration has been awarded abroad and the whole moveable estate of the bankrupt wherever situated vested in a foreign trustee, sequestration will not be granted here, even if there is property here, and even if the person who is petitioning is the foreign trustee. / Goetze & Sohn v. Aders 1874 2 R. 150; Royal Bank v. Scott Smith Stein & Co. 20th January 1813 F.C.; Gibson v. Munro 1894 21 R. 840 per Lords Kincairney and Young; Queensland Mercantile Co. v. Australasian Investment Co. 1888 25 F. 935 per Lord President Inglis 7 Section 16 of the Bankruptcy (Scotland) Act 1913 provides that "no sequestration shall be awarded by any Court after production of evidence that a sequestration has already been awarded in another Court and is still undischarged", but from the context it appears that this means that a sequestration has already been awarded in another Court in Scotland. The same words appeared in the 1856 Act (Section 18) and were not relied on in the judgement of the Court in the leading case which establishes the principle of priority, namely Goetze & Sohn v. Aders. The ratio of the judgment was that no partial sequestration could be awarded under the Bankruptcy Acts, and that the Court could only grant a universal title co-extensive with which had been granted to the foreign trustee and which would compete with it. This would be an impossible position and would be inconsistent with the principles of International Law. [Cp. The ratio of Bank of Scotland v. Youde (0.H.) 1908 15 S.L.T. 847 ]

Our Courts are so unfavourable to concurrent bankruptcies that when a petition was presented for the sequestration of the estates of a person who had been declared bankrupt in Victoria, even though the English Bankruptcy Act 1861 provided that if any person had been declared bankrupt in India or any of the colonies and possessed property in England Scotland or Ireland or/ or in any colony it shall be lawful for the trustee to apply for and obtain sequestration in the bankruptcy Court in England Scotland or Ireland or the Colony, the Court opined, while disposing of the petition for sequestration on other grounds, that it was not bound to award sequestration without enquiry, because sequestration was such a great machine compared with the results sought to be achieved. <u>Shaw 5</u> S.L.F. 171\_7 And a Scotch sequestration was refused because of a prior English one even though the petitioners offered to prove that the English bankruptcy was practically dead, the trustee having been discharged: the bankrupt had not been discharged, and the effect under the English Bankruptcy Acts was that the Official Feceiver was the trustee and there was still a depending bankruptcy. <u>Bank of Scotland</u> v. <u>Youde</u>, supra 7

Unity is further preserved by the procedure for the recall of a sequestration within forty days. <u>Cankruptcy</u> (Scotland) Act 1913 Sec. 30\_7 Recall may be granted on the ground of a prior foreign bankruptcy. <u>Young v. Buckel</u> 1864 2 M. 1077; <u>Gibson v. Munro</u> 1894 21 R. 840 per Lords Kincairney and Young\_7 But if there is a prior foreign bankruptcy and the period for recall is past, it is not competent to reduce the sequestration. <u>Cibson v. Munro</u>, supra\_7

Concurrent bankruptcies sometimes inadvertently occur. If sequestration has been granted here in ignorance of a prior bankruptcy elsewhere, the foreign trustee may, if recall of the Scotch sequestration is no longer competent, obtain payment from the Scotch trustee of the moveable funds which the Scotch trustee has ingathered, and in a competition between the trustees is preferred to the Scotch trustee; <u>/ Falconer v. Weston</u> 18th Nov. 1814, referred to in <u>Weston v.</u> <u>Falconer</u> 17th Dec. 1817 F.C.\_7 but he may not recover from the Scotch trustee the proceeds of heritage. <u>/ Weston v.</u> Falconer, supra\_7\_\_\_\_\_

When a company, which carried on business in Australia and in Scotland was made bankrupt in Australia and subsequently sequestrated here, the Court which awarded sequestration apparently being unaware of the prior Australian bankruptcy, and the two bankruptcies were proceeding concurrently with the consent of all parties, each trustee limiting himself to the funds situated in his own country, the Court, while recognising that the Australian trustee could have objected to the Scottish sequestration and rendered it ineffective, since the Australian trustee had not done that, recognised the Scottish sequestration to the extent of upholding a deliverance of the Scotch trustee declaring an equalising dividend to ensure that a creditor, who had secured a dividend in the Australian sequestration and was claiming in the Scotch sequestration, should not obtain more than his fair share. / Stewart v. Auld 1851 13 D. 1337 7 This was a departure from the strictest principles of unity, but unity was preserved to the extent of preventing a creditor from ranking unfairly in both sequestrations. The same rule against ranking twice applies when the foreign bankruptcy is of a branch firm of the Scottish firm, trading under a separate name, provided that the partners are the same in both. / Clydesdale Bank v. Anderson 1890 27 S.L.R. 493 7 The same rule of "hotchpot" is recognised in England, where concurrent bankruptcies are common.

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a creditor who had sequred a dividend in the Australian sequestration and was claiming in the Scotch sequestration should not obtain more than his fair share. [Stewart v. Auld 1851 13 D.

Would our Courts recognise a sequestration which was awarded abroad of the effects of a person whose only place of business and the majority of whose assets were situated in Scotland, but who was subject to the jurisdiction of the foreign Court on some lesser ground, such as residence? This question is of importance not only in this connection but in the topic of the universality of bankruptcy, for the question may arise when the foreign trustee asks for recognition of his title here, whether that

foreign bankruptcy was competently awarded. The Scottish Courts will not listen to objections in agestions with British that an English or Irish Court had not jurisdiction, Wilkie v. Cathcart 1870 9 M. 168; Salaman v. countries . Todd 1911 S.C. 1214; Young v. Buckel 2M. 1077; Royal Bank of Scotlandv. Scott Smith Stein & Co 20th Jan. 1813 F.C.; Queensland etc. Co. v. Australasian etc. Co. 1888 25 R. 935 or that the bankruptcy proceedings were irregularly conducted, Moyes v. Whinney 1864 3 M. 183 | which should be made in the appropriate English or Irish Court. When a bankruptcy is proceeding in one of the countries of the British Isles there is procedure for securing, by application to the Court seised of the bankruptcy, that the bankruptcy be recalled so as to allow it to proceed in another& more appropriate British country of the British Isles. When sequestration has been awarded in Scotland and it appears to the Court of Session or Lord Ordinary upon petition by the Accountant, or any creditor or other person having interest, within three months of the sequestration, that a majority of the creditors in number and value reside in England or Ireland, and that from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed among the creditors under the bankruptcy or insolvent laws of England or Ireland the Court may, after enquiry, recall the sequestration. | Bankruptcy (Scotland) Act 1913, sec. 43. A

similar section appeared in the Bankruptcy (Scotland) Amendment Act 1860. There is a reciprocal section in the Bankruptcy Act 1914 sec. 12 If the twp requirements are present and the bankruptcy is properly an English one, that the majority in number and value of the creditors wish the sequestration to proceed in scotland will not be sufficient to prevent recall. | Cooper v. Baillie 1878 5 R, 564 This provision does not apply when the majority of the creditors in number and valuelive, not in England or Ireland, but abroad. | Smith Payne & Smiths v. Rischmann 1869 8 M. 100 Recall has been granted even when the bankrupt had obtained his discharge, there being evidence that the whole proceedings had been conducted for the benefit of the bankrupt and not of the creditors, & Brandon v. Stephens 1862 24 D. 263 and when the bankrupt was not subject at the time to the jurisdiction of the English bankruptcy Courts, where it was considered that the bankruptcy should proceed.. Moses v. Gifford 1866 4 M. 1056 In ascertaining the majority of the creditors in number and value, all parties are regarded as creditors who have lodged affidavits and vouchers of debt. # Haines v. Shaw 1862 24 D. 383 This provision prevents insolvent persons coming from other parts of the British Isles to Scotland solely to obtain sequestration on more favourable terms in Scotland. I Smith v. Rostron 1860 23 D. 140; Brandon v. Stephens, supra; Cooper v. Baillie, supra; Moses v. Gifford, supra

In questions It is submitted that our Courts would recognise with non- a foreign bankruptcy awarded on any ground of British for- jurisdiction which we recognise as sufficient eign countries for our Courts to award sequestration, and there is authorizity for this in a dictum of Lord President

Robertson - "It is-impossible seems difficult to the degree of impossibility for this Court to decline on principle to recognise if done abroad what it itself is bound to do and does daily at home." [Obers v. Paton's Trustees 1897 24 R. 719] It must be confessed that in the passage in which this sentence occurs the less

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learned judge is only rejecting the plea that our Courts could not recognise the French bankruptcy of a domiciled Scotsman who carried on business in F ance. He was not faced with the more acute problem of a domiciled Scotsman who carried on business in scotland and who had been declared bankrupt abroad, jurisdiction having been founded on a lesser ground like residence. But as our courts award sequestration on the ground of residence when the debtor has his domicile of resid succession in another country and has carried on his only business in that other country, Joel v. Gill 1859 21 D. 929 it seems difficult to the degree of impossibility to decline to recognise the validity of a bankruptcy awarded in those circumstances abroad. In the same case Lord McLaren said "when it is said that the Court of the domicil is the proper Court of bankruptcy I think this must be understood to mean a trading domicil. I cannot doubt that every trader who is unable to pay his debts is liable to have his estate seized and divided amongst his creditors by judicial authority in the country where he carries on business." | at p. 733 | This, combined with the use of the phrase "trading domicile" in one or twp other cases | Goetze & Sohn v. Aders, supra; Gracie v. Gracie's Trustees (0.H.) 1909 2 S.L.T. 91 | might found a plea that a foreign bankruptcy is only effective if granted in the country of the bankrupt's "trading domicil", but although the general meaning of this phrase is apparent, it appears nowhere else in ourlaw, its precise definition would be difficult, and its infrequent use in obiter dicta does not seem to warrant the rejection of the very much simpler and more logical rule.

#### Effects of the Unity of Bankruptcy

All claims in connection with the bankruptcy must be made in the Court which is siesed of the bankruptcy. A creditor could constitute his debt in Scotland when his debtor had been made bankrupt in England, [ Roy v. Campbell 12 D. 1028; Phosphate Sewage Co. v. Lawson's Trustee 1878 5 R. 1125, per Lord President Inglis at p. 1138 ] but when the same creditor, who had not claimed or proved his debt in England, raised an action in the Court of Session torhave it found and declared that he was

ntitled to a dividend from the bankrupt's estate equal to the dividend drawn by the other creditors, his action was dismissed as incompetent, because the proper forum was the Court of Bankruptcy in England. Roy v. Campbell's Assignees 1853 16 D. 51 In their character of assignees or trustees they are subject to the jurisdiction of no Court except the Courts of the country within which the bankruptcy proceedings have been instituted, and the concursus creditorum has been established. Phosphate Sewage co. v. Lawson's Trustee, supra When creditors of an English bankrupt had obtained a Scotch decree against the English trustee constituting the debt, they were not entitled to execute diligence on that decree against funds payable to the trustee in scotland, since that would give them a preference. | In the case in point the creditors attempted to lodge a riding claim on the successful claim of the English trustee in a Scotch Multiplepoinding - Thomson & Co. v. Friese-Greene's Trustee 1944 S.C. 336 Competitions between creditors for funds of the bankrupt should be tried in the Court of bankruptcy, and not where the funds are situated, even though the Courts there have jurisdiction. Okell v. Foden 1884 11 R. 906

All questions of ranking and of the proorities of the creditors inter se are decided according to the lex fori of the bankruptcy. | Lusk v. Elder 1843 5 D. 1279; Ex parte Melbourne 1870 L.R. 6 Ch. 64 The rule may be illustrated by the following example. A man carrying on business in Scotland was sequestrated. He was a partner of a company in England. A creditor of the English company claimed in the Scotch sequestration. According to the Scotch rules of ranking he was entitled to be ranked pari passu with the personal creditors of the bankrupt. According to the English rule, he, being a creditor of the company, was not entitled to rank until the personal creditors had been satisfied. It was held that the Scottish rule of ranking had to apply. Lusk v. Elder, supra It seems impossible to distinguish this case from a subsequent one, | Williamson v. Elder Taylor ( Q845 8 D. 156 ) which, it is submitted, was decided wrongly. A claim was made in a Scotch sequestration on an English bond of annuity, which had been granted without valuable consideration. The effect of this according to English law was

it could not compete with the claims of onerous creditors. In scots law it could. The English rule was applied, the Court holding that this quality of being granted without valuable consideration was of the essence of the contract and not a mere matter of remedy. This seems however to be a pure question of the priorities of the creditors inter se, which the lex fori of the bankruptcy, namely Scots law, should have ruled. Contrast Ex parte Melbourne, supra. It is noticeable that Lusk v. Elder was not quoted in either in the debates or in the judgments. When a company, which carried on business in Australia and in scotland was made bankrupt in Australia and subsequently sequestrated here, the Court which awarded sequestration apparently being unaware of the prior Australian bankruptcy, and the twp bankruptcies were proceeding concurrently with the consent of all parties, each trustee limiting himself to the funds situated in his own country, unity was preserved to this extent that the Court refused to allow a creditor who had obtained a dividend in the Australian sequestration to claim in the Scotch sequestration without deducting what he had received. | Stewart v. Auld 1851 13 2 D, 1337 This rule applies even when the foreign bankruptcy is of a branch firm of the Scottish firm, trading under a separate name, provided that the partners are the same in both. | Clydesdale Bank v. Anderson 1890 27 S.L.R. 493 In those cases the foreign sequestration was a prodr one. A fortiori the same rule principle would apply with a subsequent foreign sequestration. The same rule of "hotchpot" is recognised in England, where concurrent bankruptcies are common.

If a creditor secures an advantage over the other creditors by being granted a preference or by using diligence in a foreign country subsequent to a Scotch sequestration, he will allowed to claim in the sequestration here without accounting for his advantage, [Selkrig v. Davies II Dow 230; Bell Comm. ii 573; Bar p. 1047; Goudy p. 265] whether he claims in the Second Sequestration ernet and he can, if subject to the jurisdiction of the Scotch Courts, be compelled to restore what he has obtained, and that even although he is a foreigner.

[ White v. Briggs 1843 5 D. 1148 ] Jurisdiction may be founded for this purpose by any competent way, even by arrestment of moveables in Scotland to found jurisdiction, [ White v. Briggs, supra or by reconvention. Barr v. Smith & Chamberlain 1879 7 R. 247; Ord v. Barton 1847 9 D. 541 - the convention was a claim by the foreigner in the sequestration The English text writers are unwilling to admit this rule to the full, and consider that is the creditor who has obtained an advantage abroad is a foreigner, and does not claim in the sequestration it might not be possible to compel him to restore. These is support for this view in obiter dicta -

" As was said by Lord Eldon | Selkrig v. Davies, supra 'It has been decided that a person cannot come in under an English commission of bankruptcy without bringing into the common fund what he has received abroad;' and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened to be personally in England, would not be obliged to bring this sum into the common fund - he might keep it if he liked - he might ignore the bankruptcy proceedings altogether if he pleased; But if he did not ignore it, if he sought to take advantage of it ...., then on the principle that he who asks for equity must do equity, he must bring into the common fund that which he had already received in respect of the obligations of the same debtors. Banco de Portugal v. Waddell 1880 5 A.C. per Lord Cairnes at p. 187 All that Lord Eldon in fact said however was "Whether the assignees could, by law in another form, get the property out of his hands, was another question " at pp. 249- 250

"I do not wish to have it understood that it follows from the opinion I am now giving ( I rather think the contrary would be the consequence of the reasoning I am now using ), that a creditor in that country, not subject to the bankruptcy laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit he would clearly not be liable. But if the law of that country preferred him to

the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided." [Sill v. Wor-(1791) swick I H. Blackst. 603 per Lord Loughborough]

As a result, each of the modern English text writers has evolved a different set of elaborate rules.

Westlake says that a creditor is liable to refund if he is a British subject, or domiciled in England, or if he must be regarded as English because the debt is owed to a house of business in England of which he is a member; otherwise the creditor may retain what he has recovered. [Secs 142,3] The forst part of this statement is not at variance with the decisions, either English, [Sill v. Worswick, supra: <u>Hunter v. Potts</u> 1791 4 T.R. 182; <u>Phillips v. Hunter</u> 1795 2 H.Bl, 402] or Scottish & [Sym v. Thomson 1758 M. 1137; Ord v. Barton 1847 9 D. 541; White v. Briggs 1843 5 D. 1149; and Barr & Smith v. Chamberlain 1879 7 R. 247] But for the second part of the stateme'nt there is no direct authority, for in no case, Scottish or English, has the Court refused to order restitution.

although he is a British subject. This statement is open to the same objection as the first. (Cheshire ibid )

Cheshire states that the criterion is whether the creditor is subject to the jurisdiction of the English bankruptcy Court, when he is liable to refund, or not, when he can keep his gains ... he says, It is bankruptcy jurisdiction, not jurisdiction p. 483 in general, which has to be considered. If bankruptcy jurisdiction can not be exercised against a debtor, despite his presence in England, unless one of the conditions specified in the Bankruptcy Acts is fulfilled, it follows that the jurisdiction can not be exercised against a creditor unless the same conditions are fulfilled applicable to him at the time he receives the payment. " Logically it is difficult to believe that the Court posses; a wider jurisdiction over a credit. or than over a debtor against whom an adjudication order is sought" This is contrary to the Scottish cases, for there is no jurisdiction under Scottish law to sequestrate a debtor on the ground of arrestment of moveables, Croil 1863 1 M. 509; Joel v. Gill 1859 21 D. 929 per L.J.C. Inglis at p.938 or reconvention, L.J.C. Inglis, ibid but a creditor can be compelled to restore an advantage which he has obtained abroad if jurisdiction is founded against him by arrestment, White v. Briggs 1843 5 D. 1148 or by reconvention. Barr & Smith v. Chamberlain 1879 7 R. 247; Ord v. Barton 1847 9 D, 541

It is submitted that the correct view is laid down in a decision of the whole Court in Scotland, <u>White v. Briggs</u>. [1943 5 D. 1148] A bill of exchange was sent by A, a merchant in London, to B, a commission agent in Glasgow, to be discounted there, and with instructions to remit theproceeds to A. B proceeds had the bill discounted, but applied the bill discounted the purposes. A was pressing for a remittance, so B admitted his difficulty and then indorsed and remitted to him by post an acceptance of a **Liverpool** house which was received in due course by A and acknowledged. Within sixty days thereafter B was sequestrated in Scotland. The trustee arrested to found

jurisdiction against the English merchant A, and brought an act action against him concluding for reduction of the indorsation and payment of the value of the bill\$. It was held that the law of Scotland had to be applied, that the transaction was struck at by the Act 1696 c. 5 annulling voluntary dispositions in favour of creditors made within 60 days of bankruptcy, and the indorsation was reduced and the English merchant decerned to repay the value of the bill. This case was as favourable as any could be for the foreign creditor, because it was the retrospective portion of the Act of 1696 which was appealed to. The English creditor obtained the bill, an English one, Anot after but before sequestration, and when the debtor was quite capable of granting it. The right to this English asset was vested in the English merchant.Later, on the debtor becoming bankrupt, the retrospective part effect of the Scotch Act defeated his right and the English merchant was bound to repay. The majority judges proceeded on the view that the Act of 1696 annulling preferences was general in scope and contained no exception when the alienation was in favour of English or other foreign creditors. Why, they said, should deeds granted to foreigners be excepted when foreigners are admitted to the benefit of this law in Scotland and they have the full benefit of the annulment of preferences made in favour of Scotch creditors? Lord Cunninghame said: "The law annulling preferences was-general within a limited time prior to bankruptcy, is not an unjust or immoral law, which exposes traders from other nations to any injustice or hardship of which they are entitled to complain. On the contrary it is a wise and salutory regulation for preventing frauds. It was not introduced for the benefit of creditors resident in Scotland alone, but was calculated to secure, as far as possible, an equal and just distribution of the insolvent's property among his whole just and lawful creditors, foreign as well as domestic. AS this law then is strongly founded in justice and good policy, it is entitled to high effect in all civilised commercial and encourage of peace arts states who cultivate the 28800 1904 Frequences moreial Whee cultivaten to martery By that rule, if it could be intercourse with each other.

shown that a Scots trader had obtained a preference in America, within the period prohibited by their law, I should **E** hold it equally competent for the American assignees to sue the creditors in the Courts of this country for restitution, as it is for Bell's trustee to maintain the present action." [ at p. 1167 ]

16.

The rule therefore seems to be that our Courts will compel a creditor who has obtained a preference abroad, to restore it, if that creditor is in any way subject to the jurisdiction so that that decree can be made effective. There is no reason to suppose that the same reasons would not apply to the restitution of advantages obtained abroad by diligence, for although the Act 1696 c. 5 might not apply to that, since there had been no voluntary assignation, the 1913 Bankruptcy Act, which gives the trustee a title to all moveables wherever situated, would be held to have just as universal an application asthe

his is not his, as Dicey others seem hik, because asures the und distribution the bankrupt's wis, which is assence of mess. 1696 ACT . Contra Goudy p.246 This rule was formerly statutory. The old Act of 1814 54 Geo. III c. 137 sec. 51 provided that a creditor obtaining any preference, either by diligence or by the volunts ary act of the debtor, after the date of the sequestration out of the estate of the debtor situated beyond the jurisdiction of the Court should be obliged to communicate it for the general behoof, etherwise he was to be liable-te-commun excluded from all participation in dividends, and to be liable to an action at the instance of the trustee to. communicate such preference, so far as the jurisdiction of the Court could reach him. There was no similar provision in the 1856 Act, which repealed this Act, nor in the 1913 ACt. It is clear that at common law the same rule applies as under that old Act: White v. Briggs was not laid down on that provision in the1814 Act, but on the general considerations mentioned, and the same result has been arrived at as to the kind of jurisdiction which will found an action of restitution while the Act was in force, Ord v. Barton 1847 9 D. 541 and

after its repeal, Barr & Smith v. Chamberlain 1879 7 R. 247

If a creditor of a bankrupt sequestrated in Scotland is attempting to obtain satisfaction by diligence or action out of the funds of the bankrupt situated abroad, the Scottish Courts will interdict him from doing so, provided of course that such creditor is subject to the jurisdiction of the Scottish Courts so that the interdict can be made effective. Lindsay v. Paterson 1840 2 D. 1373; Young v. Barclay A claim in the sequestration, founding 1846 8 D. 774 jurisdiction reconventione will entitle the Court to restrain proceedings abroad. | Liquidators of the California Redwood Co Ltd v. Merchant Banking Co. of London 1886 13 R. 1202 But if the creditor that is proceeding against the bankrupt abroad is a firm, and one of the partners is aubject to the jurisdiction but another not, the Court will refuse interdict. Liquidators of the California Redwood Co v. Walker 1886 And section 121 of the Bankruptcy Act 1914. 13 R. 810 which provides that any order pronounced by a bankruptcy Court in any one of the countries of the British Isles countries of the British Isles, Shall be enforced by the nother will not give jurisdiction over persons in England or Ireland so as to enable the Court to pronounce an interdict against them and enforce it through the interposition of the Cousrts Liquidators of the California Redwood of those countries. Co Ltd v. Walker, supra

When a creditor in a Scotch sequestration has obtained partial satisfaction by doing diligence against foreign heritage, the same two questions arise: (a) is he liable to an action of restitution by the Scotch trustee, and (b) must that advantage be deducted from the dividends which he draws if he claims in the Scotch sequestration ? To the first question, in spite of an opinion to the contrary, [Goudy p. 604] it seems proper to give a negative answer: **The** Act and Confirmation in favour of the Scotch trustee does not give him a right to foreign immoveables; and if the trustee creditor has obtained the property by action or diligence abroad, that shows that by the lex situs the he has the title to the property

which is the law which governs title; accordingly the trustee has neither right to the property by the law of the country which appointed him, nor title by the lex situs, and can not succeed in an action of restitution. The second question is more difficult. It has been held by the Privy Council that when a creditor proved the amount of his debt in an Indian sequestration, and, after receiving dividends on the whole debt, brought an action against immoveable estate in Java and recovered a sum which was three fifths of his whole debt and greatly exceeded all the dividends which till then had been paid to all the creditors, he was not only immune from an action of restitution by the Assignees, but was entitled to receive future dividends pari passu with the other creditors so long as he did not receive more than twenty shillings in the pound. "The principle is, that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come inpari passu with the other creditors for satisfaction out of the remainder of that fund: and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund " [ Cockerell v. Dickens II Moo, Ind. App. 353; 3 Moo. P.C. 99 7 This decision is no longer applicable in England because the recent Bankruptcy statutes there have provided that the bankruptcy shall extend to all property "whether real or personal and whether situate in England or elsewhere", ZBankruptcy Act 1914 sec. 167. Dicey p. 372 n. 7 but it is exactly in point in Scotland. However it is contrary to the principle of Stewart v. Auld, ( 1851 13 D. 1337 ] is unfair, and it is submitted would probably not be applied in Scotland now. [Goudyp. 605; Bar p. 1049]

18

The Universality of Bankruptcy

10

(A) Moveables.

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questionsIn a Scottish sequestration, the act and warrant inith Britishfavour of the trustee inso iure transfers and vestsountriesin him "the whole moveable estate and effects of thebankrupt wherever situated". There are similar provisionsin the bankruptcy statutes for England, [Bankruptcy Act 1914secs 53,167 ] and Ireland. [Bankruptcy and Insolvency Act(Ireland) Act 1857 sec. 267 ]

Any order made by a Court having jurisdiction in bankruptcy in England shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy there in the same manner in all respects as if the order had been made in the Court which has to enforce it; and in like manner any order made by a Court having jurisdiction in bankruptcy Ireland in Scotland shall be enforced in England and Scotland Bankruptcy Act 1914 sec. 121; the terms of the Bankruptcy Act 1883 WOT were similar. See Wilkie v. Cathcart 1870 9 M.168 The High Court and County Courts in England, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respect ively, shall act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be sufficient to enable the latter to exercise jurisdiction. [Ibid sec. 122. This repeats sec. 118 of the 1883 Act. See Murphy's Tr. (9-H.) 1933 S.L.T. 632; Scrivenor .v. (O.H.) 1926 S.N. 21; Mrs. Steele (O.H.) 1894 Home's Trs. 1 S.L.T. 697

The result is that the assignation of the whole moveable estate of the bankrupt to the trustee by the bankruptcy law of one of the countries of the British Isles is, by statute, recognised as effective in all H.M. Dominions. Consequently the bankrupt can not deal with his property, nor can diligence be effectively used against it, in any British country when sequestration has previously been awarded in one of the countries of the British Isles.

The Scottish Courts will lo**k**kat and construe the terms of the English or Irish bankruptcy statutes, where they do not contain technical expressions of English or Irish bankrupt law, to determine what estate has been conveyed to the trustee under those statutes. [Salaman v. Todd 1911 S.C. 1214; Young v. Buckel 2 M. 1077]

questions with In/non-British There the effect of the foreign bankruptcy is foreign countries to vestsin the foreign trustee the whole move-

> able property of the bankrupt, wherever situated, his title to moveable property situated in Scotland is recognised, | Gracie v. Gracie's Trs. (0.H.) 1909 2 S.L.T. 91; Obers v. Paton's Trs. 1897 24 R. 719; Goetze & Sohn v. Aders 1874 2 R. 150 per Lord President Inglis at p. 153 and subsequent diligence in Scotland against property of the bankrupt situated here is of no effect. [ Strother v. Read July 1st 1803 Mor. Forum Competens App. p. 4. Overrules Ogilvie v. Creditors of Aberdein 1747 Mor. 4556 and other previous cases. Approved Selkrig v. Davies II Dow 230. There was no specialty in these cases because at that time in bankruptcy matters England and Scotland stood in the position of foreign countries - Goetze & Sohn v. Aders 1874 2 R. 150 per Lord President Inglis at p. 153, but in any event, the same judgment was given where a commission of bankruptcy issued in America was held preferable to an arrestment used subsequently in Scotland - Maitland v. Hoffman 1808 Mor. There is no need to intimate the App. Bankrupt No. 26 foreign award of bankruptcy to the holders of the Scottish foreign funds before the title of the Scottish trustee becomes Strother v. Read, Selkrig v. Davies, supra effective; but intimation is necessary of a foreign trust deed for creditors, and that intimation must satisfy the requirements of Donaldson v. Findlay Bannatyne & Co. 1855 07 D. Scots law. 1053

The foreign decree of bankruptcy is a sufficient title to the trustee to ingather funds in Scotland. A petition for the confirmation of a Chilean sequestration of the estates of a deceased person was considered to be incompetent, and in the same petition a crave for authority to uplift the proceeds of certain Scottish policies of assurance on the life of the deceased was refused as incompetent unnecessary. [<u>Araya v. Coghill</u> 1921 S.C. 462] If the debtors of the bankrupt are unwilling to recognise the title of the foreign trustee, the foreign trustee should sue them in a simple action for paymentor raise a multiplepoinding in thm name of the debtoras nominal raiser.

When a person had been made bankrupt in France, and a "syndic", i.e. trustee, appointed there, who by French to sue on behalf of the creditors, his title bankruptcy law had the exclusive right/to bring an action of reduction in the Court of Session of a deed which prejudiced the creditors was sustained. Oluny. Patents In. 1897 248.719

Suppose a Scote debtor paid the bankrupt after he had been sequestrated abroad unknown to the debtor, would the debtor be liable to pay again to the foreign trustee? There **is** no authority, but it is submitted that on equitable grounds, if the debtor was in <u>bona fide</u> ignorance of the foreign bankruptcy when he paid, he could not be called upon to pay again. If the debtor paid the bankrupt after he had been rendered bankrupt in this country, the debtor would have to pay again to the trustee, but that is because bankruptcy is supposed to be a public act of which everyone has notice. But a debtor can not be expected to know the adjudications of foreign**#** Courts.

"It is only as operating a conveyance of moveable estate that the foreign bankruptcy proceedings receive effect." [<u>Goetze v. Aders</u> 1874 2 R. per Lord President Inglis at p. 054] Thus a radical right remains to the bankrupt in respect of property situated in Scotland, even though that is not the case by the law [<u>Gracie v. Gracie's Trs.</u> (0.H.) 1909 2 S.L.T. 91] in a of the foreign bankruptcy our statutes foreign bankruptcy our statutes preferences apply

preferences apply; Blackburn 22 nd Feb 1810 F.C. See however <u>Scottish National Insurance v. James</u> 1886 13 R. 928 ) and although the title of the foreign trustee is recognised to the extent of excluding subsequent diligence against property situated in Scotland, if the foreign bankruptcy law is retrospective and cuts down diligence which was validly-laid-on-at-the-time used prior to the bankruptcy, it will not be allowed that retrospective effect in Scotland so as to exclude diligence which was validly laid on at the time. | Hunter v. Palmer 1825 3 S. 586. But a creditor who used arrestments in Scotland after the date of an American commission but prior to the assignment was affected by the tetroactive operation of the assignment according to the American law - Maitland v. Hoffmann, supra Our Courts however will, inconsistently, allow our retrospective bankruptcy statutes to cut down voluntary preferences or securities given to foreign creditors prior to bankruptcy, although the foreign creditor validly obtained his right at the time. White v. Briggs 1843 5 D. 1148

22.

#### (B) Immoveables.

The universality of bankruptcy is not recognised either by ourselves, [Phosphate Seware Co v. Lawson's Trustee 1878 5 R. per Lord President Inglis at p. 1138] or by most foreign countries, [Bar p.] in respect of immoveables. To immoveables the law of the situs generally applies. In questions Among the British countries there is with British countries. statutory provision for securing universality.

> and warrant in favour of the trustee ipso iure transfers and we vests in him all real estate situated in England , Ireland, or any of H.M. Dominions, belonging to the bankrupt, to the same effect as if he had been rendered bankrupt in England Ireland or a Dominion. As regards all freehold, copyhold and leasehold estate there there act and warrant of confirmation

Thus in a Scottish sequestratiojn the act

has to be registered in the chief Court of bankruptcy of the country where it is situated, in the like manner as an adjudication of bankruptcy or other similar process ought to be registered according to the law of that country. This is to ensure that all persons concerned may have the same means of ascertaining whether any person has been adjudicated bankrupt according to the law of Scotland as they have of ascertaining whether any person has been adjudged bank rupt according to the law of the country where the property is situated. | and no parson purchaser for valuable consideration of such property shall be affected by the bankruptcy until such registration. Where, according to the laws of England Ireland or other of H.M. Dominions, any deed or conveyance requires regustration, enrolment, or recording, the act and warrant of confirmation shall be so registered enrolled or recorded. Purchasers for valuable consideration, and without notice of the sequestration, prior to the regristration enrollment or recording of the act and warrant, area not to be affected. Bankruptcy (Scotland) Act 1913 sec. 97. See Murphy's Tr. (O.H.) 1933 S.L.T. 632 There are similar provisions in the bankruptcy statutes for Ireland, Bankruptcy and Insolvency (Ireland) Act 1857 sec. 268,9 | and England. Bankruptcy Act 1914 secs 53,167

In questions with non-for British for-Ac Jas eign countries

foreign immoveables. The English [Bankruptcy for- Act 1914 secs 53, 167] and Irish [Bankruptcy and Insolvency Intries (Ireland) Act 1857 sec. 268] the statutes purport, though ineffectively, to do this. The Scotch trustee can obtain a title to foreign immoveables by the bankrupt granting a conveyance in his favour, and the Court can compel the bankrupt to grant such conveyances under penalty of imprisonment and forfeiture of the benefits of the bankruptcy Acts. [Bankruptcy (Scotland) Act 1913 sec. 77]

A scotch trustee is not given a title to

tee completes his title to them, the creditor will generally be generally be preferred by the foreign country. Correspondingly.

But if a creditor attaches foreign immoveables before the trut.

persons using diligence against gootch immoveables are preferable to a foreign trustee who obtained his title as trustee before the diligence, but had not completed it according to our conveyancing requirements when the diligence was executed. [<u>Weston v. Falconer</u> 17th Dec. 1817 F.C.; <u>Royal Pank v. Scott Smith Steins Go.</u> 20th Jan 1813 F.C.; <u>Selkrig v. Davies</u> 1814 II Dow 230

The Court of Session will assist a foreign trustee to dispose of Scotch heritage. Thus a Chilean trustee was authorised to sell Scotch heritage, but on the condition that out of the proceeds bonds over the property and the expenses of sale be paid, that the sale should not operate conversion, and that the proceeds should be consigned with the Accountant of Court to await the orders of the Court. <u>Araya v. Coghill</u> 1921 S.C. 462

Whereas a foreign trustee appointed in a proor foreign bankruptcy may obtain payment of moveable funds ingathered by a Scotch trustee appointed by a subsequent Scotch sequestration, and will be preferred to him in a competition for moveable funds in Scotland, [ Falconer v. Weston 18th Nov. 1814 F.G. referred to in Weston v. Falconer 17th Dec 1817 F.C. ] he may not recover from the Scotch trustee the proceeds of heritage. [ Weston v. Falconer, supra

# Universality of Bankruptcy, continued . Discharge of the bankrupt

In British

countriewhich releases him "of all debts and obligations contracted by him or for which he is liable at the date of the sequestration [ Bankruptcy (Scotland) Act 1913 sec. 145 ] "shall receive effect within Great Britain and Ireland and all H.M's other Dominions! [ Ibid sec. 144 ] In the bankruptcy statutes for England [ Bankruptcy Act 1914 sec. 28 and 121 ] and Ireland, [ Bankruptcy and Insolvency (Ireland) Act 1957 sec. 148 and Bankruptcy Act 1914 sec. 121 ] there are provisions which secure, more or less expressly, that the discharge

The discharge of a bankrupt in a Scotch sequestration.

is recognised in the British Isles, and as these statutes are passed by the Imperial Parliament, the discharge granted under them will be effective in all H.M. Dominions. <u>Gill</u> v. <u>Barron</u> 1868 L.R. 2 P.C. 157; Ellis v. McHenry 1871 L.R. C.P. 228, 234 But a discharge granted by the Courts of a Dominion under a statute of that Dominion is in the same position as a discharge granted by a formign Court, i.e. it only discharges debts of which the proper law is the law of the Dominion. Goudy p.805

At the outset it is necessary to distinguish between In questions with non- a discharge of the debts of the bankrupt, and exemption from British forsome of the remedies against, and disabilities of, a Coudy p. 606 | In England and Scotland there eign countries is an absolute discharge of all prior debts, but in some countries the debtor is only liberated from future imprisonment and responsibility. Story 8th ed. sec. 338 Obviously the bankrupt's discharge can have no higher effect outside the territory of the Court which discharged him than inside, and so whenever a fortign discharge is pleaded as having extinguished a debt, it is necessary to enquire whether it has that effect in the country of bankruptcy. If the debt is not extinguished, it may be enforced Dec. 21 st 1809 F. in other countries. Story 8th Ed. sec. 339: Lashley v. Morelan

Taking the case where the discharge extinguishes all prior debts, what effect has this outside the country of bankruptey? Our Courts will recognise such a discharge as discharging all obligations of which the proper law is the law of the country of bankruptcy; [Story sec. 335; Cheshire p. 490; Goudy p. 605; Bell Comm. 7th Ed. ii p. 379; Dicey p. 503; <u>Marshall v. Yeeman & Spence</u> 1746 Mor. 4568; <u>Christie</u> v. <u>4569</u> <u>Straiton</u> 1746 Mor. RFY0; <u>Royal Bank v. Scott Smith Stein</u> <u>& Co</u>. 20th Jan. 1813 F.C.; at that time England was in the position of a foreign country as regards bankruptcy - <u>Goetze</u> <u>v. Aders</u> 1874 2 R. 150 per lord President Inglis at p. 153; but in any event the same principle was applied in the case of a bankruptcy in New York; <u>Armour v. Campbell</u> 1792 Mor. 4476; <u>Ellis v. McHenry</u> 1871 L.R. C.P. 228 **b**ut where obligations of which the proper law is Scottish, or the law of a third foreign country, are not discharged. [ Cheshine D. 490; Story sec. 339; Goudy D. 606; Bell Comm. 7th Ed. II 380; Dicey p. 506; <u>Greditors of Galbreath v. Galbreath</u> 1762 Mor. 4574; <u>Watson v. Renton</u> 1792 Mor. 4589; <u>Rose v.</u> <u>McLeod</u> 1825 4 S. 308; <u>Richardson v. Lady Hadinton</u> 2 Shaw App. Cases 406; <u>Antony Gibbs & Sons v. La Société Industrielle</u> <u>et Commerciale Des Métaux</u> 1890 25 Q.B.D. 399;

It has been opined that if a creditor has claimed in a foreign bankruptcy and drawn dividends, he could not challenge the right of those bankruptcy proceedings to discharge his debt. [ Duncan 2 Dykes D. 257; Bar D. 1038,9 ] — However it was neld in an old case that a creditor is not b barred from proceeding against the person of the debtorin Scotland, and by parity of reasoning it would apply to proceedings against his heritage, because he had claimed in the bankruptcy proceedings of that debtor abroad, even althou gh claiming operated, in the country seised of the bankruptcy, as an election of the remedy of sequestration. [ Robinson v. Coupar 11th Feb 1811 F.C. ]

#### Succession.

mination he death he ositus Whether a person must be presumed dead, and if so, from what date, is a problem which frequently arises when a person has been missing for some time. The death usually affects a question of inheritance or a question as to whether a marriage is dissolved by the death of one of the spouses. The former only is considered here.

By the Fresumption of Life Limitation (Scotland) Act 1891 [54 & 55 Vict. c. 29]7 Sec. 3, when any person has disappeared and has not been heard of for seven years or upwards, the Court, on the petition of any person entitled to succeed to any estate on the death of such person may find that such person has disappeared and find what was the date on which he was last known to be alive and that he died on some specified date, which shall be, if there is no sufficient evidence that he died at any definite date, 7 years after he was last known to be alive; "Provided always, that nothing herein contained shall entitle any person to any part of the intestate moveable succession of a person who has disappeared if the latter was not a domiciled Scotsman at the date at which he is proved or presumed to have died."

A foreign declaration of death would not be recognised in the case of a domiciled Scotsman.

If a person domiciled abroad has been declared dead by the Courts of his domicile, that should be regarded as a judgement <u>in rem</u> and conclusive here. [Bar p. 294] If a person domiciled abroad has not been declared dead by the proper process of the Courts of his domicile it should be competent to declare him dead in the Scottish Courts in accordance with our law [The common law, since The Presumption of Life Limitation (Scotland) Act 1891 is not applicable to such a case 7 with respect to such of his assets as are situated in this country. [Cp. German Civil Code, Rabel, i p. 165, Breslauer, Private International] International Law of Succession p. 64 7

Another problem is to determine which of two relatives died first when they suffer a common calamity. Each country has a different set of presumptions to decide this question. This is simply the determination of fact and the presumptions matter of evidence, and accordingly, the order of death is determined according to the rules of evidence of the lex fori. / Contra Bar p. 805, Rabel i, p.167 In one English case / In re Cohn 1944 171 L.T. 377 7 where the question was whether a daughter had survived her mother, both having been killed in the same air-raid, the law of the domicile of the mother, the succession to whose property was in issue, was held to govern. The domicile of the daughter happened to be the same as that of the mother. It is submitted that the German presumption for simultaneous death, which was applied because German law was the law of the testator's domicile, was purely a presumption of evidence: the lex fori should have governed. / This case raises a difficulty problem of Classification (q.v.) 7

Lex situs governs questions of title The law of succession in moveables to the effect of pointing out who has the right to succeed is, generally speaking, the <u>lex domicilii</u>, but questions as to the title of the successor are governed by the <u>lex situs</u> of the property. <u>[Bar p. 836, Craigie v. Gardiner 12th June 1819 F.C. ] Thus where A dies A's heir also dies before expeding confirmation, the question whether the property of A vested <u>ipso iure</u> in the heir so as to descend to the heir's heirs, or goes instead to the next heirs of A is determined by the <u>lex situs</u>. <u>[Milligan v. Milligan 1826 4 S. 432; Smith</u> v. <u>Lauder 1834 12 S. 646; McLaren p. 41]</u></u>

In some countries, for example Scotland and England, the only person who has a title to uplift and administer the property of a deceased is one to whom authority has been granted by the Court. \_ The title of a testamentary executor/ executor to personalty of which he has obtained possession is complete without confirmation, which is however necessary in order to give him an active title against debtors to the estate who decline to pay without it" - Orr-Ewing 1885 13 R. (H.L.) per Lord Watson at p. 26 7 Such a person, who is referred to here as the executor, has the duty of ingathering the estate of the deceased, paying his debts, and distributing the balance to the beneficiaries entitled In other countries no judicial title is required, thereto. the estate of the deceased passing directly to his heirs, subject to their acceptance, who are entitled to the property and liable (usually personally liable unless they take the succession cum beneficio inventarii) for the debts of the deceased. / Cheshire p. 500 7 The question whether a judicial title is required to intromit with the papers and property of a deceased, and the effect of vitious intromission without a title, are to be determined according to the law of the situs of the property. / Fischer v. Earl Seafield 1 S. 435 (2nd ed. p. 437); Dingwall v. Vandosme 1619 Mor. 4449; Archbishop of Glasgow v. Bruntsfield Mor. 4449; McLaren p. 44 7

Effect of confirmation, probate etc. limited to own jurisdiction The Scots Courts will grant confirmation when, and only when, there are moveable assets of the deceased situated within Scotland. [Currie p. 4185\_7 In virtue of the Fevenue Act 1808 [See also Confirmation and Probate Act 1858 Sec. 9\_7 the Scots executor must give up an inventory of the whole property of the deceased wherever situated, but it is only with regard to property situated in Scotland that the confirmation gives an effective title, and similarly the validity of all foreign grants of probate or administration are limited to property within their territory, although they may purport to give a title to property everywhere. [Currie p. 17\_7 "The grant of probate does not of its own force carry the power of dealing/ dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testators domicil". / Blackwood v. The Queen 1882 8 A.C. (P.C.) 82 at p. 92. Statutory provision exists for resealing in England grants of confirmation probate or administration made in Scotland, Northern Ireland (Supreme Court of Judicature Act 1925 Secs 168, 169, as amended by Administration of Justice Act 1928 sec. 10) British possessions (Colonial Probates Act 1892, Colonial Probates (Protected States and Mandated Territories) Act 1927) and foreign countries in which His Majesty has jurisdiction (1913 3 & 4 Geo.V c. 16) (Confirmation of Executors (Scot) ( Confirmation of Executors (Soutland) Act 1858 sec. 14) Act 1858 sec. 14 and resealing in Scotland, and Northern Ireland (Probate and Letters of Administration (Ireland) Act 1857 Sec. 94; Northern Ireland (Miscellaneous Provisions) Act 1932 S. 2) grants of probate of letters of administration obtained in England, whereupon the confirmation, probate, or letters of administration have the same validity as if they had been granted by the Court by which they are resealed. 7 In this respect confirmation or a grant of probate differs from sequestration. Where the heirs of the deceased have right to all debts or goods belonging to him without any judicial process, that right is similarly limited to goods within the territory of that law, and confirmation in Scotland is required to obtain a title to deal with property situated in Scotland, / Brown & Duff v. Bizet 1666 Mor. 4498 7 even if the deceased died domiciled in a country where such a rule obtains. Until a foreign heir confirms to property situated here it remains in bonis defuncti and it is not possible, for instance, to arrest the property to found jurisdiction against the foreign heir, / Houston v. Stirling 1824 2 S. Cameron v. Chapman 1838 16 S. 907 7 unless there is 672: a special assignation and disposition of the subject in question/

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question by the defunct to the foreign heir or representative when that is a good title without confirmation, [1690 c. 26, saved by 4 Geo IV c. 98 sec 4; Bell v. Willison 1831 9 S. 266; Lyle v. Falconer 1842 5 D. 236 7 and in which case it is possible to arrest the property to found jurisdiction against the foreign heir even though he is not confirmed. / Inverrarity & Co. v. Moffat 1840 2D. 813 7

As regards corporeal goods in transitu at the time of death, or goods sent from one country to another after death, the executor who first reduces them into possession within the territory from the law of which he derives his grant, has title to them. / Westlake par. 95; Currie p. 130; Hutchison v. Aberdeen Banking Co. 1837 15 S. 1100 7 Thus a Scotch executor has the right to be confirmed not only to the moveable property of the deceased which was situated in Scotland at the time of death, but also to any corporeal moveables which may be brought into the country subsequently, provided that they have not been lawfully reduced into possession previously by some foreign heir or executor, when of course he has title to them.

The rules for determining what is the situs of various kinds of property are considered elsewhere

/ infra p.

Which executor has title to a debt due to deceased?

In consequence of the rule that the law of the situs grant discharge governs all questions of title, the question which executor, where there are more than one, has a title to receive and discharge a debt due to the deceased depends on the situs of the debt, for the executor appointed by the Courts of the situs has that right. / Earl of Breadalbane v. Innes 1736 1 Pat. 181 7 In Hutchison & Co. v. Aberdeen Banking Co. / 1837 15 S. 1100\_7 a domiciled Englishman had died intestate, and a Scotch debtor had, at the request of his relatives, sent money due to him to England/

England to be paid to his legal representatives. The money was subsequently handed over to an English creditor of the deceased who obtained letters of administration; a Scotch creditor obtained appointment in Scotland as executor-creditor and sued for a second payment of the money. It was held that the transmission of the money to England in the first place was lawfully and regularly done as the proper forum of distribution, that the money was then situated in England and properly paid to the English administrator, and accordingly the Scotch executor creditor could not succeed in his action.

It has been suggested that if a Scots debtor of the deceased had reasonable grounds for believing that a foreign executor was the bona fide representative of the deceased, and paid to him, he would be discharged. Cheshire p. 510; Story 7 but there is no authority for this, it is contrary to principle, and there is not even any equitable ground on which it can be defended: if a creditor dies and his executor demands payment the debtor should not pay until he sees the executor's title; if that title when exhibited, is a foreign one, that should put the debtor on his guard to enquire whether the executor really has a right to payment, and if the debtor does pay him in spite of the foreign title, that is a piece of carelessness for which he deserves no consideration. It is submitted that there is no exception to the rule that only the executor of the situs of a debt can validly discharge it.

To whom is confirmation granted? In the interests of unity of administration, if the deceased died domiciled abroad and an executor has been appointed by the Courts of his domicile, that executor will normally be appointed executor here too, whether the deceased died testate or intestate. <u>Marchioness of</u> <u>Hastings</u> 1852 14 D. 489. "The practice is to allow foreign executors to come here and obtain confirmation so as to give/

give them a title to that portion of the moveable estate of a defunct which happens to be situated in this country and that whether the executor be an executor-nominate or and executor-at-law" - Goetze v. Aders 1874 2 R. Per Lord President Inglis at p. 153 7 But this will not be done where the foreign executor is not competent to act as such in Scotland, for example because he is under age. / In re Duchess D'Orleans 1859 1 Sw. & Tr. 253. But resealing cannot be refused because the executor appointed in the other British country is incompetent to act as an executor here - In re Rankine 1918 P. 134\_7 Nor can anyone be appointed executor who has not himself a title founded either on the express nomination of the deceased or his propinquity or his direct interest as a creditor or a legatee, and accordingly when, in a competition in the English Court of Probate between several claimants for the office of executor, a temporary administrator was appointed during the dependence of the suit, he had no title to be decerned executor-dative qua administrator in Scotland. / Whiffin v. Lees 1872 10 M. 797 7 The comity of appointing the same person executor here only means that we will appoint the executor according to the domicil of the deceased and when the English Court of Probate appointed an administrator on the English estate of a deceased who died domiciled in Paraguay, he was not entitled to be decerned executor-dative qua administrator here. [ Whiffin v. Lees, supra 7 If the deceased died domiciled in a country where the office of executorship is unknown, the foreign heir or universal successor will be appointed. [In re Achillonpoulos 1928 Ch. 433] In bankruptcy Scotland recognises the principles both of unity and universality. In the administration of successions Scotland recognises the principle of unity, but not of universality.

A foreign grant of probate or administration is a sufficient/

sufficient incheate title to enable the foreign executor to sue in Scotland for debts or goods situated in Scotland due to the deceased, provided that he confirms before extract. [Wardlaw v. Maxwell 1715 Mor. 4500; Clerk v. Brebner 1759 Mor. 4471; Stewart v. Macdonald 1826 5 S. 29 7 Otherwise a foreign grant of probate or administration is no title to sue in Scotland. Of course a foreign executor can sue for a right due to him personally as executor if it is not one which he takes by coming into the shoes of the Thus if a foreign executor obtains judgement deceased. against a debtor in a foreign country he can sue on that foreign decree here without expeding confirmation here, / In re Macnicol L.R. 1874 19 Eq. 81 7 and similarly where the foreign executor or representative obtains subsequent to the death any right due to him as such executor or representative, which was not part of the deceased's estate, the executor or representative can sue here without expeding confirmation. / Vanquelin v. Bouard 1863 15 C.B. (N.S.) 341 7 Where foreign letters of administration or a foreign grant of probate / but not grants from England or Northern Ireland 7 are produced as a title, the signature of the foreign judge must be authenticated by the signature of a Notary Public, British Consul, or mayor of the town. / Disbrow v. Mackintosh 1852 15 D. 123; Dickson ii 1320 7

By statute, whenever a convention shall be made with a foreign state whereby our consuls or vice-consuls shall receive the same power, the King may direct by Order in Council that whenever any subject of such foreign state shall die within H.M. Dominions, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the deceased's estate, it shall be lawful for the consul or vice-consul of such foreign state to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and/ and to retain the surplus for the benefit of the persons entitled thereto; but such consul or vice-consul shall immediately apply for and shall be entitled to obtain from the proper Court, Letters of Administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit. [24 & 25 Vict. c. 122 sec. 4]7 A convention has been made with Japan. [Order in Council 26th December 1906 S.E. & 0 1906 p. 2. See In re Aikyo 1924 130 L.T. 32 7

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Administration is governed by the law of the country which appointed the executor. / Story sec. 524; Westlake secs 109, 110; Dicey p. 791 7 When the same individual is an executor in two countries, X and Y, he must administer the assets which he obtains under the grant in X according to the law of X, and those he obtains under the grant in Y according to the law of Y, even though for convenience he may have collected all the assets into one of the countries. [Cook v. Gregson 1854 2 Drew 286; Westlake s. 111 7 But if a Scotch executor, without obtaining a foreign con-:firmation, succeeded in reducing foreign assets of the deceased into possession, he would be liable to account for them in this country as if he had received them by authority of the Scottish confirmation. / Westlake s. 103 7 Whether the executor is entitled to remuneration, and if so at what rate, is governed by the law of the country which appointed him. / Bogle v. Henderson 1831 105. 104; Westlake s. 109 7 An executor must pay all debts of which he has notice according to the rules of the law of the country which appointed him, as to the priority of debts, and that whether the debts are due to fellow countrymen or foreigners, and whether the deceased was domiciled in the country of appointment or abroad. / In re Kloebe 1884 28 Ch. D. 175; Dicey p. 791; Westlake s.110. This is contrary to Lawson v. Maxwell 1784 Mor. 4473 where the proper/

proper law of the contract was held to determine whether a debt was privileged. It is difficult to see how this decision could be followed. Suppose according to the proper law of debt A, A had priority over all debts of class B, and according to the proper law of debt B, B had priority over all debts of class A, what then? How can a competition be decided by several different systems of law? Surely it must be decided by one, namely the law of the place of administration. This is the rule in Bankruptcy, that the lex fori of the bankruptcy settles the question. 7 It has been remarked by an English judge that "in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid the proportionate amount." / In re Kloebe, supra, per Pearson J. at p. 177 7 The extent of the executor's liability for the ancestor's debts raises difficulties. A Scottish executor is only liable for the ancestor's debts to the extent of the succession which he takes from the deceased, but many foreign heirs are personally liable for their ancestor's debts, even beyond the amount by which they have benefited as a result of the death, unless they take the succession with the benefit of an inventory. If a foreign creditor sues a Scotch executor is the executor personally liable, and if a Scotch creditor sues a foreign heir can he take advantage of the foreign heir's personal liability? It seems that this question also is answered in accordance with the law of the country which appointed the executor, or the law under which the foreign heir accepted the succession. / Bar p. 835 7 Accordingly the answers to the two examples put are no and yes respectively.

The disposal of the surplus estate completed.

When he has cleared all debts, the executor, if he is the executor of the domicil of the deceased, must distribute after admin-Istration is the surplus estate to the persons beneficially entitled thereto.

/Kinloch v. Fullerton 1739 Mor. 4456, AFFD 1 Pat. 265 7

If/

If the domicil of the deceased is abroad and there is an executor appointed by the Courts of the domicil, he may, if that is the convenient course, pay the surplus over to him for distribution to the beneficiaries, when the receipt of the executor of the domicil is a sufficient discharge; /McLaren p. 44; Westlake s. 105 7 but he should only do this after, and can not be forced to do this hefore, he has completed the business of administration, that is collected the estate and paid the debts. / Preston v. Melville 1841 2 Rob. 88; Young v. Ramage 1838 16 S. 572 is of doubtful authority\_7 Nor is there any legal necessity for his proceeding in this way at all: if it is more convenient to do so he should himself distribute the surplus among those beneficially entitled thereto according to the lex domicilii. "Why the property should be remitted to the forum of the domicil, in order that it shall be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution among the several persons entitled, and transmitting to Eussia the shares of the next of kin resident there, I am unable to comprehend". / Enchin v. Wylie 10 H.L.C. at p. 24 per Lord Chelmsford. His opinion has been approved and Lord Westbury's opinion to the contrary disapproved in Orr-Ewing 1885 13 R. (H.L.) 1, per Lord Chancellor Halsbury at p. 57 It is a reason for not remitting the surplus to the domicil if there are debts of the deceased which are prescribed by our law but not by the lex domicilii, for remission in that case would have the effect that the executor of the domicil would satisfy these creditors, whose debts had prescribed, and thus the fund for distribution to the beneficiaries would be unfairly diminished. [In re Lorrillard 1922 2 Ch. 638 7

Execution/

tion of

trust

All questions relating to the execution of trusts are to be determined by the law of the domicil of the trust. Trusts are said to be "Scotch Trusts" or "English Trusts". To determine whether a trust is a "Scotch Trust" or an "English Trust", that is to determine the comicil of the trust, the domicil of the testator, the domicil and residence of the trustees, the situation of the trust property, the place of performance of the trust, the law which is to govern the construction of the trust deed, are looked to. [ Duncan & Dykes p. 213 7 If all or most of these factors point to Scotland, it is a "Scotch Trust", or, in other words, the domicil of the trust is in Scotland. / Directions by the testator as to what law is to govern the powers and immunities of the trustees - see Orr-Ewing 1885 13 R. (H.L.) 1 at p. 23 - will be conclusive as to the questions referred to, and this will be a weighty . factor in determining the domicile of the trust for other matters - Duncan & Dykes ibid 7 It should be noted that it is the law of the domicil of the trust and not the law of the domicil of the testator which regulates questions as to the execution of trusts. The domicil of the trust is usually, but not always, /e.g. Ferguson v. Marjoribanks 1853 15 D. 637 7 the same as the domicil of the testator. When a testator domiciled in Jamaica by his will executed there bequeathed in trust to certain named persons resident in Scotland the residue of his estate to be applied by them in the erection and endowment of a free school in Bathgate, and the school after erection was to be under the management government and direction of these "trustees their heirs and assigns", it was held that the trust was a Scotch one and that the law of Scotland and not the law of Jamaica was to determine who were the heirs and assigns. / Ferguson v. Marjoribanks 1853 15 D. 637 The question was a narrow one, because it was contended that the issue was the construction/

construction of the trust deed, and that the lex domicilii of the testator should have governed, but the Court probably took the correct view in deciding that this was a question of execution. Lord President McNeill pointed out that the trust was in two parts, firstly certain parties were to receive the bequest and erect the school, which had been done, and the second part of the trust was for carrying on the perpetual government and management of the school. It was with regard to the second part that the question arose. [ Note however that Lords Cuninghame and Fullerton thought that the law of Scotland would have applied even if the question had arisen before the money had been paid over. / The law of the domicil of the trust applies to questions as to the propriety of investments, / Ferguson v. Marjoribanks, supra, per the Lord Ordinary, Rutherford at p. 639 7 and to the powers of trustees. / Harris's Trs. 1919 S.C. 432; Pender's Trs. 1903 5 F. 504; Carruther's Trs. & Allan's Trs. 1896 24 R. 238 and 24 R. 718; Stewart's Trs. 1913 S.C. 647 /

A way in which the question of the powers of trustees often arises in practise is when trustees under a foreign trust want power to do some act in Scotland, for example sell Scotch heritage, which they have not power to do under the trust deed. An application by foreign trustees for power to sell Scotch heritage under the Scotch Trusts Acts will be refused, because such a matter is one for the Courts of the domicil of the trust and the law of the domicil of the trust. / Carruther's Trs. & Allan's Trs. 1896 24 R. 238 7 But if the Courts of the domicil of the trust have considered the question and say that it is lawful and expedient that the trustees should have the power of sale, the Court of Session will, on appeal to its nobile officium, give effect to this by granting power of sale in exercise of its auxiliary jurisdiction. [Allan's Trs./

Trs. 1897 24 R. 718; Pender's Trs. 1903 5 F. 504; Harris's Trs. 1919 S.C. 432 7 Harris's Trs. [supra\_7 is an illuminating case: trustees under an English trust, holding land in Scotland which the truster had specially excepted from the operation of a clause conferring powers of sale, obtained an order of the High Court of Justice in England declaring that a sale of the land was expedient and in the interests of the beneficiaries. and would be competent under English statutes which did not extend to Scotland, and authorising the trustees to apply to the Court of Session for power to sell the land. It was pointed out by Lord Dundas, who dissented, that a petition to the Court of Session either under the Trusts Acts or to its nobile officium for authority to sell must have failed. Nevertheless the Court granted authority to sell in exercise of its auxiliary jurisdiction, holding that the powers of the trustees fell to be regulated by the English Courts to which the trust as an English trust was subject. The settlement of a scheme for the regulation and management of a charity is similarly one for the law and Courts of the domicile of the trust, and when the domicil is abroad the Court of Session exercises a similar auxiliary jurisdiction. / Lipton's Trs. 1943 S.C. 521 7

The Courts of the domicil of the trust alone have jurisdiction to appoint new trustees. <u>Brockie & Another</u> 1875 2 R. 923; <u>Stewart's Trs</u>. 1913 S.C. 647; <u>Hall & Others</u> <u>Petitioners</u>, 7 M. 667\_7 If the trust is a foreign one the Scots Courts will not appoint new trustees even if the trust includes landed estate in Scotland. <u>Brockie</u>, <u>Hall</u>, supra7 The appointment of trustees by the Courts of the domicil of the trust is recognised here even with regard to the title to Scotch heritage, <u>Tbid</u> and an application can be made/ made to the <u>nobile officium</u> of the Court of Session for authority to have the names of the trustees altered in respect of the Scottish property. <u>Evans-Freke's Trs</u>. 1945 S.N. 42\_7 A defect in the title of trustees owing to informalities in the assumption of trustees will be cured by the appropriate order of the Courts of the domicil of the trust. <u>Freke's Trs</u>. v. Brownlie 1877 5 R. 201 7

the domicil he trust hanged?

If there is nothing in the trust deed to the contrary, trustees can, if it is in the interests of the trust, remove the trust funds and trust administration to another country, and they can not be interdicted from doing so; <u>Corr-Ewing</u> 1885 13 R. (H.L.) 1, per Lord Blackburn at p. 21\_7 but it is doubtful whether the Court will give express authority for such a step. <u>Simpson's Trs</u>. 1907 S.C. 87; <u>Stewart's Trs</u>. 1913 S.C. 647\_7

he incidence f debts stween the fritable and he moveable state In Scots law heritable debts are chargeable against heritage, and moveable debts against the moveables; the heir in either capacity is liable to pay the creditor, no matter what is the nature of the debt, but is entitled to relief against the other part of the estate if the debt truly affeirs to it. In other countries different rules prevail. For example according to the former law in England the personal estate might be liable for a mortgage over land due by the predecessor. Difficult questions arise therefore when the estate consists of heritage and moveables situated in different countries if the heritage and moveables are taken by different persons.

The problem might arise in two forms: firstly, is the creditor of the debt on the one hand, entitled to exact payment from the heir or executors on the other: in the case of immoveables the <u>lex situs</u> governs this question, <u>Kinloch</u> v. <u>Fullerton</u> 1739 Mor. 4456, 1740 1 Pat. 265 7 and the <u>lex situs</u> probably rules in the case of moveables also. Secondly, is the heir liable in relief to/ to the executor or vice-versa? The solution to this second problem seems to be that if the debt is heritable the lex situs governs, and if the debt is moveable, the lex domicilii governs. A dies domiciled in England leaving heritage in Scotland. Suppose he leaves a heritable debt, is that, in a question between the heir and the executors, chargeable against the Scotch heritage according to the Scots rule, or against the moveables according to the English rule? Being a question of heritage, the lex situs, namely Scots law governs, and the heir in heritage has to pay without relief against the executors. / Drummond v. Drummond 1799 Mor. 4478, 4 Pat. 66; Frazer v. Spalding 1812 5 Pat. 642 7 But if the debt is moveable, the lex domicilii, English law governs, and the personal estate is liable, so that if the debt has been paid by the heir in heritage he has relief against the English executors. / Winchelsea v. Garretty 1837 2 Keen 293. Of course the personal estate is also liable according to Scots law. 7 Conversely if a person had died domiciled in Scotland leaving heritage in England, Moveable debts would, according to the lex domicilii, Scotland, have been payable from the moveable estate / the same result would have followed if the law of England had been applied 7, heritable debts would, according to the lex situs not have been due from the heritage.

### Actions against trustees and executors

The mere act of obtaining confirmation in Scotland does not render the executor liable to the jurisdiction of the Scots Courts if he is not otherwise liable. <u>/ Robson v. Walsham 1867 6 M. 4; Kerr v. Halliday's</u> <u>Executors 1886 14 R. 251; Anderson v. Borthwick 1827</u> 5 S. 879; <u>Sim v. Sim's Executors Sh. Ct. G.1 238</u> Jurisdiction/ Jursidcition exists against trustees and executors to enable them to be sued in the Scots Courts when either (a) the trust is a Scotch trust, or

(b) the executors or trustees are personally subject to the jurisdiction in personal actions. \_ Duncan & Dykes p. 213; McLaren pp49 et sequ.\_7

#### (a)

How to determine whether a trust is a "Scotch trust" of an "English trust" is dealt with elsewhere. [ infra p. ] If it is a Scotch trust, the trustees or executors are subject to the jurisdiction of the Scots Courts in actions relating to the trust or the trust estate even though some of the trustees are not personally subject to the juris-:diction. / Cruikshank v. Cruikshank's Trs. 1843 5 D. 733, 4 Bell 179; Mags. of Wick v. Forbes 1849 12 D. 299; Kennedy v. Kennedy 1884 12 R. 275; Robertson's Tr. v. Nicholson 1888 15 R. 914; Ashburton v. Escombe 1892 1892 20 R. 187 7 If it is a Scotch trust the fact that an administration order has been pronounced, placing the administration of the estate, wherever situated, under the control of the High Court of Justice in England will not oust the jurisdiction of the Scots Courts. / Brown v. Maxwell's Executors 1883 10 R. 1235 7 Where there are several executors or trustees the office is a joint and indivisible one, and the trustees must all be sued together. /But not where the action is one for delict - for example for damages for improper administration - Mackay v. Mackay (O.H.) 1897 4 S.L.T. 337 7

If originally there was jurisdiction against trustees or executors because the trust was a Scotch one, that jurisdiction will persist even when the trustees have moved from Scotland, and when there are no longer any funds here, if there is no other single forum where the trustees can be sued. <u>McGennis</u> v. <u>Rooney</u> (O.H.) 1891 18 R. 817\_7

These/

These principles apply equally to testamentary and to inter vivos trusts.

(b)

18.

If an executor is personally subject to the jurisdiction of the Scottish Courts e.g. in virtue of residence in Scotland or possession of Scots heritage as trustee of the deceased, / Charles v. Charles' Trs. 1868 6 M. 772; Cruikshank v. Cruikshank's Trs. 1843 5 D. 733 7 he is subject to actions with regard to the estate, even though he has not confirmed in Scotland, and even though, where personal subjection to the jurisdiction is on the ground of residence, none of the estate is in Scotland; and he can not evade an action by beneficiaries by pleading that he was appointed by a foreign court and is only under obligation to account to that court. / Peters v. Martin 1825 4 S. 107; Morison v. Kerr 1790 Mor. 4601; Bain v. Shand 1833 11 S. 688; McTavish v. Lady Saltoun 3 Feb. 1821 F.C.; Grant's Trs. v. Douglas Heron & Co. 1796 3 Pat. 503 7 Where moveable estate belonging to the deceased is situated in Scotland, and the foreign executor has confirmed to it, [ Houston v. Stirling 1824 2 S. 672; Cameron v. Chapman 1838 16 S. 907 ] or, in the absence of confirmation in Scotland, if there is a special assignation and disposition of the property by the defunct to the foreign heir or representative / Inversarity & Co. v. Moffat 1840 2 D. 813 7 the moveables can be arrested jurisdictionis fundandae causa so as to found jurisdiction against the foreign executor even when he is resident abroad. [ McMorine v. Cowie 1845, 7 D. 270; Campbell v. Rucker 1809 Hume 258; but this class of cases is very liable to the objection of forum non conveniens: see post\_7

But although our courts may have jurisdiction against the trustees or executors, and although our courts may be perfectly <u>competent</u> to try the question, they may not be the most <u>convenient</u> forum, and the plea of <u>forum non conveniens</u> may/ may be sustained to the effect of excluding the jurisdiction of our courts. For the plea of forum non conveniens to succeed there must be another competent forum which is more suitable for the trial of the question. It is not necessary that there should be a litigation proceeding in the other forum. / Orr-Ewing supra, per Lord Watson at p. 29 7 Thus where one of the executors was personally subject to the jurisdiction of the Scottish Courts, but both were subject to the jurisdiction of a foreign court where probate had been granted, the Court refused to allow the action to proceed. /Gillon & Co. v. Dunlop & Collett 1864 2 M. 776 7 On the question of convenience a distinction falls to be made between actions against trustees or executors by beneficiaries or legatees for an accounting or for damages for breach of trust, on the one hand, and actions by creditors of the deceased for payment of the debt on the other. In the latter class of cases there are seldom reasons for holding that a competent forum is an inconvenient one, but in the former it is recognised that the action ought to be in the country where the trustees are and the estate is being administered. /Orr-Ewing, supra; per Lord Watson at P. 26; Robinson v. Robinson's Trs. 1930 S.C. (H.L.) 20; Martin v. Stopford Blair's Executors 1879 7 R. 329 7 The Scottish Courts will not usually allow a beneficiary to sue a foreign executor who resides abroad for an accounting by founding jurisdiction against him by arrestment jurisdictionis fundandae causa, / Brown's Trs. v. Falmer 1830 9 S. 224; Macmaster v. Macmaster 1833 11 S. 685; See also McMorine v. Cowie 1845 7 D. 270 where it was decided that such arrestment gave jurisdiction against the executors. At the stage at which the case was reported it had not yet been decided whether the Scots Courts were the forum conveniens 7 but where the action against the foreign executor is by a creditor of the deceased for his debt, the Scots Courts are not an inconvenient forum, and this kind of/

of action will usually be allowed when jurisdiction is founded by arrestment jurisdictionis fundandae causa. Campbell v. Rucker 1809 Hume 258; Orr-Ewing 1885 13 R. (H.L.) 1 per Lord Watson at p. 26; see however Annandale v. Annandale 1723 Robert. 467 7 No hard and fast rules however can be laid down, and it is always a question of the balance of convenience. Thus it was convenient to entertain an action by a legatee founded by arrestment jurisdictionis fundandae causa against a foreign executor for payment of a legacy, which, under the foreign will was appropriated out of a particular fund in this country. / Inversarity v. Moffat 1840 2 D. 813 7 In another case it was not convenient to try in Scotland the part of an action of count and reckoning against executors which related to real estate in the West Indies considering that the administration of the estate was under the superintendence of the Court of Chancery in England where most of the estate was, but it was convenient to try in Scotland another part of the action which related to the apportionment of rents of Scotch heritage. [ Martin v. Stopford Blair's Executors 1879 7 R. 329 7

A claim by a surviving spouse for legal rights or by a child for legitim is a claim by a creditor for a debt, and consequently there is no reason why it should not proceed in a competent forum other than the Courts of the country where the estate is being administered. <u>CRobinson v. Robinson's</u> Trs., supra. 7

Since the reason assigned by the Scots Courts for declining to entertain actions against foreign trustees or executors when they come to Scotland or when funds are arrested here to found jurisdiction, is not that the Court of Session is an incompetent but is an inconvenient forum, it follows that the plea of <u>forum non conveniens</u> must fail when the trustees are not liable to suit or are evading an accounting in the proper forum of the trust, which the law of  $S_c$ otland regards as the only convenient forum so long as the/ the pursuer can there obtain the redress which he seeks. If it is doubtful if the Courts of the <u>forum conveniens</u> have it within their power to give the pursuer a full remedy, or to enforce their orders against the persons of the trustees and the trust estate, the Court of Session will not dismiss the suit, but sist procedure until it is seen that the pursuer is obtaining satisfaction in the <u>forum conveniens</u>. /<u>Orr-Ewing</u>, supra, per Lord Watson at pp. 26, 27; <u>Peters v. Martin</u> 1825 4 S. 107 (2nd ed. p. 108); <u>Macmaster</u> v. Dickson 1834 12 S. 731 7

21.

# Continuing actions against the representatives of a deceased litigant

When a defender dies during the dependence of an action and it is sought to have the action transferred against the deceased's representatives, they too must be subject to the jurisdiction of the Scots Courts, and it will not suffice to say that as the deceased defender was subject to the jurisdiction therefore his representatives are. [McLachlan v. Rob 1831 9 S. 588; Cameron v. Chapman 1838 16 S. 907; Mackenzie v. Drummond's Executors 1868 6 M. 932; Duncan & Dykes p. 252 7 But where the deceased defender is a trustee on a Scotch trust, the action is transferable against the deceased's representatives even though they are resident outside the jurisdiction, because the representatives are, like the deceased defender, liable to the jurisdiction of the Scots Courts irrespective of residence because the trust is a Scotch one. [Rintoul v. Garroway 1898 (O.H.) 5 S.L.T. 306 7

#### Distribution of Moveables on Intestacy

The law of the domicile of a deceased intestate at the time of his death Lynch v. Provisional Government of Paraguay 1871 2 P.&D. 268. See also Cockburn's Trs. v. Dundas 1864 2 M. 1185 moveable determines the class of persons who take his/estate and the proportions to which they are entitled. Erskine stated this to be the rule, Inst. 3,9,4 citing Brown v. Brown 1744 Mor. 4604 but his view was not followed until 1790. Instead there were a number of cases where the moveables were held to be divisible among the next of kin of the deceased according to the laws of the various countries in which the moveables were situated at the time of his death. Davidson v. Elcherson 1778 Mor. 4613; Henderson v. McLean 1778 Mor. 4615; Morris v. Wright 1785 Mor. 4616 Bruces v. Bruce Mor. 4617 & 1790 3 Pat. adopted the principle which Erskine had stated, and which 163 had been followed in one earlier case, Brown v. Brown, supra namely, that the law of the domicile of the deceased and not the law of the situs of the goods governs intestate succession, and this principle holds to-day. Hog v. Hog 1791 Mor. 4619;8 1792 3 Pat. 247; Durie v. Coutts 1791 Mor. 4624; Macdonald v. Laing 1794 Mor. 4627; Farrell v. Barclay 1846 8 D. 774; McLaren p. 17; Cheshire p. 513; Dicey p. 799; Train v. Train's Executrix 1899 2 F 146. This was also the trend of the old Scots Act 1426 c. 88. which provided that the causes of all merchants and inhabitants of the kingdom of Scotland dying in Zealand Flanders or elsewhere, who transferred themselves for the sake of trade, a journey, or any other cause whatever ( but not for the purpose of remaining outside the kingdom ) ought to be brought before the ordinary judgeswithin the kingdom, by whom their wills are confirmed, it not mattering that certain of the goods of the person dying in this way, at the time he died, were in England or in parts across the sea.

The application of the law of the domicile is logical and reasonable. The law of one's domicile is the law with which one is most familiar. Every person must be presumed to have had in mind that if he made no will his estate would devolve in a certain way, and the way in which he would think it would devolve would be according to the law with which he was familiar. To give effect therefore to the <u>lex domicilii</u> in the division of an intestate's estate is to divide the estate according to what is presumed to be the deceased's intention.

Three limitations to the applicability of the law of the domicile must be noticed.

Firstly, the statement that the law of the domicile of the deceased determines what class of persons are to take his estate legitimate means that the law of his domicile will say " his /children", or "his brothers and sisters of the full blood", take his legitimate Who are his/children is to be answered by applying estate. our rules of International Private Law relating to status. See "The Question "] Incidental If a child seeks to be included on the ground that he is really legitimate, having been legitimated by the subsequent marriage of his parents, which is a question of status to be determined by the law of the domicile of the child's father at the time of the alleged legitimation. This is well illustrated by a decision of the English Court of Appeal In re Goodmans Ch. 266 Trusts 1881 17 in which the facts were as follows: D. A woman domiciled in England left a legacy which fell into intestacy and was therefore payable to her next of kin, who were, according to English law, the legitimate children of her two deceased brothers. One of the brothers, while domiciled in England, had three illegitimate children. He acquired a domicile in Holland and had another illegitimate child, then married the mother, which had the effect according to Dutch law of legitimating all the previously born children. He then had a legitimate child. The question was whether the legitimated child who had been born while her father was domiciled in Holland could share along with the legitimate child. It was held that the legitimated child could share, for, while the rules of intestate succession in England were the ones which geverned, because the testator died domiciled in England, they allowed the succession to go

to children, and the question whether a person was a legitimate child or not was a question of statusfor the law of the domicile of the father of thechild. It was not argued that the three children who had been born illegitimate while the brother was domiciled in England could share, in view of the attitude adat common law that before legitimation by subsequent manning could occur opted him England there must be capability of legitimation both by the law of the domicile of the father at the time of subsequent the birth and of the/marriage.

Conversely, when an illegitimate child wes domiciled, and his parents were domiciled, ina country which did not recognise legitimation by subsequent marriage, and the parents subsequently married there, it was held that he was not a legitimate child and could not succeed to lands in Scotland <u>ab intestato</u>, though if his parents had been domiciled in Scotland he would have been legitimate and would have succeeded. <u>Sheddan v.</u> <u>Patrick</u> 1803 Mor. For. App 9, 1849 11 D. 1333

Secondly, that the law of the domicile of the deceased is followed in regard to what class of persons take the estate does not mean that it can determine what happens when there are no persons of that class who can take it. The law of the domicile of the deceased may say that in that event the property is payable to the fisc. But where the country of the deceased's domicile is a foreign one, that part of the foreign law will not be given effect to. The property goes to the state where the domiciled Bar p.843 ) Thus an Austrian died property is situated. possessed of a fund in the English Court; he left no heirs according to Austrian law, and, in that event, according to Austrian law, his property became liable to confiscation by the Austrian fisc. It was held, however, that the property went to the Crown as bona vacantia, because the right claimed was not in the nature of a succession. In this matter the lex situs ruled. In re Barnett's Trusts 1902 1 Ch. 847; In re Musurus 1936 2 All E.R. 1666; Dicey p. 800; Cheshire p.513. Contra. Mclaren p.22, Savigny p.285

Thirdly, although the <u>lex domicilii</u> determines who are to get the estate, the question whether it vests in the successors by survivance or only if the successors have obtained a title by confirmation, depends on the <u>lex situs</u> of the property concerned.  $\left[ \underline{\text{Milligan}} \text{ v. \underline{\text{Milligan}}} 1826 4 \text{ s. } 432; \underline{\text{Smith}} \text{ v. \underline{\text{Lauder}}} 1834 12 \text{ s. } 646 \right]$ 

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# Distribution of Immoveables on Intestacy

The persons entitled to succeed to immoveables on intestacy are determined by the lex situs of the immoveables, McLaren p.17; Cheshire p.549; Irain v. Train's Executrix 1899 2F. 146; Doe or Birtwhistle v. Vardill 1830 2 J. 431, 1 Rob. 627; Macalister's Executors v. Macalister's Trustees 1834 13 S. 171; Ross v. Ross's Trustees July 4th 1809 F&C. even when the foreign lands have been sold, and are represented by cash in Scotland. Macalister, supra We-have-already The question whether a child is or is not legitimate, and so entitled to succeed to Scottish land, is not determinable by the lex situs, but is a question of status which is ruled by our principles of International Private Law, and in the case of legitimation involves reference to the domicile of the father. Sheddan v. Patrick, supra. The rule in Re Goodman's Trusts 1881 17 Ch. D. 266 applies to immoveables as well as moveables - McLaren p. 20. In Doe or Birtwhistle v. Vardill, supra, which was decided at a time when the only way of becoming legitimate according to English law was to be born in lawful wedlock, it was held that a child who had been legitimated according to the law of the domicile of his father, but who had not been born in lawful wedlock, could not succeed to lands in England. It was recognised that the child was legitimate in England, but the English rule of succession to land was that a child, in order to succeed, had to be not only legitimate, but born in lawful wedlock. This decision was based on a peculiar rule of the English law of succession to land which was such that it was unnecessary to enquire into the status of the child under the appropriate 1 w, the enquiry not being allowed to progress as far as that. Segt Legitimation to But sentrast the Lond Ordinary's obiter

statement in Beattie v. Beattie 1866 5M. 181

statement in <u>Beattie</u> v. <u>Beattie</u> 1866 5 M. 181, which however is contrary to <u>Sheddan</u> v. <u>Patrick</u>.

"he question whether property is moveable or immoveable is determined by the law of the situs of the property. [See p. ] <u>Collation</u>. Collation <u>inter heredes</u> is regarded as an incident of

the moveable rather than the immoveable succession, and it has its place accordingly only where it is recognised by the <u>lex domicilii</u>. [McLaren p. 22] Thus where an intestate died domiciled in England, where collation between the heir in heritage and the heir in moveables was not required, leaving heritage in Scotland where collation was required, it was held that because the deceased had died domiciled in England, the heir did not have to collate, and could take the heritage and a full share of the moveables. [Balfour v. Scot 1787 Mor. 4617]

Approbate and Reprobate ( Election )

Sometimes an intended beneficiary under a will can enforce rights against the estate apart from the will. He might be able o to insist on legal rights, or the will may be invalid to convey immoveables of which he is the heir at law. In such cases a question arises whether the beneficiary is entitled at the same time to approbate and reprobate the will, i.e. whether he can claim legal provisions contrary to the testator's intention and still take the benefits given to him under the will. Scots law says that he cannot. Other systems of law have no such rules, or the rules differ.

— The law of the deceased's domicile decides questions of approbate and reprobate ( election ), [ <u>Trotter v. Trotter</u> 5 S. 78, Affd. 1829 3 W.&S. 407; <u>Campbell v. Munro</u> 1836 15 S. 310; <u>Murray v. Smith</u> 1828 6 S. 690; <u>Dundas v. Dundas</u> 1829 1 Jur. 7; <u>Robertson v. Robertson</u> 16th Feb. 1816 F.C.; <u>Hewit's Trustees</u> v. <u>Lawson</u> 1891 18 R. 793; <u>Brown's Trustees v. Gregson</u> 1920 S.C. (H.L.) 87; <u>Bennet v. Bennet's Trustees</u> 1829 7 S. 817; McLaren p. 46;

According to our principles of approbate and reprobate the beneficiary is only put to his election if, by abandoning the claim which he had apart from the will, he makes the fund which he claims subject to the purposes of the will. Where a testator domiciled in Scotland leaves a universal will disposing inter alia of foreign land in a manner which is illegal by the law of the situs of the land, the testator's intention can not be carried out even if the heir is willing to abandon the land to the purposes of the will, so that the heir is not put to his election, and can take the foreign lands under the foreign rules of intestacy and his full share of the rest of the estate under the will. Hewit's Trustees v. Lawson, Brown's Trustees V. Gregson, supra --- While the law of the domicile of the deceased decides questions of election, if the law of the domicile says that a beneficiary is only put to his election when the testator intended to deal in his will with the estate which the beneficiary claims apart from it, ( as Scots law says ), there may be a question of construction for the law of construction of the will, whether the testator did so intend to deal in his will with the disputed estate. The problem has then two parts. First, what law decides questions of election? It is the law of the domicile of the deceased. Second, if that law contains rules of election like our own, the will has to be construed according to its appropriate law, which is usually, but not always, the law of the domicile of the deceased, to determine whether the beneficiary is put to his election. | See Robertson v. Robertson 16th Feb. 1816 F.C.

# Legal Rights of Spouses and Children.

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<u>Ius relictae</u> and legitim from a deceased father's estate are, historically, a relic of the old Scottish community of goods between spouses, and therefore should be part of the matrimonial law and not the law of succession. The abolition of the other features of the community of goods, and the statutory introduction of <u>ius relicti</u> and legitim from a deceased mother's estate, however, make these legal rights very like rights of succession, and they are now classified as such.  $\angle$  See "The Property Rights of Spouses"; <u>Macdonald</u> v. <u>Macdonald</u> 1932 S.C. (H.L.) 79 per Lord Thankerton at p.85; McLaren p. 21: Falconbridge LIII L.Q.R. pp.539, 540; Baty, "Polarized Law p. \_7

At common law ius relictae is due to the widow of a man who died domiciled in Scotland, from all moveable estate belonging to him, whether situated in Scotland or abroad, Nisbett v. Nisbett's Trustees 1835 13 S. 517; Robinson v. Robinson's Trustees 1930 S.C. (H.L.) 20; Manderson v. Sutherland 1899 1 F. 621; McLaren p. 21 7 and legitim is due to the children of a man who died domiciled in Scotland, out of his moveable estate wherever situated; [Hog v. Hog 1791 Mor. 4619, 3 Pat. 247; McLaren p. 21] and otherwise is not due. By statute ius relicti is due to the widower of a woman who died domiciled in Scotland, and is subject to the same principles as ius relictae, [Married Women's Property Act 1881 Sec. 6 ] and legitim is due to the children of a woman who died domiciled in Scotland, and is subject to the same principles as legitim from the father's estate. / Ibid Sec. 7 7

- Terce and courtesy are payable from Scottish lands to the widow or widower respectively of a deceased proprietor, even when he died domiciled abroad, in accordance with the general rule that the <u>lex situs</u> governs all rights over immoveables. <u>Train v. Train's</u> Executrix/ Executrix 1899 2 F. 146 /

Where a foreign law has similar institutions to our legal rights it is necessary, first, to determine whether these rights are part of the law of succession or of the matrimonial law. Where they are restrictions on testamentary power, or rights conferred on the surviving spouse or children which fall short of a real community of goods in which the spouse or children have a proprietary interest which they can enforce in their lifetime, they are part of the law of succession and the law of the deceased's last domicile governs, but if the rights conferred on the spouse or children result in a real community of goods in which the spouse or children have a proprietary interest which they can enforce in her lifetime, they are part of the matrimonial law, and the law of the domicile of the husband at the time of the marriage will govern. Z See "Property Rights of Spouses" /

Legal rights exist over immoveables situated abroad if they are given by the law of the situs of the immoveables.

The question whether property is moveable or immoveable is determined by the law of the situs of the property.  $\angle$  See p.  $\angle$ 

The question whether a child's right to legitim or a widow's right to <u>ius relictae</u> has been discharged in say - an antenuptial marriage contract, will be tested by the rules of Scots law if the system of law which would normally have governed the question does not have a comparable institution. Similarly the question whether any similar right under a foreign law has been discharged may have to be tested by that foreign law. A child of a man who had died domiciled in Scotland brought an action against his father's executrix for payment of legitim. The father and mother of the child

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had their domicile in England at the time of the marriage, and had entered into an antenuptial marriage contract in the English form which made provision for the children but did not expressly discharge legitim in consideration thereof, (which is required by Scots law). The executrix averred that by the law of England the provisions made in the marriage contract in favour of children operated as a full discharge of all legal and other claims which the issue so provided for could prefer against the succession of their parents. The averment was held irrelevant. [ Trevelyan v. Trevelyan 1873 11 M. 516 / Lord Justice Clerk Moncreiff stated that: "We know, as matter of general jurisprudence, that the right of legitim has no place in the law of England ... I doubt if the allegation is meant to imply that the indenture would exclude the son's right ab intestato; and if it do not mean that, I am at a loss to gather its import." [At p. 520] Legitim was such a peculiarly Scottish right that the question whether it had been discharged could only be referred to Scots law. [See also Keith's Trustees v. Keith 1857 19 D. 1040; Breadalbane's Trustees v. Marchioness of Chandos 1836 2 S. & McL. 377; Robinson v. Robinson's Trustees 1930 S.C. (H.L.) 20 / However Scots law is only applied to construing the discharge clause and determining whether it is sufficient to effect a discharge, and a marriage contract which is in terms sufficient according to Scots law to discharge legal rights will not be denied that effect because it is formally invalid by our law, if it is valid by the lex loci contractus, even where the legal right is one affecting Scotch heritage. [Seafield v. Grant 8th Feb. 1814 F.C. 7 A widow who has accepted testamentary provisions out of landed property in England is not barred from claiming terce out of her husband's lands in Scotland, although the Act 1681 c. 10 is in general terms that any provision made by the husband for the wife should exclude

her terce unless the contrary be expressed. <u>Ross v. Aglianby</u> 1797 Mor. 4631, Revd. Mor. Foreign App. p. 9 \_7

## Wills ... Formal Validity

A will of moveables is formally valid, i.e. well executed, if executed either according to the law of the domicile of the testator at the time of making the will, or according to the law of the place of execution. A nuncupative will, however, will not carry moveables in Scotland, even if valid by the lex. domicilii or the lex loci actus, because written evidence is required of a last will. Shaw v. Lewis 1665 Mor. 4494; Dinleton's Doubts sub voce lestament Ersk. Inst. 3,2,41; Story considers that this rule of Scots law is obsolete and would not now be followed - par. 469. Dickson, too, par. 1010, says that this decision is erroneous, but admitting what he says, that the lex loci must determine the solemnitiess of constitution of a deed, that does not alter the fact that it would be impossible to prove a nuncupative will. The proof of a will is a question of evidence for the lex fori, and Scots law requires written evidence of a will.

At common law a will of moveables was validly executed if executed either according to the law of the testator's domicile or the law of the place of execution. In this respect the Scottish common law differed from the English common law, which required a will to be validly executed according to the law of the domicile of the testator at the time of his death. A will executed according to the lex loci was invalid in England. Dicey p.804; Cheshire p.516 The Scottish rule that execution according to the lex loci suffices is a matter of general agreement among the Institutional writers. | Stair Inst. 1,1,6; 3,8,35; Mackenzie Inst. 3,8,p.326; Bankton 1,1,76; Erskine Inst. 3,2,39 to 42 | and is approved in a decision of the whole Court | Purvis Trustees v. Purvis Executors 25 D. 812; see also Leith's Trustees v. Leith 1848 10 D. 1137 (Whole Court); Connel's Trustees v. Connel 1872 10 M. 627; Macdonald v. Cuthbertson 1890 18 R. 101 per Lord President Inglis at p. 104; Kennion & T. Buchan's Trustees 1880 7 R. 570 per Lord The question arises Justice Clerk Moncreiff; Bar p. 814 whether it was the lex domicilii at the time of making the will Was thealexwdemiciliis at a thettime of wthettestators death which

was meant when it was said that a will was valid if executed according to the law of the testator's domicile. This question arose very sharply in England at common law, because there the formalities of the testator's domicile were the only sufficient ones; and if a testator executed a will according to the law of his domicile at the time of execution and thereafter changed his domicile, it was revoked unless it happened to satisfy the law of the new domicile. | Dicey p. 821; Cheshire p. 519 The question has not been the subject of an express decision in Scotland. It was not likely to arise in Scotland because if a testator changed his domicile and the will on his death was found not to fulfil the requirements of the lex Lomicilii at death , it usually fulfilled the requirements of the lex loci actus. The question however might have arisen if A wore domiciled in country X, made a will in country Y according to the law of country X and not of Y, and thereafter changed his domicile to country Z, which had other formalities. Would this will have been valid at common law? It is submitted that in Scotland it would have been. In Purvis the eight consulted judges reasoned thus: "Supposing a testator domiciled in a foreign country at the time when he makes his will, according to the forms there required, it seems unreasonable to say that his change of domicile to a country where a different form of authentication is required by local statutes, is eo ipso to operate as a revocation of that will which was validly made at the time when it was made." 1861 23 D. 812 at p. 824 ] It might just as well be argued: 'Supposing a testator makes a will according to the forms rerequired by his domicile at the time, it seems unreasonable to say that his change of domicile to a country where a different form of authentication is required is eo ipso to operate as a revocation of that will which was validly made at the time it was made.' | McLaren, pykes supplement p. 8

The common law rule that a will is validly executed if executed according to the <u>lex loci actus</u>, was made statutory for British subjects by the Wills Act 1861. This Act altered the English law, which, as already mentioned, demanded that a will

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executed according to the leg of the testator's last domicile, of it was largely only declaratory of Scots law.

The Act, known as Lord Kingsdown's Act", provided that overy will made out of the United Kingdom by a British subject should, as regards personal estate, be held to be well executed if executed according to the forms of either -

- (1) the place where the will was made
- (2) the place where the person was domiciled when the will was made

(3) the law of that part of His majesty's Dominions where Sec. 1 the testator had his domicile of origin. Further, every will made within the United Kingdom by a British subject shall, as regards personal estate, be held to be well executed if executed according to the forms required in that part of the United Kingdom where the same is made Sec. 2 Sec. 3 of the Act deals with the question whether it is the law of the last domicile of the deceased which determines the formal validity of his will or the la w of his domicile at the time of execution. It provides that no will or other testamentary writing shall be revoked, nor shall the construction thereof be altered. by reason of any subsequent change of domicile of the testator. It has been held in England that section 3 is general in terms and applies to the wills of all persons, including foreigners, and is not restricted to personal estate. In re Groos 1904 P. 269; approved by Dicey pp. 820 et sequ.; Westlake sec. 85; Maxwell "Interpretation of Statutes 7th ed. p.37; Monteith v. Monteith's Trustees 1882 9 R. 982 . Disapproved by Cheshire p. 526 and McLaren, Dykes Supplement p.8. The considerations in favour of the general application of the section are that it is in general terms, contrasts with the previous sections which apply specifically only to British subjects, and that if it is not read in a general sense it merely repeats in other words what has already been provided. The consideration against is that the Act is entitled "An Act to Amend the Law with Respect to Wills made by of British Subjects! and Accordingly it is submitted that not only at commonlaw , but also by statute, it suffices for the fopmal validity of a will that it meets the requirements of the law of

of the domicile at the time of execution.

Immoveables. A will of Scottish heritage is validly executed if executed either according to the law of the testator's domicile at the time of making the will, or according to the law of the immoveables place of execution. A will of foreign must satisfy the formalities of execution of the lex situs, unless that law also permits execution of wills of immoveables according to some other law. At commonlaw a settlement of Scotch heritage had to fulfil the requirements of Scots law, as the lex situs. executed The settlement had not only to be/according to the solemnities of our law, but since a will of heritage was not competent, the settlement had to be in the form of a de praesenti conveyance and the word "dispone" had to be used. A will executed abroad according to the law of the place of execution could not convey Scottish heritage, even if the testator was domiciled in the place of execution and wills of land were competent by that law. Colonel Henderson's Childrenv. Murray 1623 Mor. 4481; Melvil v. Drummond 1634 Mor. 4483; Burgess v. Stantin 1764 Mor. 4484; Choldren of James Crawfurd v. Patrick Crawfurd 1774 Mor. 4486; Henderson v. Selkrig 1795 Mor. 4489: Creditors of William Robertson v. Disponees of Janet Mason 1795Mor. 4491; Ross v. Ross's Trustees July 4th 1809 F.C.; Rich mond's Trustees v. Winton 1864 3 M. 95; Bowie v. Bowie 1811 Hume 765; Mead v. Anderson 1830 4 W.&S. 328; Ersk. Inst. 3,2,41 Similarly it was recognised that the question whether a Scotsman's will conveyed heritage in a foreign country der depended on the lex situs, even when the heritage had been sold Subsequently to the death, and the proceeds were within the jurisdiction of the Scottish Court. Macalister's Executors v. Macalister's Trustees 1834 13 S. 171

The rule of the <u>lex situs</u>, however, suffered equitable limitation. A Scotch settlement of Scotch heritage might be validly revoked by a will made abroad according to the <u>lex boci actus</u>. <u>Leith's Trustees v. Leith</u> 1948 10 D. 1137; <u>Purvis' Trustees v.</u> <u>Purvis' Executors</u>, supra. But if the foreign will was only an implied revocation by making a new disposition of the subjects, it would be ineffectual for that purpose - <u>Purvis</u> Deeds of instructions to trustees regarding the disposal of heritage already conveyed

to them Ker v. Lady Essex Ker's Trustees 1829 7 S. 454 and wills and codicils dealing with heritage in the exercise of reserved powers | Cameron v. Mackie 9 S. 601, 7 W.&S. 106; Baron Norton's Trustees v. Lady Menzies 1851 13 D. 1017 could be attested in the same way as for moveable estate. - The common law rule has been changed by statute. Section 20 of The Titles to Land Consolidation Act 1868 provided that the succession to lands could be settled by mortis cause deeds, and that where in any deed purporting to convey or bequeath lands any words of conveyance were used which, if used in a will with reference to moveables, would be sufficient to confer on the executor or legatce a right to receive the moveables, the deed, if executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, would be effective to carry heritage. The effect of this enactment, plus the rule that a will of moveables is validly executed if executed according to the lex loci actus, laid down in Purvis, supra, and made statutory for British subjects in the Wills Act is that a will made abroad according to the lex loci 1861 will now carry heritage in Scotland if the testator intends it Connel's Trustee v. Connel 1872 10 M. 627 | However to do so. this alteration of the law by statute can only affect Scottish heritage, and leaves unchanged the principle that if the lex situs of foreign immoveables insists on its own formalities being observed, the formalities of the lex situs will have to be observed, even if the foreign immoveables have been sold, and the proceeds are within the jurisdiction of the Scottish Courts. Macalister's Executors v. Macalister's Trustees 1834 13 S. 171 )

### Wills ... Capacity

The question whether a testator has capacity to make a willigas to **mo**veables is governed by the law of his domicile at the time of making the will, and as to immoveables by the <u>lex situs</u>. See Capacity. Story par. 465; Bar p.813

### Wills .... Construction

The fundamental principle in the construction of wills is to determine the testator's intention. That principle is logically carried out when the construction of a will involves a foreign law.

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As the intent object is to ascertain the testator's intention, the will is construed according to the law by which he intended it to be construed. He may have stated his intention expressly in the will, and if that is so, his desire will be given effect to. [ Stair v. Head 1844 6D. 904. This case relates to a marriage contract, but the question was the construction of a destination to the wife's heirs executors or assignees in the event of the failure of issueof the marriage and the death of the husband, and such destinations are testamentary - Aee Lord President Strathclyde in Lister's J.F. v. Syme 1914 S.C. 204 Declarations as to domicile in wills are in a different position: these are only evidence of the testator's intentionto retain his old domicile or acquire a new one; they are not conclusive of the question of domicile, but will be weighed along with the other indicia of domicile, and if there is stronger evidence to the contrary the declaration will be disregarded. Robinson v. Robinson's Trustees (0.H.) 1934 S.L.T. 183; Corbridge v. Somerville 1914 1 S.L.T. 305; In re Steer 1858 3 H.&N. 598; In re Annesley 1926 L.R. Ch.D. 622 ----- If the will does not express by what law it is to be construed, it will be construed according to the law by which the testator impliedly intended it to be construed. It is presumed that he intended a will, whether of moveables, or immoveables, or of mixed estate, to be construed according to the law of his domicile. [ Smith v. Smiths 1891 18 R. 1036; Robertson v. Robertson Feb. 16th 1816 F.C.; Gow's Executor v. Gow (0.H.) 1868 6 S.L.R. 252; McInnes v. McAllester 1827 5 S. 862; Hardman v. Rouget's Trustees 1842 4 D. 1505; Gowam v. Bradley 1845

7 D. 433; McHargs v. Blain 1760 Mor. 4611; In re Cunnington 1924 1 Ch. 68; Ommaney v. Bingham 1796 & Pat. 448 per Lord Loughborough at p. 157; Yeatesv. Thomson 1 S.&McL. at p. 835 per Lord Brougham Some writers say that in the case of a will of immoveables it should be construed according to the <u>lex</u> situs, McLaren p. 32; Bar p. 830; Halsburt's Laws of England c. vi p.242 but it is clear from Mitchell v. Baxter & Davies ( GIUE-E 1875 3 R. 208 | that there is no difference between wills of moveables and immoveables, and that in both cases the presumption is for the lex domicilii. See also Smith v. Smiths 1891 18 R. 1036 where the presumption in favour of the lex domicilii held good in the face of a strong plea that the lex situs should be applied. It appears from the argument of the second parties that this was a will dealing with real estate in New Zsaland, although the rubric mentions "moveable" estate. Dicey (p. 603), Cheshire (p. 555), Foote (p. 256), Story (secs 479) a - f, 484 say that the presumption in the case of immoveables is for the lex domicilii. Where however there is a destination of immoveables in favour of "heirs" it is submitted that heirs

must be ascertained according to the <u>lex situs</u> - see post. In <u>Re Moses</u> 14.235, the <u>lex situs</u> was held to govern quoad certain foreign immoveables in opposition to the <u>lex domicilii</u>] The testator's domicile at the time of execution of his will and at the time of death may be different, in which case it is the domicile at the time of execution which rules. The Wills Act 1861 Sec. 3 provides that "No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same" This applies to the wills of all persons including foreigners, -In re Groos 1904 P. 269. See "Wills - Formal Validity. Tn view of this statute it is suggested that Gow's Executor v. Gow (O.H.) 1868 6 S.L.R. 252 is decided wrongly. Even apart from the statute it is submitted that the rule must be correct, otherwise the meaning and effect of the will , and the persons who are to take under it, would have changed from what the testato intended when he made the will, without any alteration of the will; which can not be presumed to be the testator's intention. "The

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subsequent construction of the settlement is not altered by any/change of domicile. The provisions of Lord Kingsdown's Act are declaratory of the law." <u>Battye's Trustees v. Battye</u> 1917 S.C. 385 per Lord President Strathclyde at p. 392. It is the law of the domicile at the time of death which governs, and subsequent charger in that-demi the law of the last domicile, even if retrospective, are to be disregarded. - <u>Cockburn's Trustees v. Dundas</u> 1864 2 M. 1185; <u>Lynch v. Provisional Government of Paraguay</u> 1871 2 P.&D 268

The presumption that the lex domicilii of the testator governs the construction of his will can be rebutted. "The question always is whether the testator has manifested an intention that his will shall be construed by the law of some country other than that of his domicile - say the country in which the will is made, in the language and forms of which the will is expressed and framed, or in which the trusts created by it are to be executed." Smith's Trustees v. Macpherson 1926 S.C. 983 per Lord President Clyde at p.989; Cheshire p.533 The factors which weigh in considering whether the presumption for the lex domicilii is overcome are, that the will is expressed in the language and forms of the law of another country, Dicey, p.818 says that this is sufficient of itself to entail the will being construed by the law of that other country, but this is contrary to Smith v. Smiths 1891 18 R. 1036: However the consideration is important: Rainsford v. Hannay's Trustees 1852 14 D. 450; Mitchell v. Baxter \* Davies 1875 3 R. 208: Blackett v. Gilchrist 1831 10 S. 590 ) that the will was made in another country where the testator was resident at the time, Smith v. Smiths, supra: Mitchell v. Baxter & Davies, supra that the testator's domicile of origin was in the other country, Rainsford v. Hannay's Trustees, Mitchell v. Baxter & Davier, supra that the trusts are to be executed in another country, Cameron v. Mackie 9 S. 601, 7 W.&S. 106 | that the property willed is land in another country, Cameron v. Mackie, supra; Blackett In te Moses 1908 2 Ch. 235v. Gilchrist, supran that to construe according to the law of the domicile will result in intestacy. See Smith v. Smiths, supra, which is the converse . None of these considerations is sofficient in itself, but if most concur in pointing to another country, the will may fall to be construed according to the law of that country. Thus where a woman of Scotch origin, married to a domiciled Englishman, and therefore having an English domicile herself, made a testamentary conveyance of Scotch heritage to trustees, who were her husband and two Scotsmen, and the deed was prepared by a Scotch solicitor in the Scotch form and was executed in Scotland, it was held that she could scarcely have had in view the law of any other country than that of Scotland, which therefore was held to rule the question of construction, which was whether the conditic si institus operated. Mitchell v. Baxter & Davies, supra Where a Trust Disposition and Settlement was executed according to the Scotish form, by a person of Scots origin, possessed of landed estate in Scotland, the trustees being all resident in Scotland and the trust being intended to be carried out there, it was held that the deed had to be construed according to the law of Scotland, although the testator was designed therein as resident in Vienna, where he had resided for 30 years before his death without ever returning to Scotland. Rainsford v. Hannay's Trustees, supra. The domicile of the testator was not determined. And where a person domiciled in England bequeathed heritage in Scotland to his eldest son, under burden of a trust purpose in favour of other people, the deed being drawn by a Scotch Conveyancer in the Swotch form and the main purpose being the conveyance of the Scotch heritage, it was held that a question of vesting of the trust provision had to be determined according to Scots law. Blackett v. Gilchrist 1831 10 S. 590 It was not sufficient however to rebut the presumption of the lex domicilij that a domiciled Scotsman left a will, made in New Zealand according to the New Zealand form, dealing with real estate in New Zealand ( which had to be converted ), the trustees being New Zealanders, Smith v. Smiths, supra The points of difference from the first two cases referred to were that in those two cases, firstly, the

domicile of origin of the testator was in the country the law of which was held to apply, and secondly the domiciles which were ignored were only derived or acquired ones. If New Zealand law had been applied in the last case the estate would have fallen into intestacy. It does not appear from the very short judgement whether this consideration weighed, ( Cp. <u>In re Cunnington</u> 1924 1 Ch. 68 ) but it should weigh on the principle that a deed should be construed <u>ut valeat magis quam pereat</u>: one presumes that a testator did not intend his will to be a nullity.

If the will is expressed in ordinary language, it is not necessary for the Court to refer to any foreign law for aid in its interpretation, and it is competent for the Court, and is the Court's duty, to construe the will for itself. | Thomson's Trustees v. Alexander 1851 14 D. 217, and Griffith's J.F. v. Griffith's Executors 1905 7 F. 470, over-ruling Cranstoun v. Cunninghame 1839 1 D. 521; Trotter v. Trotter 5 S. 78, 3 W.AS. 407 (where the Lord Chancellor in the House of Lords approved the contrary rule); Cowan v. Pradley 1845 7 D. 433 | If it is avverged that the words or clauses which are in dispute are-in-dubie have a technical meaning according to the foreign law, the Court will consider the evidence of experts in the foreign law as to whether this is so or not, and only assume the duty of construction if the evidence is that they have no technical meaning; but where itwas averred that according to English law effects included heritage, but was not averred that this was so because of any technical meaning of the word in English law, this was not a relevant averment which required the Scotch Court to refer to the evidence of experts, and the Court forthwith considered for itself was intended to whether "effects"/include heritage. | Griffith's, supra In construing ordinary language in this way it seems proper for the Court to confine itself to philology, and not to advert to cases in its own law which have given a meaning to the words under construction. Thus in the interpretation of the word "effects", the Inner House did not mention two previous Scots decisions referred to by the Lord Ordinary, which had held that "effects " did not include heritage, but proceeded on general considerations to the same result.

when a will bequeaths /moveables situated in a country other than the domicile, and the will is to be construed according to the lex domicilii, a difficulty arises if the will has been expressed in the technical language of the lex domicilii. It may have purported to confer immoveable rights known to the lex domicilii, which are either not known to the lex situs, or technical are not known by that/name. This difficulty is resolved by obtaining the meaning of the technical expressions in the law of the testator's domicile and asccertaining the quality of the right which the testator intended to bequeath, and then conferring the nearest equivalent right in the language and forms of the lexsitus. See 'Analogy in the Conflict of Laws by G. H. Crichton in XL L.Q.R. p. 472 Thus an Englishman left a will in the English form, by which, inter alia, he devised all such of his lands situated in the counties of Devon, Inverness etc. as consisted of "freehold of inheritance". "to the use of my elder son E.F.S., and his assigns for his life, without impeachment of waste, and after the death of the said E.F.S. to the use of the first and every other son of the said E.F.S. successively, according to their respective seniorities in tail male, with remainder to the use of etc." According to the law of England the Inverness estate which was in didpute would have been "freehold of inheritance" and this would have been a valid settle ment "in tail male" if they had been situated in England. The House of Lords considered that the incidents of a tail male following on a tenancy for life were substantially the same as the son E.F.S. would have received by a Scottish conveyance to him in liferent allenarly and to the heir male of his body in fee, and that this is what EFS. should obtain. Studd Copps Trustees v. Cripps 1926 SLT 188. Id Cook 1880 8 R. 249, 10 R. (H.L.) 53; Cp. Marquis of Bute v. Marchioness of Bute's Trustees 1880 8 R. 191 Only such rights as to immoveables as are recognised by the <u>lex situs</u> can be conferred on the beneficiary. A domiciled Scotsman by a Trust Disposition in Scottish form, after conferring a life interest on his wife, gave his land in Scotland and his London house for behoof of his eldest son James, and the heirs-male of his body

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in fee, whom failing Johan and his second son, and the heirsmale of his body in fee, with other remainders over. By English law this created an estate in tail male in James; by Scots law such directions would not have created a strict entail - the interest of John and his heirs thereunder was that of heirs substitute only, and was defeasible at the will of James, who was entitled ( subject to the life interest of his mother ) to deal with or dispose of the premines by any habile conveyance, as regards the London house e.g. by will. It was held that the Trust Disposition created an English estate in tail male without any power of disposition except that conferred by English law, and that James's will was not effective to defeat it but that the premises went on James's death to John. In re Miller, Baillie v. Miller 1914 1 in favour The estate which these advocates of Scots law maintained 511 was not known to Stots law.

There is no reason why one part of a will should not be construed by a different law from another, if that could fairly be said to be the intention of the testator. Different clausesof mercantile contracts, Hamlyn v. Talisker Distillery 1894 21 R. (H.L.) 21 and of marriage contracts, Chamberlain v. Napier 1880 15 Ch. 614 | may be construed by different systems of law, and there is no reason why the same should not apply to wills. This is borne out by Marquis of Bute v. Marchioness of Bute's Trustees. 1880 8 R. 191 in which a Trust Disposition and Settlement in Scotch formand executed in Scotland by a Scotch lady directed that certain jewels plate etc. should be settled as heirlooms on the Marquis of Bute and after him on the heirs entitled to succeed to the Bute estates in the county of Glamorgan in entail. This was competent by English but not By Scots law. Now it is clear that the settlement as a wholewas to be construed by Scots law, but it is equally clear that this bequest was intended to take effect under English law, because in favour of the heirs of ens tail of English estates, and although the case was decided on another ground, Lord President Inglis saw no reason why the bequest should not receive effect by the trustees executing an English deed of entail of the jewels and plate. 196 at p.

Strictly, that was not a question of construction but of essential validity, but both are governed by the same system of law. If the testator dealt with immoveables in one clause in the language of the lex situs, and subjected them to trusts to be carried out in the situs by trustees resident there, and moveables in another clause in the language of the law of his domicile, it might well be that the lex situs should apply to the construction of the former clause and the law of his domicile to the construction of the latter.  $\int_{\Lambda}^{\ln te} \frac{M_{oses}}{\log te}$  1908 202. 235. 1831 10 S. 590, where a person domiciled in England bequeathed heritage in Scotland to his eldest son under burden of payment of £400 to trustees for a trust in favour of other people. The deed was drawn by a Scotch conveyancer in the Scotch form, and it was held that because of this and because the main. purpose was the conveyance of Scotch heritage, that a question of vesting of the trust provisions had to be construed according to Scots law, notwithstanding that the testator died domiciled in England. | It is submitted that the single word "heits" may have to be construed according to two different laws if the estate comprises both moveables and immoveables. See post

Construction of destinations to "heirs" or "next of kin" Testator's What is the effect of a destination by the testator heire to his "heirs" or "next of kin"? The "heirs do not take by reason of the failure of the deceased to make any will; on the contrary they take by operation of the will. [ <u>Brown's Trustees</u> <u>v. Brown</u> 1890 17 R. 1174 per Lord President Inglis at p.1180 ] But "it is plain in the absence of a controlling context that, when a testator leaves moveables to his own"heirs", he intends to bestow them on the same persons **d**s those who would succeed to him if he died intestate. That being so it is evident that the duestion - who are the persons thus designated? - must depend for answer on the law of the testator's own domicile." [<u>Smith's</u> <u>Trustees v. Macpherson</u> 1926 S.C. 983 per Lord President Clyde at p. 988 ] It is equally plain in the absence of a controlling context that when a testator leaves immoveables to his own "heirs", he intends to bestow them on the same persons as those who would succeed to him if he died intestate. That being so it is evident that the question - who are the persons thus designated? - must depend for answer on the lex situs. If a testator leaves the residue of his estate to his "heirs" and dies possessed of both moveables and immoveables, the residue will go so far as moveable to his heirs in mobilibus according to the lex domicilii, and so far as immoveables to his heirs in heritage according to the lex situs. If he leaves land in various countries the the heirs to the immoveables may vary from situs to situs. It has been suggested that if a testator has property in England, Jamaica, and British Guiana, and makes a will in favour of his heir, that it is not to be presumed that he used the expression in three different senses, and that 'heir' must be construed according to the law of his domicile. / Cheshire p. 544; Story sec. 479h quoting Burge 1838 ed. vol. ii p. 858\_7 But why should 'heir' not mean a different person for moveable and immoveable property, and one person for immoveables in one place and another for immoveables in another. A devise in a will of land in both England and Scotland to A and the heirs-male of his body in fee, whom failing B and the heirs-male of his body in fee, with limitations over, was held in Re Miller. / 1914 1 Ch. 511 / to have a different effect as regards the English lands from what it had as regards the Scotch lands. If it is admitted that by using the word 'heir', the testator meant to benefit the person who would have benefited if he had died intestate, then different meanings must be assigned to 'heir' in order to carry out the testator's intention. The other view/

view is too strict an application of the rule that the law of the domicile of the testator must be presumed to govern the construction of a will of moveables or immoveables: to apply the rule in this case is to defeat the testator's intention; the rule exists only because it elucidates what is thought to be the testator's intention; the intention is the over-riding principle; if the testator's intention has been ascertained to be otherwise then the rule is not needed. In a Scots will where no question of foreign law arises it is clear that a destination to "heirs" takes the moveable property to those who would have been heirs in mobilibus and the heritage to those who would have been heirs at law by the rules of intestate succession. [McLaren p. 758] 'Heir' then can denote two different persons at the one time/

according to the nature of the estate.

Where the funds are moveable, a further question arises when the testator's domicile is different at the date of his death from his domicile at the time of execution of his will: are "heirs" ascertained according to the law of the former domicile or the latter? In view of the principle, the construction of a will is not altered by a change of domicile, it is submitted that in the absence of some counter consideration, the heirs according to the law of the former domicile would be those entitled to take. [ An example of a 'counter consideration' can be found in <u>Eadie's Trustees v. Henderson</u> 1919 1 S.L.T. 253, where a destination to "the then next of kin of the said John Eadie" obviously meant his next of kin according to the domicile at death and not at the time of the deed.]

The point is a difficult one. It has been said, obiter, by Lord President Clyde that where there is a destination to a testator's heirs, he intends to endow the same persons who would succeed to him if he died intestate, and accordingly "the law of the testator's ultimum domicilium ( should he have meantime changed his domicile ) must be held to contain the rules of intestate succession which the testator intended to invoke ... It may be pointed out that the effect ( as above axplained ) of an alteration in the testator's domicile involves no alteration in the construction of the will. The will remains, as it always was, a gift to those who would succeed to the testator's moveables if he died intestate, and therefore the effect of the alteration of the testator's domicile involves nothing inconsistent with sec. 3 of the Wills Act 1861". ( Smith's Trustees v. Macpherson 1926 S.C. 983, at p. 988 . This is also McLaren's view - p.779, and his statement is not corrected in Dykes Supplement, which however does not note the subsequent marriagecontract cases aftermentioned | The question was left open in the only Scottish case in which it arose with regard to a will, Brown's Trustees v. Brown 1890 17 R. 1174. The Lord Ordinary, Fraser, however, was in favour of the view which Lord

president Clyde later expressed, because he said "No doubt in the case of a simple will the presumption is that it is to be construed according to the law of the domicile at the time of the death." He then goes on to say that the rule is not conclusive and is rebutted by the other considerations. but on the authority of two marriage contract cases | In marriage contracts a destination to one of the spouse's heirs or next of on the failure of the other spouse and tin failing all offspring of the marriage of funds contributed by that spouse, is like a will by him or her. - Lister's J.F. v. Syme 1914 S.C. 204 per Lord President Strathclyde this dictum of Lord President Clyde is wrong: such a destination to "heirs" or "next of kin" is construed according to the law of the domicile of the testator at the time of making the deed, and not according to the law of his domicile at his death. Lister's J.F. v. Syme, supra; Battye's Trustees v. Battye 1917 S.C. 385 | The testator intended to endow the same persons who would succeed to him if he died intestate at the time he made the will.

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Legatee's Where a legacy is directed to be paid to a legatee, whom heirs failing "his nearest heirs", those heirs are to be ascertained according to the law of the legatee's domicile and not the law of the testator's domicile. | Smith's Trustees v. Macpherson 1926 S.C. 983; Mitchell's Trustees v. Rule (0:H.) 1908 16 S.L.T. 189 Otherwise the persons called to succeed would not be his heirs. Smith's Trustees v. Macpherson per Lord President Clyde at p. The contrary has been held in England. In re Fergusson's 990 Will 1902 1 Ch. 483 ) The question again arises as to whether it is the legatee's heirs according to his domicile at the date of the will or according to his last domicile. Lord President Clyde has stated obiter, that it is according to his last domicile, Smith's Trustees v. Macpherson at pp 990) and the same reasons do not exist for doubting this opinion as for doubting his opinion that it is the last domicile that counts in a destination to the testator's hears, for there is neither authority against it, nor does the proposition seem unreasonable: the argument that the testator must be presumed to have known who were the legatee's

heirs by his domicile at the time of making the will, and to have had a <u>delectus</u> in favour of those persons, is disposed of by the consideration that generally a destination to a man's heirs is an accentuation of the favour to him, not an exercise of <u>delectus</u> in favour of other people. [I bid, per Lord Bands at p. 992]

Where a testator is domiciled in one country and leaves a legacy to a person who belongs to another, payable when the legates attains majority, it will be majority according to the legates's foreign domicile that is meant. [ Bar p. 329n ]

A bequest to "the children of A" means in Scots law, McLaren pp. 692,4 ) as in English law, the legitimate children of A. If the will falls to be construed by Scots or English law a question may arise as to whether a child legitimated under a foreign law, say by the subsequent marriage of his parents, is comprehended. The question whether the child is legitimate is one of  $\frac{1}{4}$  status, to be determined by the law of the domicile of the father at the date of the alleged legitimation. The rule in <u>Re Coodman's Trusts</u> [ 1881 17 Ch. D. 266 ] applies equally to testacy and intestacy, and to both moveables and immoveables. McLaren p.20 | It must always be remembered however that the real question in testate succession is to determine the intention of the testator, and if it can be said that in a bequest to the children of A, the testator appears, on a true construction of the settlement, to have meant such children of A as were born in lawful wedlock, the class will have to be restricted accordingly. [ F.A.Mann in 1941 LVII L.Q.R. 136 Further, if a foreign law governs the construction of the will, and that law says that children means not simply legitimate children, but children born in lawful wedlock, then the enquiry does not get as far as the question of status. Cp. Doe or Birtwhistle v. Vardill 1830 2J. 431, 1 Rob. 627 See Legitimation

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# CONSTRUCTION OF "FREE OF DUTY"

A direction to pay a legacy "free of duty" or to pay an annuity "free of all taxes" in a Scottish will means, in the absence of any contrary intention which appears from the will, that Scottish duties and taxes only and not foreign ones, are to be borne by the residue of the estate. / In re Norbury 1939 1 Ch. 528; In re Frazer 1941 1 Ch. 326 7 An example of an intention to the contrary occurred when a British subject ordinarily resident in Turkey bequeathed freehold estate in France "free of all death duties," and no United Kingdom duty or any duty other than the French mutation duty was payable: the French mutation duty was payable out of the residue of the estate. [In re Quirk 1941 1 Ch. 46] In drawing a will where such a question may arise it is desirable to use a term of art, such as "free of legacy duty", which means the legacy duty payable under our law. <u>[In re Scott</u> 1915 1 Ch. 592]

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### Wills .... Essential Validity

A will which has been sufficiently executed, and by a testator with capacity, may yet be invalid either in whole or in part if (1) it purports to bequeath property which the testator has no power to bequeath, or

(2) bequeaths it in a way that the law does not permit, or(3) if it has been executed under error or as a result of undue influence or force.

In Scots law an example of the first class is a will in which the testator purports to leave all his estate to charities, ignoring his wife and children, which however is ineffective to defeat their legal rights. Examples of the second class are the prohibition or accumulations beyond certain periods, the prohibition of the creation of a liferent in favour of a person not in life at the time of the creation, the rule that a condition attached to a legacy which is contra bonos mores is to be held pro non scripto, and that an entail of moveables can not be created. These two classes of essential invalidity are subject to different rules. [The English text writers, possibly in consequence of their unfamiliarity with legal rights, have not distinguished them. It is usually stated simply that questions of essential validity are referred to the law of the last domicile of the deceased - Dicey p. 804; Cheshire p. 530 7

(1)

Where there is a limitation of the power of the testator to bequeath part of his property, that limitation may be part of the matrimonial law, whereupon the rules apply which are described in The Property Rights of Spouses and Children. [q.v.] Alternatively it may be a part of the law of succession as a restriction of the testamentary power, whereupon the law of the last domicile of the deceased governs/

governs.  $\sum$  Bar p. 827  $\sum$  Where there is a restriction on testamentary power by the law of the testator's domicile at the time of making the will, and none by the law of his last domicile, a will disposing of all his property, reserving the legitimate share to which his relatives may be entitled at his death, will pass the whole of the estate.  $\sum$  In re Groos No. 2 1915 1 Ch. 572  $\sum$ 

#### (2)

veables

The question whether the testator has disposed of his property in a way which the law will permit is determined in the case of moveables in this way: the disposition is valid if the same law which determines the construction of the will (i.e. usually, but not necessarily, the law of the domicile of the deceased), / Boe v. Anderson 1862 24 D. 732; Ommaney v. Bingham 3 Pat. App. 488, Cheshire, (p. 530) McLaren, (P.24) and Dicey (p. 804) declare that the law of the last domicile rules the essential validity of a will, but in this they rely too much on cases about legal rights, and it is the narrower question of the manner in which the property can be disposed of that is here under consideration. The rule here stated is in harmony with the rule in regard to contracts and marriage contracts, namely that the law which governs their construction governs their essential validity. See Lord Curriehill in Boe v. Anderson 1862 24 D. at p.750, Marquis of Bute v. Marchioness of Bute's Trustees 1880 8 R. 191. When a testator domiciled in country A leaves a will which would normally have been construed according to the law of country A, but because it does not contain any technical expressions is being construed by the Courts of country B, which is seised of the problem, without reference to the law of A, the essential validity of the will is still determined by country A. ( Boe v. Anderson, supra  $\sum$  and by the law of the place where the bequest is to take effect. [Marquis of Bute, supra; Bar p. 826]

As/

As in the case of contracts [q.v.] and marriage contracts, the testator can not name a law to govern essential validity with which the testator or the will has absolutely no connection. If the testator purports to do that, his direction is regarded <u>pro non scripto</u>, and the law which would otherwise have governed the essential validity of the will is applied.

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The essential validity of one part of a will may be tested by a different system of law from another part. Thus in Marquis of Bute v. Marchioness of Bute's Trustees / 1880 8 R. 191 7 a Trust Disposition and Settlement in Scotch form was executed in Scotland by a domiciled Scotch lady, in one clause of which she directed that certain jewels plate etc. should be settled as heirlooms on the Marquis of Bute and after him on the heirs entitled to succeed to the Bute estates in the county of Glamorgan, in entail. This was competent by English, but not by Scots, law. There is no doubt that the essential validity of the main part of the settlement had to be tested by Scots law, but it is equally clear that this bequest, because in favour of the heirs of entail of English estates, was intended to take effect under English law, and although the case was decided on another ground, the Court saw no reason why the bequest should not receive effect by the trustees executing an English deed of entail of the jewels and plate. /Lord President Inglis at p. 196 7: i.e. the essential validity of that clause of the deed was to be tested by English law. / This is also authority for the proposition given above that the rule that the lex domicilii governs essential validity is only a presumption.7

Immoveables

The question whether the testator has disposed of his immoveable property in a way which the law will permit is determined by the <u>lex situs</u>. <u>/ Hewit's Trs</u>. v. <u>Lawson</u> 1891 18 R. 793; <u>Brown's Trs. v. Gregson</u> 1920 S.C. (H.L.) 87\_7 —

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In <u>Re</u> Piercy, [1895 1 Ch. 83]7 an English testator gave <u>inter alia</u> Sardinian land to trustees to sell; after conversion the proceeds of sale were to be held on certain trusts which were invalid under Italian law. The English Court however held upon the evidence of Italian law that the trustees had power to sell the testator's land in Sardinia. That was the only matter for which reference need be made to the <u>lex situs</u>. Thereafter, the proceeds being moveable, Italian law had no applicability: English law governed and the trusts received effect. The Italian law still applied to the land in the hands of the purchasers from the trustees, but not to the proceeds.

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(3)

Questions as to whether a will has been executed under error or as a result of undue influence or force should be determined in the first place by the system of law in accordance with which the will was executed and from which, in consequence, the will derives such validity as it possesses; if the will was executed according to the lex domicilii they should be determined by the lex domicilii, and if according to the lex loci actus, by the lex loci actus; if the will was executed in accordance with the law both of the domicile and of the place of execution, the law of the domicile at the time of execution should govern. / Contra Breslauer, "Private International Law of Succession" p. 180 (always the law of the domicile), Wolff p. 593 (lex fori) 7 But the over-riding principle is always present that a foreign deed, although valid by the foreign law, will not be enforced if it is in contravention of an essential principle of justice or morality and a deed impetrated by threats comes within this exception. [Kaufman v. Gerson 1904 1 K.E. 591]7

## Wills .... Fevocation

Revocation may be by (1) an act of revocation by the testator or (2) by operation of a rule of law. In the former category are subsequent wills or codicils which revoke, tearing up the old will, deleting clauses from it, selling the article bequeathed. In the latter category comes the Scots conditio si testator sine liberis decesserit. The English rule that a will is revoked by marriage has been classified as relating to matrimonial law / q.v. 7 and not the law of succession, although German law classifies a similar rule as part of the law of succession. / Wolff p.1467 The English rule would be more appropriately classified as relating to succession and Westerman's Executor v. Schwab / 1905 8 F. 132 7 only classified it under matrimonial law in order to solve the enigma which that case presented.  $(\mathbf{1})$ 

A misleading obiter dictum on this point by Lord Justice Clerk Inglis has gained a certain amount of currency: "The law of the domicile of the deceased, at the time of his death, must determine not only what is the true meaning and construction and effect of any will or deed of settlement he may have left disposing of his moveable estate, but also, as regards his moveable estate, whether he died testate or intestate; and if he died testate, the law of the domicile must further determine what paper or papers constitute the will of the deceased." / Purvis v. Purvis 1861 23 D. at p. 830; Cp. Dicey p. 815. Dicey's statement has more to be said for it since at English common law a will had to be executed according to the law of the last domicile of the deceased. 7 This will not do. Each of the alleged testamentary papers must be taken in order, and the question asked whether it is valid as to formalities capacity and essentials by the several systems of law which governed these matters at the time of making the will, and if so, whether the will has been revoked in whole or in part by a subsequent will or codicil which is valid as to formalities/

formalities capacity and essentials. An averment of cancellation or tearing up of a will, must be dealt with according to the law by which the formal validity of the will was originally established (so that a will executed according to the <u>lex loci</u> <u>actus</u> in a foreign country must be cancelled, in the case of tearing up and the like, according to that law before it ceases to be effective) and not necessarily according to the law of the testator's last domicile. The law of the last domicile will determine the effect of the sale of the article bequeathed. / Bar p. 832 7

## (2)

The law of the domicile of the testator at the time of the birth of the child determines whether there is revocation or not. Thus if a man domiciled in Scotland made a will, had a child in Scotland, and died domiciled in England, the question whether his will was revoked would be decided according to Scots law. Again, if a man domiciled in England made a will and had a child, and then acquired a domicile in Scotland, the question whether his will was revoked would be decided according to the law of England. [ Cp. In re Reid 1866 L.F. 1 P. & D. 74; In re Groos 1904 P. 269, where a similar result was held with regard to the English rule of a will being revoked by marriage, before that rule was classified in Westerman's Executor v. Schwab 1905 8 F. 132, as part of the matrimonial law. 7 As regards the second example, it has been held that sec. 3 of the Wills Act 1861 applies to this situation, and that this section is applicable to the wills of all persons, foreigners included. / In re Groos, supra. Supported by Westlake sec. 86. Doubted by Cheshire p.526/ section 3 provides that no will shall be held to have been revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same; but if the section is applicable to this situation it only affirms what is clearly the law in any event.

#### wills .... Powers of Appointment,

when a power of appointment has been given by, or reserved Formal . alidity in, a will or other deed, for example a marriage contract, by what law is the formal validity of the deed exercising that power to be tested? The will or marriage contract granting the power may indicate what law, or may impose formalities, and if so, they must be observed. In re Kirwan's Trusts 1883 25 Ch. 373; In re Lewal's Settlement Trusts 1918 2 Ch. 391 If there is no indication the exercise of a power is validly executed if executed either -(a) according to the law by which the testator intended his will to be construed, which, in the absence of express instructions, is generally, but not necessarily, the law of the testator's domicile. Thus a holograph will executed in England, by a domiciled English woman, although ineffectual as a will because not executed according to English law, which was both the law of the testator's domicile and the lex loci actus, was held to be an effectual exercise of a power of appointment under a Scotch trust deed. Kennion' v. Buchan's Trustees 1880 7 R. 570 or (B) according to the law of the place of execution of the power if it is inter vivos, or if it is mortis causa, according to any method open to the donee by the Scottish law principles of International Private Law for making a mortis causa deed. Kennion v. Buchan's Trustees, supra, per Lord Justice Clerk Moncreiff at p. 573; Ker v. Lady Essex Ker's Trustees 1829 7 S. 454; Cameron v. Mackie 9 S. 601- 7 W.&S. 106; Baron Norton's Trustees v. Lady Menzies 1851 13 D. 1017; D'Huart v. Harkness 34 Beav. 324; In re Price, Tomlin v. Latter 1900 1 Ch. 442; In re Wilkinson's Settlement 1917 1 Ch. 620; Cheshire p. 527

Construction The question whether the donee of the power has or has not exercised the power in a validly executed will is a question of construction of the donee's will, to be determined by the law which governs the construction of the donee's will. [In re Price. Tomlin v. Latter, supra; Cranstoun v. Cunninghame 1839 1 D. 521] A problem arises however when the donee of the power is domiciled in a country which does not recognise powers of appointment, and leaves a general will. Is that general will and exercise of a general power of appointment conferred by a Scotch will? The question can not be determined by the law which governs the construction of the will which is alleged to exercise the power, and has to be determined by the law which governs the construction of the will which is alleged to exercise the power, and has to be determined by the law which governs the construction of the will which granted the power. <u>In re Simpson</u> 1916 1 Ch. 502; <u>In re Wilkinson's Settlement</u> 1917 1 Ch. 620; <u>In re Lewal's Settlement Trusts</u> 1918 2 Ch. 391; <u>In re D'Estes</u> <u>Settlement Trusts</u> 1903 1 Ch. 898 and <u>In re Scholefield</u> 1905 2 Ch. 408 have not been followed.

ential lidity

The essential validity / The most usual difficulty in the essential validity of the exercise of a power is exemplified by A domiciled in England giving B domiciled in Scotland a power of appointment to be exercised by will; B executes a will which includes the appointed funds, but by Scots law, the law of his own domicile, he is only entitled to dispose of a third of his estate by will because he has a wife and children; his execution of the power however would be valid by English law: is it valid? of the exercise of a special power is determined by the law which governs the essential validity of the will conferring the power, since the exercise of a special power is not the disposition of property belonging to the donee of the power. [ Pouey v. Hordern 1900 1 Ch. 492] The essential validity of the exercise of a general power, on the other hand, is determined by the law which governs the essential validity of the donee's will, because the donee of a general power is entitled to dispose of the property as if it were his own. [In re Pryce, Lawford v. Pryce 1911 2 Ch. 286\_7

# Donations Mortis Causa

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The question whether there has been a good donatio mortis causa depends on the law applicable to gifts inter vivos. /In re Korvine's Trusts 1921 1 Ch. 343; Westlake sec. 1216 / Thus the law with which the transaction has most connection governs, and not the law of the domicile of the deceased. <u>Contra In re Craven's Estate</u> 1937 3 All E.R. 33  $\overline{J}$  If the law with which the transaction has most connection is to the effect that for a good donatio mortis causa there must be effective parting with the dominion in the property, the question whether there has been effective parting with dominion will be governed by the lex situs of the property. ZAdopting a secondary but not the primary conclusion of In re Craven's Estate 1937 3 All E.R. 33 ] Of course the testator must have power to make a donatio mortis causa by the law of his domicile, and if the law of his domicile, for example, has community of goods between the spouses which prevents a spouse from making a donatio mortis causa to a third party, then there can be no valid donatio, even if it is valid by the law with which it has most connection.

Testamentary Destinations in Titles Bonds and Share Certificates

A person when purchasing heritable property, share certificates, or receiving a bond, may take the title or the obligation to repay with a special destination, e.g. to himself or his wife, or, to himself and his wife and the survivor. The effect of such special destinations differs from country to country, and a choice domiciled of law is possible when a person dies/in country A, leaving property situated in country B with such a destination in the title. Does the law of country A or B determine the effect of the destination?

It is clear that with regard to beritage the law of the situr determines the effect of the destination, in accordance with the general principle that only the <u>lex situs</u> can apply to immoveable

In regard to share certificates, documents of debt, an d Moveables the like, which are moveable, the principle should be to distinguish in the first place between testamentary dispositions destinations and contractual ones. In the former category would come cases where A, who had bought a personal bond entirely with his own money, took the obligation to repay in name of himself and B, Such a destination should be construed on the same principles as a will made by A, namely that it should be governed by the law by which A intended it to be governed, the very strong presumption being in favour of the law of Ats domicile, but another law applying if it was clearly the testator's intention that it should apply, as in Henderson's Trustees. Q868 5 S.L.R. 394 And that principle should apply whether the question arose on A's predecease or B's. The right to the bond should be distinguished from the title to the bond. Although the right should be governed by the law of A's domicile, the law of the situs of the bond might ompanies determine who had the legal title to it, leaving the right to be 929 Schedule enforced as a trust h The position can be illustrated by an example; Wilton . In Scotland a destination in a bond to A and B means that A and in d, p.439 B are joint owners, and on the death of one his trustees and the

other take a share each. By the law of England there is a

presumption that the whole bond goes to the survivor. If A predeceases domiciled in Scotland, the debtor in the bond might be entitled to pay all to the survivor, B, but B would hold half in trust for A's trustees.

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Unfortunately, in <u>Connell's Trustees</u>, 0886 13 R. 1175 where special destinations were taken in a number of share and stock certificates by a domiciled Scotsman, it was held on his death that Scots law should apply to the certificates of Scotch companies and English law to those of English companies. The law of the situs was doubted of the shares was applied. This decision however, by Lord Hunter in the subsequent case of <u>Cunninghame's Trustees</u>, 1924 S.C. 581 where he opined that although English law might determine the person entitled to uplift the proceeds of the investments, the right of succession, being to a Scotsman, must be determined by Scots law. See also Colenso's Executor v. Davidson (O.H.) 1930 S.L.T. 359 Government stocks are neither Scottish nor English, but British, and so when a domiciled Scotsman died leaving government stock with a special destination, there was no need to choose between the law of the domicile and the law of the situs, and Scots law was applied. Cunningham's Trustees, supra; Drysdale's Trustee 1922 S.C. 741

When the special destination is in the second category, mamely those of a contractual nature, the rules for choice of law in contracts should apply. Thus two persons domiciled and resident in Scotland placed a sum of money, belonging in part to each, upon Deposit Receipt with an English bank, and the receipt bore that the sum was repayable to the two persons or the survivor. It was held that all questions as to the right of the depositors <u>inter</u> <u>so</u> fell to be determined by Scots law, "seeing that the depositors are both Scotch, that they are dealing with moveable estate situated in Scotland, and that they cannot be assumed to have transacted with each other on any other footing than that their respective rights should be determined by the only law with which they are supposed to be acquainted, that is the law of their own country". <u>Dinwoodie's Executrix v. Carruther's Executor</u> 1895 23 R, 234 per Lord Trayner at p. 239 The law of England would have been applied in a question batween the bank and the depositors, because both the <u>locus contractus</u> and the <u>locus solutionis</u> were in England.

# CONTRACTS

#### FORMAL VALIDITY

A contract is validly executed if executed either according to the <u>lex loci contractus</u>, *[*Ersk. Inst. 3,2,40; Kames, Equity, p.549; Dickson on Evidence §§ 996,997; <u>Cunninghame v. Lady Semple 1706 Mor. 4462; Fortune v.</u> <u>Shewan 1610 Mor. 4429; Galbraith v. Cunninghame 1626</u> *[650 i Brown's Supp. 467* Mor. 4430; <u>Harper v. Jaffrey 1630 Mor. 4431; Surrariers Garpines</u> <u>Salton v. Salton 1673 Mor. 4431; Davidsons v. Town of</u> <u>Edinburgh 1682 Mor. 4444; Pine v. Creditors of Lord Semple</u>

1721 Mor. 4451; <u>Govan v. Boyd</u> 1790 Mor. 4476; <u>Creditors of the York Building Coy</u> 1783 Mor. 4472; <u>Henderson v. Wilson & Melvilles</u> 1797 Mor. 4478; <u>Falconer v. Heirs of Beattie</u> 1627 Mor. 4501; <u>Erskine v.</u> <u>Ramsay</u> 1664 Mor. 4502; <u>Scot v. Toish</u> 1676 Mor. 4502; <u>Great Northern Railway Co. v. Laing</u> 1848 10D. 1408; <u>Earl of Hopetoun v. Scots Mines Co</u>. 1856 18D. 739; <u>Stuart v. Potter Choate & Prentice</u> 1911 1S.L.T.377; Dicey p.641; Cheshire p.243

or the proper law of the contract, which, when different from the lex loci contractus, usually means the lex loci solutionis,  $\angle$  Valery v. Scott 1876 3R. 965; Cheshire p. 248; Dicey p.645

and otherwise is not validly executed. The <u>lex loci</u> <u>contractus</u> and the proper law of the contract are alternatives, and if the requirements of either are satisfied, the deed is well executed, even although the requirements of the other are not satisfied. Thus in one case a deedwas held to be validly executed which satisfied the <u>lex loci contractus</u>, but not the proper law; <u>Pine v. Creditors of Lord Semple 1721 Mor. 4451</u> and in another a deedwas held to be validly executed which satisfied the proper law, though not the <u>lex loci</u> <u>contractus</u>. <u>Valery v. Scott</u>, supra\_7 If neither the formalities of the <u>lex loci contractus</u> nor those of the <u>lex loci solutionis</u> have been observed then the deed is invalid, <u>Shedlock & Ors v. Hannay</u> 1891 18K.663\_7 and it is irrelevant that the formalities of Scots law have been observed if Scots law is neither the <u>lex loci contractus</u> nor the <u>lex loci solutionis</u>. <u>/ Tayler v. Scott</u> 1847 9D. 1504; Dickson § 998; In <u>Shedlock & Ors v. Hannay</u> 1891 18R.663 Lord Kinnear seemed to think that the question was still open, (at p.669) 7

Similar principles apply to contracts concerning immoveables. A contract regarding immoveables is validly executed either according to the <u>lex loci</u> contractus, Cunninghame v. Lady Semple 1706 Mor. 4462; Govan v. Boyd 1790 Mor. 4476; Ersk. Inst. iii, 2, 40; Kames, Equity p.549; Dickson § 1000 7 or the <u>lex situs</u> (which, with land, is the <u>lex loci</u> solutionis). Thus a contract to convey lands in Scotland made in another country according to the laws of that country will found an action of implement in Scotland. [Authorities cited in last note\_] But a conveyance of Scottish heritage made in a foreign country in the foreign form is not valid, even as an obligation to compel the granter to make a more formal conveyance. [ Dalkeith v. Book, 1729 Mor. 4464; Ersk. ibid 7

There is a distinction between the formalities required to constitute a contract and the proof of the existence and tenor of a contract. It is only the former question that is subject to the principles just stated. The latter is always governed by the lex fori  $\int$  See Remedy p.  $\int$ 

The principles just stated apply to the formalities of Marriage-Contracts,  $\angle q \cdot v \cdot \neg 7$  but not to Marriages, Bills of Exchange, or Wills  $\angle q \cdot v \cdot \neg 7$  Stamping of deeds

No country is bound to recognise the revenue laws of another. Consequently there can be no

objection to a deed on the ground that it has not been properly stamped according to a foreign law, even though that be the lex loci contractus, and the deed be utterly void by that law because of the lack of the stamp. <u>Stewart v. Gelot</u> 1871 9M. 1057 J However it is difficult to appreciate why the Court of Session did not take this easy solution in <u>Valery</u> v. <u>Scott</u>. [1876 3R. 965] In that case a Scotsman contracted in France by a letter written in the French language to pay a certain commission and it was objected that the letter was void because not duly stamped according to French The question could have been dealt with very Law. simply by holding that the French revenue law could not have any effect in any event. But the Court proceeded on the ratio that the contract was a Scotch one because Scotland was the locus solutionis, and that even if stamping was a necessary solemnity by the lex loci contractus, it was not so by the lex loci solutionis, and the fulfilment of the requirements of the latter in the solemnities of deeds was sufficient. It is a little surprising that the very simple ratio of Stewart v. Gelot was not adopted to settle the question at the outset. However the case is not inconsistent with Stewart v. Gelot.

yler v. Scott 1847 9D. put bord Mackenzie 1502] although b Dominions are noy-General for Canada whe 190195. L.T. 4; al Council of Sydney 1.1909 1K.B. 7]

In this matter another British country, is not counted as a foreign country, and consequently failure to comply with the stamp laws in force in another part *United Kingdom* of the British Commonwealth, where the deedwis executed, will, if the lack of a stamp renders the deed utterly null, (as distinct from merely inadmissible as evidence, a question which the <u>lex fori</u> rules) invalidate it, even/

even though according to Scots law the deed would have been quite valid unstamped.  $\angle Tayler v \cdot Scott$ 1847 9D.  $\frac{1564}{1054}$ ; Dickson § 977 7

The English cases have resulted in a different set of rules. <a>Alves v. Hodgson (1797) 7 T.R. 241;</a> Clegg v. Levy (1812) 3 Camp. 166; James v. Catherwood (1823) 3D. & R. 190; Bristow v. Sequeville 1850 5 Ex. 275; Republic of Guatemala v. Nunez 1927 1 K.B. 669 per Scrutton L.J. at pp. 690-691; Dicey pp. 704, 858; Westlake \$ 209 :if the foreign stamp law is to the effect that an unstamped deed is utterly null, and the foreign country is the locus contractus, then the unstamped deed is null everywhere, but if the foreign stamp law merely renders an unstamped deed inadmissible in evidence, since the lex fori governs evidence, a deed not stamped according to the foreign lex loci contractus would nevertheless be receivable in evidence in England.

## Capacity to Contract

Capacity to enter into a contract is dealt with in the general consideration of capacity.  $\sqrt{q.v.7}$ 

# THE INTERPRETATION OF CONTRACTS

5.

"Interpretation" includes the meaning and legal effect of the contract and the extent of the liabilities which the parties have undertaken. For example, B in Gibraltar sells anchovies to D in Malta, f.o.b. Gibraltar. Upon the anchovies arriving in Malta D complains of their quality and claims an allowance for shortage but does not reject them, and delivers to sub-purchasers from him. Upon their refusing to accept, D claims to rescind his contract with B and regain the price plus freight and damages. The question whether D is entitled to reject or whether he has lost the right because his acts and conduct are inconsistent with the ownership of the sellers, is a typical instance of the interpretation of a contract. [Benaim & Co. v. Debono 1924 A.C. 514 7 The extent of damages, the question whether any interest is due on a debt and if so the rate of interest, / Cochrane v. Gilkinson 1857 20D. 213. 7 and the question whether a See Remedy p. tenant under a lease has a power to sublet without that power being expressly conferred / Mackintosh v. May 1895 22R. 345\_7 are other instances.

When the question is simply the construction of ordinary words in a contract to determine their meaning, the Court seised of the case, if it speaks the language, may decide without reference to foreign law. <u>Robertson v. Brandes Schonwald & Co.</u> 1906 **SF.** 815, per Lord McLaren at p.821\_7 This principle frequently arises in the interpretation of wills, but it is of little value or importance in regard to contracts. Indeed the principle must be applied/

applied with caution. A clause in an English charter-party which ran "Penalty for non-performance of this agreement estimated amount of freight," would not have the effect under English law of quantifying the damages exactly, but would leave them to be assessed according to the actual loss suffered, but a foreign court which construed the words for themselves in their natural sense would, wrongly, fix the damages at the exact amount of the freight. <u>See Godard v. Gray</u> (1870) L.R. 6 Q.B. 139

The interpretation of a contract is governed by the law by which the parties mutually  $\$  the intention must be the intention of both parties, not of one alone -<u>Rex v. International Trustee</u> 1937 A.C. 500 per Lord Russell of Killowen at p.557; <u>Hamlyn v. Talisker</u> <u>Distillery</u> 1894 21 R. (H.L.) 21, per Lord Watson at p.25 intended, or are presumed to have intended the contract to be governed. <u>Hamlyn v. Talisker Distillery, supra;</u> <u>Spurrier v. La Cloche</u> 1902 A.C. 446, at p.450; <u>Rex v. International Trustee</u> 1937 A.C. 500 per Lord Atkin at p. 529; <u>Lloyd v. Guibert</u> 1865 1 Q.B. 115, at p. 123; Dicey Rules 155 and 161

The law by which the parties intended or are presumed to have intended the contract to be governed is often referred to, for convenience of expression, as "the proper law" of the contract. Another method of expression which has been used by the judges, particularly the Scottish judges, is to say that a contract is a Scottish contract or an English contract, meaning thereby that the proper law of the contract, or the law by which the parties intended or are presumed to have intended the contract to be governed, was Scottish or English.  $\angle$  E.g. Mackintosh v. May 1895 22R. 345

If the parties to a contract expressly stipulate that a certain law shall govern, that law will be applied. <u>Earl of Stair v. Head</u> 1844 6D.904; Corbet v. Waddell 1879 7R.200 per Lord Shand at p.208; Girvin Roper & Co. v. Monteith 1895 23R.129; Municipal Council of Johannesburg v. D. Stewart & Coy. 1909 S.C. (H.L.) 53; Montgomery v. Zarifi 1918 S.C. (H.L.) 128; Bayley v. Johnstone (0.H.) 1928 S.N.153; Drummond v. Bell-Irving 1930 S.C. 704; Feist 1934 A.C. 161 (H.L.); Rex v. International Trustee 1937 A.C. 500 per Lord Atkin at p.529; Vita Food Products v. Unus Shipping Co. 1939 A.C. 277 at pp. 289, 290 (P.C.); Mount Albert Borough Council v. Australasian etc. Assurance Society 1938 A.C. 224 at p. 240 (P.C.); British South Africa Co. v. De Beers Consolidated Mines Ltd. 1910 1 Ch. 354 per Swinfen Eady J. at p. 381; Salt Mines Syndicate Ltd. 1895 2 S.L.T. 489

Reference in a contract to a foreign law e.g. French law, may either mean that the parties intend French law to govern the contract or that the parties wish to incorporate a part of French law, e.g. a French statute, into the contract, that is nevertheless to be governed by another law. Thus a bill of lading may contain a declaration that it is to be governed by the law of New York; in which case that law will be the proper law of the contract. Or the bill of lading may incorporate the Harter Act of the United States by reference, but the whole bill of lading be governed by Scots law as the law with which the contract has most connection, whereupon Scots law is the proper law. <u>Standard Oil Co. v. Clan Line Steamers Ltd</u> 1924 Dobell v. Steamship Rossmore Co. S.C. (H.L.) 1; 1895 2 Q.B. 408; Ex parte Dever 1887 18 Q.B.D. 660; Vita Food Products v. Unus Shipping Co. 1939 A.C. 277 Ocean Steamship Company Ltd. v. Queensland State Wheat Board 1941 1K.B. 402 at p.286\_7 In an English case in which the Harter Act was/

was incorporated by reference into an English bill of lading Lord Esher, M.R., said: "They then introduce into their bill of lading the words of the Harter Acts which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading." [Dobell v. Steamship Rossmore Co., supra, at p. 413\_7 In a recent case bills of lading provided that general average was to be settled according to, York-Antwerp Rules, 1924, that in the case of shipments from the United States the Harter Act of 1893 was to apply, and that save as so provided, the bill of lading was subject to the terms and provisions of and exemptions from liability contained in the Canadian Water Carriage of Goods Act 1910; and that the contract should be governed by English law. [Vita Food Products v. Unus Shipping Co. 1939 A.C.277] These directions could only be given effect to by considering the Acts referred to simply as words occurring in the contract, the whole of which was to be governed by English law.

When the parties have not expressly stipulated for a certain law, the contract is governed by the law which it is presumed they intended should govern, or, in other words, the law to which it is presumed that the parties intended to submit themselves.  $\underline{/\text{Rex v. International Trustee}}$  1937 A.C. 500 per Lord Atkin at p. 529\_7

This law is gathered from the terms of the contract and the surrounding circumstances. It is the law with which the contract has the most connection.  $\angle$  Westlake § 212\_7 There are certain presumptions, which will be examined shortly, for determining this law, but our Courts have refused to treat as conclusive, rigid or arbitrary, criteria such/

such as <u>lex loci contractus</u> or <u>lex loci solutionis</u>, and have treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract,

9.

the situation of the parties, and generally on all surrounding facts". <u>Mount Albert Borough Council</u>, supra, at p.240\_7

Some of the factors which may be taken into consideration in determining the proper law are the place of making the contract / see below 7; the place of performance; [ see below\_7 a reference to arbitration in a certain country; [ see below ] where the contract is one of affreightment, the law of the flag of the ship; / See below\_7 the language in which the deed is expressed; / Spurrier v. La Cloche 1902 A.C. 442 (P.C.); Chatenay v. Brazilian Submarine Telegraph Coy. Ltd. 1890 1 Q.B. 79; "The Industrie" 1894 P.58; "The Adriatic" 1931 P.241. If the contract is a commercial one, and the language in which it is expressed is that of a great commercial nation, like England, it is an added consideration for the application of that law which the parties could reasonably be expected to have had in contemplation its well known provisions - "The Adriatic", supra; Vita Food Products v. Unus Shipping Co. 1939 A.C. 277 at p. 291 (P.C.). English Courts seem to consider that the contract being in the English language indicates English law, even though the other countries with which the contract has a connection speak the English language.

"The remarkable fact that is noticed after reading many of the cases is the great regularity with which the English Courts find, by various methods, that

it/

That the contract is expressed in the technical legal language of a particular law; <u>Mackintosh v. May</u> 1895 22R. 345; "<u>The Industrie</u>" 1894 P. 58\_7

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That provisions would be valid under one law but not under another ( the interpretation should be "<u>ut res</u> <u>magis valeat quam pereat</u>". <u>P. & O. Steam Navigation</u> <u>Co. v. Shand</u> (1865) III Moo. P.C. (N.S.)272; <u>In re Missouri Steamship Co</u>. 42 Ch. D.321; <u>Hamlyn v. Talisker Distillery</u> 1894 21 R. (H.L.)21; <u>South African Breweries Ltd. v. King</u> 1899 2 Ch. 173; Affd. 1900 1 Ch. 273\_7

The domicile of the parties;

The place of residence of the parties; <u>South African</u> <u>Breweries Ltd. v. King</u> 1899 2 Ch. 173, 1900 1 Ch. 273; <u>Evans v. Earl of Buchan</u> 8D. 296; <u>7</u>

The nationality of the parties; <u>Chartered Mercantile</u> Bank of India v. Netherlands India Steam Navigation Co. 1883 10 Q.B.D. 521\_7

The country in which a corporation is incorporated; <u>Parken v. Royal Exchange Assurance Coy</u>. 1846 8 D.365; 7 particularly if the question is the rights and duties of shareholders <u>inter se</u>; See below 7 the place of business of the parties; <u>Parken v. Royal Exchange</u>, supra 7

The situs of the goods about which the contract is concerned; <u>Todd v. Armour</u> 1882 9R. 901; <u>McNaughton v. Baird</u> 1852 24J. 623; <u>Connal & Co. v.</u> <u>Loder</u> 1868 6M. 1095\_7 particularly if they are immoveables; <u>Mackintosh v. May</u> 1895 22R. 345; <u>British South Africa Co. v. De Beers Consolidated</u> <u>Mines</u> 1910 2 Ch. 502\_7 and/ and the fact that one of the parties is a sovereign [Rex v. International Trustee 1937 A.C. 500] state.

But it is not legitimate to look for the intention of the parties in factors of a different nature to this, e.g. in the prior communings of the parties before entering into the contract.  $\sum Mackintosh v. May$ , supra\_7 Nor would it be competent to prove that one of the parties said to a third person that he thought the contract would be governed by a certain law, <u>Contra</u> Lord Robertson in Pender v. Commercial Bank of Scotland (O.H.) 1940 S.L.T. 306\_7 although it is legitimate to speculate that since a person is resident in a certain country at the time of the contract he would obtain legal advice there as to the meaning of the contract according to its law. / Henderson's Trs. v. Henderson 1868 5 S.L.R. 394, 396 J Some of the presumptions which guide in determining the proper law are :-

(1) Presumption in favour contractus

If the place of making the contract and the place lex loci of performance are in one country, there is a presumption that the law of that country rules; / Parken v. Royal Exchange Assurance Co. 1846 8D. 365, per Lord Moncreiff Jacobs v. Credit Lyonnais 1844 12 Q.B.D.589, at p.374; per Bowen L.J. at p.600; Lloyd v. Guibert L.R. 1 Q.B. 115 at p. 122; Dicey p.671; Cheshire p.261; Steuart's Answers p. 227;

> which that admits however of an exception where it appears that the parties at the time of making the contract have a view to a different country. <u>CRobinson v. Bland</u> per Lord Mansfield, (the Black Rep. 256; Edmonstone v. Edmonstone etc. June 1st 1816 F.C. per Lord Robertson at p. 147 7

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation/

obligation and the interpretation of it. The parties to the contract are either the subjects of the Power there ruling or as temporary residents owe it a temporary allegiance; in either case equally they must be understood to submit to the law there prevailing, and to agree to its actions on their contract." /P. & O. Steam Navigation Co. v. Shand (1865), 3 Moo. P.C. (N.S.) 272 at p. 290-17

(2) <u>Presumption</u> <u>in favour</u> <u>of lex loci</u> <u>solutionis</u>

But if the whole of the contract is to be performed in a country different from the locus contractus, it is presumed that the lex loci solutionis and not the lex loci contractus will govern. / Parken v. Royal Exchange Assurance Co., supra, ibid; Chatenay v. Brazilian Submarine Telegraph Co. (1890) 1 Q.B. 79 per Lord Esher, M.R., at p. 83; Benaim v. Debono 1924 A.C. 514; Livesey v. Purdom & Sons 1894 21 R. 911; Dicey p. 672; Cheshire p. 263/ The reason for the preference for the lex loci solutionis is simply that the parties are more likely to have had that law in mind, not the civil law rule contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit, for it is only necessary to appeal to this rule if one starts from the premisg that the lex loci contractus governs. We start however from the principle that the proper law of the contract governs. Many of the early cases do lay down the rule that the lex loci contractus governs and therefore it was probably felt desirable in the interests of consistency to appeal to the Roman rule when it was obviously correct to apply the lex loci solutionis. It is more satisfactory however if, in the early cases that affirm the authority of the lex loci contractus, the lex loci contractus is translated as the proper law of the contract.

It is not sufficient that a small part or the final part of the contract should be performable in another country. Thus in <u>P. & O. Steam Navigation Co.</u>  $\underline{v}$ . Shand, supra when a passenger by an English vessel belonging to an English company from Southampton to Mauritius took and signed a ticket in England for the carriage of himself and his baggage, it was held that the <u>lex loci contractus</u> must govern, although the contract had ultimately to be performed by the delivery of the baggage in Mauritius, which was subject to French law.

Suppose a contract made in country A is to be performed partly in country A, and partly in B and C; according to what law will it be interpreted, or will it be interpreted according to the law of A as to acts performed in A and according to the laws of B and C as to acts performed in B and C? There are two cases:

Firstly, the performance in A and the performance in B are separable parts of the contract. In this case it is undoubted that the law of A may govern as to the acts to be performed in A and the law of B as to acts to be performed in B. In other words there may be more than one proper law of the contract - a law applicable to one part and a different law applicable to another part. <u>[Hamlyn v. Talisker Distillery</u> 1894 21 R. (H.L.) 21; <u>Chamberlain v. Napier</u> (1880) 15 Ch. 614\_7 Thus in <u>Hamlyn v. Talisker Distillery</u> 2 supra\_7 a contract

between an English and a Scots firm to be implemented in Scotland was signed in London and contained this clause :-"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." It was held that the arbitration clause fell to be construed and/

governed by the law of England although it was thought that the main part of the contract should be governed by Scots law. / Per Lord Chancellor and perhaps Lord Lord Watson was non-committal. Shand. Lord Ashbourne thought that the contract would have been governed by Scots law if it had not been for the arbitration clause, but that its inclusion showed that the intention was that the whole contract should be governed by English law. And see Lord Chief Justice Hewart in Jones v. Oceanic Steam Navigation Co. 1924 2 K.B. at p. 733: "it is not probable that the parties would intend that some parts of the contract should be governed by the law of one country and other parts by the law of another country". Cp. Cozens Hardy M.R. in British South Africa Co. v. De Beers Consolidated Mines 1910 2 Ch. at p.512\_7

Secondly, the obligations to be performed in A and B are not separable parts of the contract, but are the same obligations that are to be performed in both A and B or alternatively in A or B.  $\angle$  As in Rex v. International Trustee 1937 A.C. 500\_7 In this event there can only be one proper law to determine the obligations of the parties, although when the law of the place of performance of any part of the contract is different from the proper law, the law of the place of performance may rule as to the mode of performance of that part of the contract. / Jacobs v. Credit Lyonnais 1884 12 Q.B.D. 589 at p.604; Adelaide etc. v. Prudential 1934 A.C. 122; Mount Albert Borough Council v. Australasian etc. Assurance Society 1938 A.C. 224 at p. 241 (P.C.); Vita Food Products v. Unus Shipping Co. 1939 A.C. 277 at p. 291 (P.C.).

The function of the law of the place of performance in such an event has been stated too widely in some dicta, <u>Chatenay</u> v. <u>Brazilian Submarine Telegraph Co</u>. (1891) 1 Q.B. 79 per Lord Esher, M.R., at pp. 82, 83; <u>Rex</u> v. <u>International Trustee</u> 1937 A.C. 500 per Lord Roche at p. 574; <u>Adelaide etc</u>. v. <u>Prudential</u>, supra, per Lord Wright at p. 151 and Lord Tomlin at p. 145; Cheshire p. 258

for although, when the proper law of a contract is the law of a certain country and performance is to take place in another country, the law of the place of performance may govern a question of the mode of performance, such as the currency in which a debt can be discharged, / Adelaide v. Prudential, supra 7or the mode of delivery of goods, / Lloyd v. Guibert 1865 1 Q.B. 115, at p. 126; Robertson v. Jackson 1845 2 C.B. 412; "The Turid" 1922 1 A.C. 397 7 including the right of retention of goods, / MeNaughton v. Baird 1852 24 J. 623 7 the extent of the obligations of the parties can not depend on or be altered by the law of the place of performance, but is determined by the proper law. / Mount Albert Borough Council v. Australasian etc. Assurance Society 1938 A.C. 224 at p. 241 (P.C.); Vita Food Products v. Unus Shipping Co. 1939 A.C. 277, at p. 291 (P.C.); F.A. Mann in 1937 18 B.Y.I.L. at p. 108.\_7

It has been suggested by Dicey that when a contract is to be performed as regards the obligations of one of the parties in country A and as regards the obligations of the other in B, as when one person agrees to deliver goods to A and the other to pay for them in B, that these obligations can be regarded as two contracts each with its own proper law, which is the <u>lex loci</u> <u>solutionis</u> of that part **p**'s obligations  $\sum p. 675$ ; Cp. Savigny p. 1957 There is no authority however for/ (3) Presumption in favour of the law of the forum to which parties have submitted themselves

If the parties have agreed that their disputes should be settled by arbitration in or by the Courts of a certain country, the presumption is that the law of that country is to govern. <u>Hamlyn v. Talisker</u> <u>Distillery</u> 1894 21 R. (H.I.) 21; <u>Robertson v. Brandes</u>, <u>Schonwald & Co.</u> 1906 8 F. 815; <u>N.V. Kwik Hoo Tong</u> <u>Handel Maatschappij v. James Finlay & Co.</u> 1927 A.C.604; <u>Ralli Bros. v. Compania Naviera Sota Y Aznar</u> 1920 2 K.E. 287; "<u>The Njegos</u>" 1936 P.90; <u>Royal Exchange Assurance</u> <u>Corporation v. Sjoforsakrings Aktiebolaget Vega</u> 1902 2 K.B. 384. 7

(4) Where immoveables concerned, presumption for lex situs

Where the contract concerns immoveables the presumption is for the <u>lex situs</u> instead of the <u>lex</u> <u>loci contractus</u>. <u>Mackintosh v. May</u> 1895 22 R. 345; <u>Edmonstone v. Edmonstone etc</u>. June 1st 1816 F.C. per Lord Robertson at pp. 148, 9; <u>Bourne v. Gairdner</u> as in the case of all the other presumptions, 1823 2 S. 212\_7 The presumption, may be rebutted <u>CBritish South Africa Co. v. De Beers Consolidated</u> <u>Mines</u> 1910 2 Ch. 502; <u>In re Smith, Lawrence v. Kitson</u> 1916, 2 Ch. 206; <u>Exparte Holthausen</u>, <u>In re Scheibler</u> L.R. 1874 9 Ch. App. 722\_7

(5) In contracts of affreightment presumption for the law of the flag In the interpretation of contracts of affreightment, whether made by charter-party, <u>Lloyd</u> v. <u>Guibert</u> 1865 L.R. 1 Q.B. 115; <u>Société du Gaz de Paris v. Armateurs</u> <u>Français</u> 1926 S.C. (H.L.) 13\_7 or bills of lading, <u>Chartered Mercantile Bank of India v. Netherlands</u> <u>India Steam Navigation Co.</u> 1883 10 Q.B.D. 521 at p. 529; <u>P. & O. Steam Navigation Co. v. Shand</u> (1865) III Moo. P.C. (N.S.) 272; <u>In re Missouri Steamship</u> <u>Coy.</u> (1888) 42 Ch. D. 321; "<u>The August</u>" 1891 P. 328\_7 the/

the presumption is that the law of the flag of the ship governs, and not the lex loci contractus. When the flag is that of a state which includes several countries having separate systems of law, as in the case of the United States and British flags, the law is the law of the country where the ship is registered. [Dicey p. 686\_7 The flag will be the one which the ship in fact flies, even although the ship is truly of a different nationality, for a person contracting with the shipowners can see the flag which is actually being flown but can not be expected to divine its true nationality, and the remarks of Brett, L.J. in Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. / 1883 10 Q.B.D. at p. 534 7 that it is the true nationality of the ship that must be looked at only apply to questions of delict. [Contra Westlake \$ 219 7

This presumption is not only in accordance with the probable intention of the parties, but is also the most consistent and intelligible, and therefore most convenient to those engaged in commerce. / Lloyd v. Guibert, supra, at p. 129 7 "There are many ports which have few or no seagoing vessels of their own, and no fixed maritime jurisprudence, and which yet supply valuable cargoes to the ships of other countries. Take Alexandria for instance, with her mixed population and maritime commerce almost in the hands of strangers. Is every vessel which leaves Alexandria with grain under a charterparty or bill of lading made there, and every passenger vessel leaving Alexandria or Suez, be she English, Austrian or French, subject to Egyptian law? .... Again, it may be asked, does a ship which visits many ports in one voyage, whilst she undoubtedly retains the criminal law of her own country, put on a new/

new sort of civil liability, at each new country she visits, in respect of cargo there taken aboard?" To hold this would be most inconvenient. [Ibid, at p. 128\_7

There was some suggestion in <u>The Owners of the</u> "<u>Immanuel</u>" v. <u>Denholm</u> [1887 15 R. 152]7 that Scots law should be applied to the contract of affreightment there as the <u>lex loci solutionis</u> (Scotland being the country of discharge of the cargo), although the law of the flag was Danish and the <u>lex loci contractus</u> was Russian. The judgments are far from clear, but the case was decided on another ground that did not <u>International Private Law</u> involve I.P.T., and it seems that the question of *International Private Law* **F.P.T.** which did arise was truly a question of evidence, and therefore governed by Scots law <u>qua</u> the <u>lex fori</u> and not <u>qua</u> the proper law of the contract.

It has been argued that contracts like contracts of affreightment should be governed by the maritime law of the forum only, in consequence of the view that our maritime law is our version of a general maritime law recognised by all nations, but this argument has not been accepted. / Lloyd v. Guibert, supra. This seems to have been the ratio of "The Hamburg" 1864 Br. and L.253, which has not been followed. Cp. the argument in Aberdeen Banking Co. v. Maberley Cane & Co. 1835 13 S. 827 that the general law merchant should apply to bills of exchange. 7 There seems to be no reason why it should have been rejected in the case of contracts of affreightment and yet should be applied in the case of delicts to property at sea.  $\int q \cdot v \cdot 7$ -The principle of a general maritime law should apply either in both cases or in neither. Admiralty causes included actions on charter-parties and bottomries,

as/

The presumption can be rebutted. /Chartered Mercantile Bank, supra, ibid; "The Industrie" 1894 P.58; "The Adriatic" 1931 P. 241; "The Njegos" 1936 P. 90; Peacock v. Olsen 1944 Sh. Ct. Rep. 173\_7 Indeed the English Courts have recently found it very easy to hold. that the presumption was rebutted when this brought in . English law as the governing law. When the charterparty is made in English in the normal English form between two mercantile houses in London, even although one house is only acting as agent for a foreign principal, English law is presumably intended by the parties and will govern the charterparty to the exclusion of the law of the flag. / "The Industrie", supra; "The Njegos", supra. 7 It is obvious that since the test is what law the parties intended and since the presumption for the law of the flag is simply to determine what law the parties intended, if freight engagement notes or bills of lading are entered into without any particular nationality of ship being specified, the presumption for the law of the flag becomes very weak indeed, if not quite inapplicable. /"The Adriatic", supra.7 There is no presumption that the law of the flag governs a policy of marine insurance effected by an English cargo-owner with English underwriters for a voyage on a foreign ship; English law governs. <u>Greer</u> v. <u>Poole</u> 1880 V Q.B.D. 272\_7

)The presumption in the con-:tract between mem-:bers of a corporation

The contract between the members of a corporation, such as that constituted by Articles of Association, is governed by the law of the country where the corporation is incorporated. <u>Spiller</u> v. <u>Turner</u> 1897 1 Ch. 911; Adelaide/

seems reasonably certain that there is.

# Adelaide v. Prudential 1934 A.C. 122; Westlake § 223a\_7

(7) Presumption in the case of certain contracts for professional services

In the questions whether a barrister is entitled to sue for remuneration for his services, and if so the rate of remuneration, the presumption is that the law and custom of the bar to which he belongs will apply and not the law of the place where the contract engaging him is made or the law of the place where his services are rendered. "When an advocate or other skilled practitioner is, by law and the custom of his profession, entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered." The Queen v. Doutre 1884 9 A.C. 745 at p. 752 (P.C.) 7 The same presumption applies in the case of solicitors / Livesey v. Purdom 1894 21 R. 911; In re Maugham (1885) 2 T.L.R. 115 7 and other skilled practioners in a like position / The Queen v. Doutre, supra; Westlake & 218 7

Other supposed presumptions

A dictum to the effect that when the government of a state contracts a loan in another country the contract is governed by the law of the state contracting the lean, <u>Smith</u> v. <u>Weguelin</u> (1869) L.R. 8 Eq. 198 per Lord Romilly, M.R. Cp. Serbian Loans Remanent Court of International Justice Case, Publications of the, P.C. 1J. Series A No. 20\_7 has recently been disapproved. / Rex v. International Trustee 1937 A.C. 500\_7: this is no more than a factor to be taken into consideration. It has been said that the rule that if possible a contract should be construed ut valeat magis quam pereat was a presumption, / Cheshire p. 268 7 but this cannot be so. There cannot be two presumptions, to different effects, operating/

operating at one and the same time. This is no more than a factor to be taken into consideration though a very weighty one. It may reinforce the other presumptions, or rebut them, but it can not itself be a presumption.

When room is left for Court's discretion When, according to the proper law of the contract, the Court has a discretion to decide one way or another, or to decide to order less or more, a difficult question faces the Court of another country which happens to be seised of the case and which is attempting to elucidate the rights of the parties by considering the proper law as question of fact. In one case Lord Kinloch, seised in the Court of Session of a question of the interpretation of an English bond which, according to English law, would have been subject to the discretion of the English Courts,

conceived that he was not restricted only to those cases which have received the sanction of the English Courts, that therefore he did not require the opinion of English counsel on the special circumstances of the case, and that he possessed this discretion, free and unhampered by the rules which any other tribunal might have laid down for its own guidance  $\sum Scott v \cdot Sinclair 1865$ 3 M. 918; the question however was reserved in the Inner House. 7

## THE MATERIAL OR ESSENTIAL VALIDITY OF A CONTRACT

The material or essential validity of a contract is governed by the same law as governs its interpretation, and, indeed, cases which really deal with essential validity have been quoted in enunciating the principles applicable to interpretation.

Three matters are comprised in "essential validity" :-

Firstly the question whether a provision in a contract is void or voidable. The provision may be void or voidable under one system of law, but not under another. For example, in a contract for the carriage of a passenger and his luggage by sea there is a clause that the shipping company are not liable for the loss of baggage. By English law this is a good stipulation, but by French law it is invalid and void and the shipping company always remain liable.  $\sum P. \& O.$  Steam Navigation <u>Co. v. Shand</u> (1865) III Moo. P.C. (N.S.) 272; <u>Jones v.</u> <u>Oceanic Steam Navigation Co.</u> 1924 2 K.B. 730 7 The question whether this provision is valid or not is a typical issue of the essential validity of a contract.

Secondly, the question whether a contract must be read subject to a certain compulsory rule of law. This question arises when one system of law provides that contracts of a certain nature have to be subject to a certain rule, whether or not the rule is embodied in the contract, and even if a contrary rule is expressed, while another system of law has no such provision. E.g. а system of law might provide that all bills of lading should contain an express statement that they are subject to the Hague Rules and should be deemed to have effect subject thereto notwithstanding the omission of such express statement. ["The Torni" 1932 P. 78; Vita Food Products v. Unus Shipping Co. 1939 A.C. 277 7 Again/

Again, a statute might provide for the compulsory reduction of interest on mortgages  $\angle$  Mount Albert v. <u>Australasian etc. Assurance Society</u> 1938 A.C. 224  $\angle$ or that any obligation containing a gold value clause should, notwithatanding such clause, be discharged upon payment, dollar for dollar, in any coin or currency which at the time of the payment is legal tender.  $\angle$  <u>Rex v. International Trustee</u> 1937 A.C. 500  $\angle$ 

Thirdly, whether a certain ingredient, other than a formality, must be present to make the contract binding - e.g. consideration. <u>[In re</u> Bonacina 1912 2 Ch. 394; <u>Stuart v. Potter Choate & Prentice</u> 1911 1 S.L.T. 377; Dicey p. 651\_7 "Essential validity" is not intended here to include the issue of illegality, which is subject to special rules, and is dealt with separately below.

Such compulsory rules, either invalidating a provision or compulsorily imposing a positive term on a contract, affect the contract if they are the rules of the proper law of the contract, and otherwise do not affect the contract. <u>Mount Albert</u>, supra\_7

Now, while parties are obviously free to choose any law they like to determine the meaning and legal effect of the contract and the extent of the liabilities which they undertake, for in so doing they are only shortening the wording of the contract by incorporating provisions by reference to a code, <u>Girvan Ropes & Co.</u> v. <u>Monteith</u> 1895 23R. 129, per Lord McLaren at p. 134; Martin Wolff in 1937 J.R. 110 7 some writers argue that the intention of the parties can not affect questions as to whether provisions are void, can not in other words determine the essential validity of the contract, for if that were permitted parties might evade troublesome provisions/ provisions of the law by stating that they intended some other law to govern, with which perhaps the contract had very little real connection. If the parties do declare that essential validity shall be governed by a system with which the contract has little connection, these writers argue that notwith-:standing such declaration, the law with which the contract has most real connection will govern this point.  $\angle$  martin Wolff in 1937 J.R. 121; Cheshire p. 256; Cheshire and J.H.C. Morris, 1940 L.Q.R. 320 at p. 338; Baty, 'Polarized Law', p. 46; Dicey pp. 649, 668 and App. 22\_7

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The second principle simply means that the parties are free to choose the proper law for the "interpretation" of the contract but not for its material or essential validity: Cheshire in his book does not deal separately with "interpretation" and "essential validity", but considers all together under the head of "material or essential validity".

Other writers have expressed similar views. [Even Dicey pp. 649, 668 and App.22; Baty, Polarized Law p.46\_7

This argument seems logical, but it is certainly not the attitude which has been adopted by our Courts. Our Courts, including the House of Lords and Privy Council on many occasions, have expressly affirmed the function of the intention of the parties as determining the law applicable to the essential validity of contracts, and they have used language exactly similar to that used when the issue was the interpretation of a contract. / E.g. <u>Hamlyn</u> v. <u>Talisker Distillery</u> 1894 21 R. (H.I.) 21, particularly per Lord Watson at p. 25; <u>Spurrier v. La</u> <u>Cloche</u> 1902 A.C. 446 (P.C.); <u>P. & O. Steam Navigation</u> <u>Co. v. Shand</u> (1865) III Moo. P.C. (N.S.) 272, at p. 291; <u>Vita Food Products</u> v. <u>Unus Shipping Co.</u> 1939 A.C. 277 at pp. 289, 290\_7

There is no reported decision where the express intention of the parties as to the law which should govern essential validity was refused effect on the ground that the law referred to had not a sufficient connection with the contract. <u>["The Torni"</u> 1932 P. 78, on which Cheshire relies was dissented from in <u>Vita Food Products</u> v. <u>Unus Shipping Co</u>. supra\_7

The argument was dealt with in a recent decision of the Privy Council in a case which was concerned with essential validity in these words:

"It is now well settled that ... the proper law of the contract "is the law which the parties intended to/

to apply." That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances But as Lord Atkin, dealing with cases where the intention of the parties is expressed, said in Rex v. International Trustee \_ 1937 AC. 500,529 7 (a case which contains the latest enunciation of this principle), "Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive." It is objected that this is too broadly stated and that some qualifications are necessary. It is true that in questions relating to the conflict of laws rules cannot be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention is expressed bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public In the present case, however, it might be policy. said that the choice of English law is not valid .... because the transaction, which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries, contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of The provision in a contract principle essential. (e.g. of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent/

frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England. Moreover in the present case the <u>Hurry On</u>, though on a Canadian register, is subject to the Imperial statute, the Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case parties may reasonably desire that the familiar principles of English commercial law should apply". <u>/ Vita Food Products</u> v. <u>Unus Shipping Co</u>. 1939 A.C. 277, at pp. 289, 290. Criticised by J.H.C. Morris and Cheshire in 1940 L.Q.R. 320 7

However it is indubitable that although parties are absolutely free to choose the law which should determine the meaning and legal effect of the contract and the extent of the liabilities which the parties undertake, there must be some limit to the parties' ability to choose the law applicable to the essential validity of the contract. The parties could not provide thata system with which the contract has no connection at all is to govern its essential validity. Even in the passage just quoted from that is not maintained. The expression of intention must be "bona fide and legal". This possibly means that parties could not avoid a rule of the law with which the contract has most connection that a certain contract or provision is illegal and not merely void, simply by providing that another law is to Consequently in the rules that follow for govern. "Illegality" the phrase "the law with which the contract has most connection" is used instead of "the proper law" of the contract.----

"Provided there is no reason for avoiding the choice on the ground of public policy" probably refers to the principle which is always present, that a law otherwise applicable/

applicable will not be applied if to do so would be contrary to morality or public policy. But in addition to this the Privy Council thought it desirable to go on to specify certain connections which the contract had with the law chosen, namely English law. These connections are tenuous enough. It appears that if the law selected is English law there will always be this connection, at least in the view of the English Courts, that "the parties may reasonably desire that the familiar principles of English commercial law should apply." / Ibid, p. 290. Cp. "The Adriatic" 1931 P. 241.7

A Polish statute of 1926 allows the parties the choice between the lex loci contractus, the lex loci solutionis, the lex situs, the law of the domicile. and the law of the nationality of the parties. / Martin Wolff in 1937 J.R. 110 at p. 119 7 No such definite rules can be laid down for this country, but at least it can be said that the law referred to must have some connection with the contract, however tenuous, that it will not do if the law referred to has absolutely no connection with the contract; and it is submitted that except in the case of English law, which enjoys the advantage of being a familiar commercial law, the kind of connection required will be similar to that required by the Polish statute. The law of the flag of the ship, or of the residence or place of business of either party might be added to the possibilities there That is the kind of connection which should be given. present.

It has also been argued that one of the considerations for determining the proper law of the contract, namely that a contract should be construed <u>ut res magis valeat quam pereat</u> is unjustifiable. [Westlake § 212\_7]
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It certainly seems a more reasonable attitude to regard the choice of the law which is to govern essential validity as the first question, and the enquiry whether according to the governing law the contract is valid or not as a subsequent question of fact to be decided after hearing evidence as to what the governing law says on the topic. The theory behind <u>ut res magis valeat</u> is that the parties presumably intended their contract to be valid, and therefore presumably contracted with reference to the law under which the contract is valid. But in every case, the parties presumably intended their contract to be valid, and therefore in every case you are bound to find that the law governing the essential validity is the law under which the contract is valid; which is an absurd result.

However there is no doubt that the consideration is taken into account. / P. & O. Steam Navigation Co. v. Shand (1865) III Moo. PC. (N.S.) 272; In re Missouri Steamship Co. 42 Ch.D. 321; Hamlyn v. Talisker Distillery 1894 21R. (H.L.) 21; South African Breweries Ltd. v. King 1899 2 Ch. 173, Affd 1900 1 Ch. 2737 Some limit therefore must be imposed on the consideration so that the absurd result is not arrived at. The law which upholds the validity of the clause or contract and which is found to be the governing law must be a law with which the contract has a substantial connection. Construing ut valeat is limited to tipping the scales between contesting laws which otherwise have a strong claim to govern the contract. Thus when other considerations showed that a contract was to be governed by English law, by which the contract was invalid, the fact that the contract would have been valid by Swedish law, which had a faint connection with the contract, was not enough to make Swedish law applicable and validate the contract. \_ Royal Exchange Assurance Corporation v. Sjoforsakrings Aktiebolaget Vega 1902 2 K.B. 384. Cp./

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Cp. British South Africa Co. v. De Beers Consolidated Mines Ltd. 1910 2 Ch. 502 7

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In spite of the above rules as to essential validity, if an Act of Parliament directly applies to the validity of the contract in question, the provisions of that Act will govern, irrespective of the proper law of the contract, because the Act is binding on our Courts; but Courts of other countries of course will have regard to the proper law. / Mount Albert v. Australasian etc. Assurance Society 1938 A.C. 224; Vita Food Products v. Unus Shipping Coy. 1939 A.C. 277; Dicey Rule 156 7 Examples of British Acts which directly apply to contracts, the proper law of which may well be that of a foreign country, are the Slave Trade Act 1843, / (6 & 7 Vict. c. 98) -Santos v. Illidge (1860) 8C.B. (N.S.) 861\_7 The Royal Marriage Act 1772, / (12 Geo. 3, c. 11) - The Sussex Peerage Case 1844 11 Cl. and F. 857; the Carriage of Goods by Sea Act 1924, / 14 and 15 Geo. 5 c. 22 7 and the Trading with the Enemy Act 1939. / 2 and 3 Geo. VI c. 89 7

It is the proper law of the contract as that law stands at the date of the emergence of the dispute, and not at the date of making the contract that governs the essential validity of the contract. <u>Nex. v. International</u> <u>Trustee 1937 A.C. 500 (H.L.); Mount Albert v.</u> <u>Australasian etc. Assurance Society 1938 A.C. 224\_7</u> "The submission of a contract to a particular law does not mean submission to certain individual provisions, but/

#### ILLEGALITY

31.

A contract or a provision in a contract will not be enforced, nor will damages be granted for the breach of it, if the making of it is illegal by the law of the country where it is made, / In re Missouri Steamship Co. (1888) 42 Ch. L. 321; "The Torni" 1932 P. 78, Dicey p.655; A contract or a provision in a contract being illegal is to be contrasted with the case where it is merely void or voidable. This principle however is doubtful see Vita Food Products v. Unus Shipping Coy. 1939 A.C. 277, F.A. Mann in (1937) 18 B.Y.I.L. 97 or if the performance of the obligation is illegal either by the law of the country with which the contract has most connection, Moulis v. Owen 1907 1 K.B. 746; Rex v. International Trustee 1937 A.C. 500; Heriz v. Riera (1840) 11 Sim. 318; Clements v. Macaulay 1866 4 M. 583/ or is illegal at the time for performance by the law of the place where performance must take place. /Ralli Brothers v. Compania Naviera Sota Y Agnar 1920 2 K.B. 287; Vita Food Products v. Unus Shipping Co., supra; Rex v. International Trustee 1937 A.C. 500 per Lord Wright at p. 519; De Béeche v. South American Stores Ltd. 1935 A.C. 148 per L.C. Sankey at p. 156; C'Toole v. Whiterock Quarry Co. 1937 S.L.T. 521; Foster v. Driscoll (1929) 1 K.B. 470; In Trinidad Shipping Co. v. Alston 1920 A.C. 888 (P.C.) the payment of rebates as contracted was illegal by United States law but payment had not necessarily to be made in the United States and accordingly the contract was enforced. 7 But the Court will not refuse to grant damages for the breach of an obligation which

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is legal by the law of the country with which it has most connection and the <u>lex loci</u> solutionis just because the performance of the obligation is illegal by the personal law of one of the contracting parties, / Albion Life Assurance Co. v. Mills 27th June 1828 3 W. and S: Kleinwort v. Ungarische etc. A.G. 1939 2 K.B. 679; Santos v. Illidge (1860) 8 C.B. (N.S.) 861 7 or because the party unwilling to perform might be subject to criminal penalties as a result in a country where his business took him, / Trinidad Shipping Co. v. Alston 1920 A.C. 888 7 or because performance would have been illegal by our law if the acts had to be performed here. <u>Campbell</u> v. <u>Ramsay</u> 15th February 1809 F.C.; Saxby v. Fulton 1909 2 K.B. 208; Quarrier v. Colston 1 Ph. 147; Societe Anonyne etc. v. Baumgart 96 L.J. (K.B.) 789 7 And even although the performance of the obligation is illegal by the law of the place where performance was contemplated, if performance need not take place there, the obligation will be enforced. [Waugh v. Morris 1873 L.R. VIII Q.B. 202; Sumner Permain & Co. v. Webb & Co. 1922 1 K.B. 55. But see Foster v. Driscoll 1929 1 K.B. 470\_7 Similarly, although the probably purpose contemplated when entering into the contract is illegal by the law of the place of intended performance, if that purpose is not expressed and if another legal object could be attained, the contract will be enforced. <u>Cloup & Pelissie</u> v. <u>Alexander</u> 1831 9 S. 448; but again

However, a contract which contemplates the violation of our law will not be enforced by our Courts even although it is valid by its proper law and the <u>lex</u> <u>loci solutionis</u>. <u>Hope V Hope 1857 & DeG.M.4G.73/</u> <u>loci solutionis</u>. <u>Hope V Hope 1857 & DeG.M.4G.73/</u> Westlake § 214\_7 Thus where a contract for the sale of lace was entered into abroad, and the lace was packed in a/

see <u>Foster</u> v. <u>Driscoll</u>, supra\_7

peculiar manner by the vendor at the buyer's request so that it could be smuggled into this country, although both the proper law and the lex loci solutionis of the the law of contract of sale was, the foreign country, an action for the price was not allowed in our Courts. <u>Waymell</u> v. Read, supra 7

It was formerly considered that these rules do not apply when the illegality is simply the contravention of the revenue laws of a non-British foreign country, on the ground no country is bound to recognise the merely revenue laws of a foreign state. <u>Stewart</u> v. <u>Gelot</u> 1871 9 M. 1057; Dicey pp. 657, 660; Westlake

305 and authorities cited there. 7 But this exception has recently been questioned. In Ralli Brothers v. Compania Naviera Sota Y Aznar / 1920 2 K.B. 287 J Lord Justice Scrutton reserved liberty "to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing it in the English Courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood." [at p. 300] In Foster v. Driscoll [1929 1 K.B. 470]7 Lord Justice Sankey agreed :-"In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising/

arising out of the contract." <u>Lat p. 518</u> These <u>dicta</u> questioning the exception are quite obiter, and accordingly the matter may be said to be open.

In addition to the above circumstances in which performance will not be exacted, there is of course always present the principle that our Courts will not enforce an obligation otherwise due under a foreign law, if to do so would be contrary to fundamental morality or the distinctive policy of our law.  $\sum$  See p.  $\sum$ 

#### DISCHARGE OF CONTRACTS

A debt is effectively discharged if discharged according to its proper law, as that law stands at the time of payment;  $\sum Rex v \cdot International Trustee$ , below. otherwise it is not discharged.

Thus if the debtor is sequestrated and finally discharged according to bankruptcy laws of the proper law of the debt, the debt is effectively discharged, but a debt is not discharged by the debtor obtaining a discharge in bankruptcy from a system of law other than the proper law of the debt.  $\angle$  See Bankruptcy p.  $\angle$ 

Again, when according to the law of one country certain acts or circumstances, such as imprisonment of <u>Daikelly Hume</u> 1675 ii Brown's Supp. 1844 the debtor, <u>Gordon v. Gordon</u> November 12th 1818 F.C.<u></u> the existence of a counter debt, <u>Allen v. Kemble</u> (1848) 6 Moo. P.C. 314\_7 or the acceptance of a portion of the debt tendered as full payment, <u>Ralli v. Dennistoun</u> (1851) 6 Ex. 483\_7 operate as satisfaction of the debt, the debt is discharged if that law is the proper law of the debt.

Two recent illustrations of the principle may be given. In <u>Société des Hôtels Le Touquet Paris - Plage</u> v. <u>Cummings</u> / 1922 1 K.B. 451\_7 The sum of 18,035 francs/

francs, payable in Paris in 1914 under a French contract, and payment was not made. In 1919 after the value of the franc as expressed in English currency had fallen heavily, the creditor brought an action in England for the amount of sterling which would have been the equivalent of Francs 18,035 in 1914. During the action the debtor went to France and paid 18,035 francs to the creditor's manager, who did not know the amount of the debt, nor that an action had been begun, and did not when taking the money intend to accept it in full satisfaction, but gave the debtor a receipt as for money deposited with him. It was held that since it was a French debt and since in France the payment would have been a good discharge of the debt, the payment must equally be a good discharge of the debt for the purposes of the English action.

In Rex v. International Trustee / 1937 A.C. 500 7 an international loan, which contained a gold value clause, was contracted in 1917. In 1933 a joint resolution of Congress of the United States enacted that every provision contained in any obligation that purported to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, was against public policy, and that such obligation should be discharged upon payment dollar for dollar in any coin or currency that at the time of the payment was legal tender for public or private debts. It was held that the proper law of the debt was the law of the United States and that the bond was discharged upon payment dollar for dollar of the nominal amount. prescription

A principle which is a limitation of the duration of the right or obligation entering into it <u>ab initio</u> will/

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will discharge the debt if it is a prescription of the proper law of the contract, otherwise not.  $\_$  Alexander v. Badenach 1843 6 D. 322. See Prescription p.

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An enactment which postpones the date for discharge of an obligation applies if it is a moratorium of the proper law, but only in that event. / In re Francke and <u>Rasch</u> (1918) 1 Ch. 470; <u>Fouquette</u> v. <u>Overmann</u> 1875 L.F. X Q.B. 525\_7

When a debt is arrested and paid to the arrester after a decree of furthcoming, the debt is discharged if the decree of furthcoming was given by the Courts of the proper law of the debt, <u>Swiss Bank</u> v. <u>Boehmische Industrial</u> <u>Bank</u> 1923 1 K.B. 673. The mention in the judgments of the place "where the debt is situate" is a loose way of referring to the proper law of the debt\_7 but not if it was given by the Courts of another country; <u>Martin v.</u> <u>Nadel</u> 1905 2 K.B. 26\_7 accordingly decree of furthcoming will only be pronounced by our Courts in respect of Scottish debts, for otherwise the arrestee would not be discharged by payment to the arrester, but might have to pay again to the creditor of the debt if sued by him abroad. <u>Cases cited\_7</u>

When a fixed rate of interest is payable on stock or debentures, a foreign income-tax payable by the company in respect thereof does not discharge <u>pro tanto</u> the obligation to pay interest if the proper law of the contract is not the law of the foreign country imposing the tax. <u>Spiller v. Turner</u> 1897 1 Ch. 911; <u>Indian & General</u> <u>Investment Trust v. Borax Ltd.</u> 1920 1 K.B. 539\_7

Where the effect of a certain act, e.g. imprisonment, according to a foreign law which is the proper law of the debt, is not to discharge the debt but merely to preclude all execution on it, this will not prevent execution for the debt in Scotland against any property of the debtor which is situated here. <u>Lashley v. Moreland</u> 21st December 1809 F.C.<u>7</u>

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#### RATE OF EXCHANGE

All decrees for payment in our Courts must be given in British currency, and if the amount is expressed in a foreign currency in the contract it is translated into British currency at the rate of exchange prevailing when payment became due; and if a person becomes liable for the payment of damages in a foreign currency the amount is translated into British currency at the rate of exchange prevailing when the breach or default occurred. <u>[Hyslop</u> v. <u>Gordon</u> 1824 2 Shaw's App. 451; Barry v. Van den Hurk 1920 2 K.B. 709; Di Ferdinando v. Simon Smits & Co. 1920 3 K.B. 409; Ralli Bros. v. Compania Naviera etc. 1920 1 K.B. 614; Lebeaupin v. Crispin 1920 2 K.B. 714; "The Volturno" In re British American Continental Bank Ltd 1922 2 Ch. 589; 1921 2 A.C. 544; Uellendahl v. Pankhurst, Wright & Co. <u>Madeleine Viannet et Cie v. Wills 19401KB. 72; Graumann - Treitel 162 LT. 383</u>; 1923 39 T.L.R. 628; Peyrae v. Wilkinson 1924 2 K.B. 166; Over-ruling Cohn v. Boulken 1920 36 T.L.R. 767\_7

If the rate of exchange between sterling and the foreign currency is different in the <u>locus solutionis</u> and in this country, the rate prevailing in the <u>locus solutionis</u> is given effect to. <u>Ainslie v. Murrays</u> 1881 8 R. 636\_7

Difficulty occasionally arises when a contract stipulates for the payment of a certain number of "pounds" or "francs" and it is not clear whether it is Australian or United Kingdom pounds or French or If they are different units of Belgian francs. account which merely have the same name, as in the case of Belgian and French francs, it is simply a question of interpretation as to which unit of account The intention of the parties may be is meant. discoverable simply from examining the language of the contract, but if not, appeal will have to be made to the proper law of the contract. The proper law will be/

be presumed to be the lex loci solutionis and so the unit of account meant will be that which is legal tender in the place of payment. Where they are different units of account the proper law of the contract can not be the law of one country and the law determining the currency the law of another country. But where the unit of account is the same but they are of different value, as in the case of British and Australian pounds, it is presumed that the obligation is payable in the currency which is legal tender in the place of performance, even though the proper law of the contract is the law of another country, for in this case the currency in which payment has to be made does not affect the extent of the obligation but only the mode of performance. / Adelaide v. Prudential 1934 A.C. 122. Dissenting judgment of Lord Hasworth M.R. in Broken Hill Proprietary Co. v. Latham / 1933 1 Ch. 373. See also Westralian Farmers v. King Line 48 T.L.R. 598 7 The presumption is rebutted when it is clear that a currency other than that of the place of performance is intended: for example when a tailorcutter entered into a contract in London for three years employment in New Zealand at a salary of "seven hundred pounds sterling" a year, the insertion of the word "sterling" showed that United Kingdom currency was meant. [De Bueger v. Ballantyne & Co. Ltd. 1938 A.C. 452]

When a person contracts to pay a certain number of a certain unit of account, the obligation is to pay in whatever at the date of payment is legal tender and legal currency in the foreign country whose money is lent, and not simply in a bundle of the correct number of notes, although that may have been legal tender at the date of the loan; <u>Pyrmont v. Schott</u> 1939 A.C. 145\_7 nor in the correct number of gold coins, although that may have been the only legal tender at the date of the contract/

contract. <u>Cottoman Bank of Nicosia</u> v. <u>Chakarian</u> 1938 A.C. 260\_7

In international loans there is very often a gold clause, the purpose of which may either be to specify the mode of performance of the obligation - e.g. in gold coin - or to determine the extent of the obligation and guard against the risk of loss which would result to the creditor if there was inflation of the currency in which the loan is repayable. The contract may stipulate for the repayment of a certain quantity of gold - a gold clause proper; payment by gold coins minted in a specified state, - a gold coin clause; or stipulate for repayment of as much paper or other money as should be required at the date of repayment to purchase the same amount of gold as could be purchased or was represented by the loan at its date - a gold value clause. / A. Plesch, "The Gold Clause" 2nd Ed.; B.A. Wortley in 1936 17 B.Y.I.L. 112 7 The gold coin clause specifies the mode of performance of the obligation, but the gold clause proper and the gold value clause determine the substance and extent of the obligation. The gold clause proper may become ineffective when a government interferes with the free market of gold, the gold coin clause when a government substitutes paper currency for coin, and even the gold value clause may be stultified by legislation. / Rex v. International Trustee 1937 A.C. 500 / The effect of gold clauses and the problems they create may be illustrated by Feist v. Société Intercommunale Belge D'Electricité / 1934 A.C. 161 / Feist held a bond for £100 which was to be governed by English law, issued in 1928 by a Belgian company. Interest was payable in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September 1928. The Company/

Company claimed to pay the nominal amount of the interest in whatever might be legal tender in England at the date of payment. Feist claimed such a sum in sterling as would purchase in the market on the day of payment gold of the weight of fineness contained in the gold coin of the United Kingdom sufficient to discharge the payment if falling due on September 1928. Feist's claim was upheld, the House of Lords construing the clause as a gold value clause in spite of its appearance ex facie as a gold coin clause. To construe it otherwise would have been to give no effect to it, although it was obvious that the reason for its insertion was to guard against Britain going off the gold standard, which was a possibility at the date of the bond, and eventually happened; and it was obvious that in 1928 the parties were not really contemplating payment in gold sovereigns. But in another case payment of the "sum of £100 sterling gold coin of Great Britain" was construed as a gold coin clause because it was in a bond dated 1884 when the possibility of Britain going off the gold standard would not have occurred to the parties, and either party might have contemplated payment being made in actual sovereigns. Br, & Fr, Trust Corporation v. New Brunswick Railway Co. (1936) 154 L.T. 191\_7 The practical importance of determining whether the clausewas a gold coin one governing the mode of payment or a gold value one defining the obligation was that according to Section 6 of the English Coinage Act 1870, any contract to pay otherwise than according to the coins which are current and legal tender is, if not illegal, at the best void and of no effect. Feist, by getting himself into the latter category received payment of as much normal legal tender as represented at the time of payment the predevaluation value of the loan. In the second case however/

however the creditor had to be satisfied by the payment of 100 devalued paper pounds. Other systems of law affect these gold clauses differently. Thus American legislation has struck at even gold value clauses and provides that such obligations shall be discharged upon payment dollar for dollar in any coin or currency which at the time of the payment is legal tender.  $\angle$  See Rex v. International Trustee 1937 A.C. 500  $\angle$ 

When the interpretation of a contract which might contain a gold clause comes up for consideration the first question is what is the proper law of the contract, and the second is, whether according to the proper law there is a gold clause and if so what kind of gold clause is it according to the proper law. When the essential validity or legality of a gold clause is in issue the first question is what is the proper law (and, if legality is the issue what is the lex loci solutionis); the second question is whether there is a gold clause and if so what kind of clause according to the proper law (and, if legality is the issue, what kind according to the lex loci solutionis); and the third question is whether that kind of clause has been affected by the legislation of the proper law (and, if legality is the issue, the lex loci solutionis)

Thus in <u>Ottoman Bank of Nicosia</u> v. <u>Chakarian</u> [1938 A.C. 260] where the question was whether a contract of employment should be read as if there was a gold value clause in it, Turkish law was the proper law and by that law, according to the evidence, there was no such implication in the contract. [Also <u>Sforza v. Ottoman Bank of Nicosia</u> 1938 A.C. 282, where it is clearer that it is Turkish law that is being applied - at p. 283]

### CARRIAGE BY AIR

42.

Conflicts have been avoided as regards most countries by the unification of the internal laws of the several countries as to carriage of persons and goods by air. Agreement as to the rules that should be applied was reached in the Warsaw Convention 1929 and the rules have been enacted as law in the various states. / For the parties to the Convention, both original and acceding, see Carriage by Air (Parties to Convention) Order 1939, S.R. & O 1939 No. 733\_7 For this country the Carriage by Air Act 1932 / 22 and 23 Geo. 5 c. 36\_7 provides that the provisions

of the Warsaw Convention, which are set out in the schedule to the Act, shall have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.  $\sum$  Sec. 1(1) of the Act  $\sum$  The Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward and to gratuitous carriage by aircraft performed by an air transport undertaking. (Art. 1(2) of the Convention)"International carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within territory subject to another power, even though that power is not a party to the Convention.  $\sum$  Art.1(2) of the Convention; Grein v. Imperial Airways 1937 1 K. B 50; Phillipson v. Imperial Airways 1939 1 A.E.R. 761 7

For/

For the carriage of passengers the carrier must deliver a passenger ticket and for the carriage of luggage a luggage ticket which shall contain, <u>inter</u> <u>alia</u>, a statement that the carriage is subject to the rules relating to liability established by the Convention.  $\angle$  Arts. 1(e) and 2(3) (h) 7 In the case of consignment of goods the carrier has the right to require the consigner to make out and hand over an "air consignment note"  $\angle$  Art. 6 7 which shall contain a similar statement.  $\angle$  Art. 8 (q) 7 In the absence of these declarations the contract of carriage will none the less be subject to the rules of the Convention.  $\angle$  Arts. 3(2), 4(4), and 5(9) 7

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. *[*Ibid*]* 

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made, or before the Court having jurisdiction at the place of destination. (Art. 28(1)) Arbitration clauses are allowed, subject to the Convention, if the arbitration is to take place within one of these jurisdictions. (Art. 32]

Questions of procedure shall be governed by the law of the Court seised of the case.  $\angle$  Art. 28(2)  $\angle$ 

For the actual rules of international carriage by air, reference should be made to the Convention which is set out in the Schedule to the Carriage By Air Act 1932. Carriage/ Carriage by air between two countries which does not come within the above definition of "international carriage" will presumably be governed by the same principles as carriage by sea. [q.v.]Power is given in the Carriage By Air Act 1932 to make an Order in Council applying the rules of the Warsaw Convention to carriage by air other than "international carriage" as defined above, but this power has not yet been exercised. [Sec. 4]

#### AGENCY

Questions arising out of contracts where agents have been involved may be

- (1) Questions between agent and principal as to the agent's authority or the rights and duties of agent and principal <u>inter se</u>.
- (2) Questions between the agent and third parties with whom the agent has contracted.
- (3) Questions between the principal and third parties with whom the agent has contracted as to the extent of the agent's authority and as to whether the principal is bound or not.
- (4) When it is admitted that the principal is bound by

   a contract between the agent and a third party,
   questions between the principal and the third party
   other than those referred to in (3).

#### 1.

Questions in the first category are governed by the proper law of the contract of agency. <u>Maspons</u> v. <u>Mildred</u> (1882) 9 Q.B.D. 530, at p. 539. <u>Arnott</u> v. <u>Redfern</u> 1825 2 Car. and P.88; <u>In re Anglo-Austrian Bank</u> 1920 1 Ch. 69; Dicey Rule 179\_7 In determining the proper law of a contract of agency or employment the place of the principal's head office is important. /Walter/ [Walter Breslaner in 1938 J.R. at pp. 293,4, suggests that where the agent is not also an employee the place of performance is the most important factor, but where he is, the place of the principal's business is the most important factor. 7 When a contract of agency or employment is executed in country A in the language of A, where the principal's head office is, to be performed by the agent or employee in country B, the proper law of the contract will be that of country A and not B, the normal presumption that the proper law is the <u>lex loci solutionis</u> being overborne by these other considerations. <u>Arnott</u> v. <u>Redfern</u>, <u>In re Anglo-Austrian Bank</u>, supra; <u>Oppenheimer</u> v. <u>Rosenthal</u> 1937 1 All E.R. 23; Westlake § 218 7

As to service at sea, if there appears to be a conflict of laws, then, if there is in Part II (Masters and Seamen) of the Merchant Shipping Act 1894 any provision on the subject which is thereby expressly made to extend to the ship concerned, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered. \_Merchant Shipping Act 1894 Sec. 265, 57 and 58 Vict. c. 60\_7

## 2 and 4.

It/

Questions in the second <u>Spurrier</u> v. <u>La Cloche</u> 1902 A.C. 446; <u>Albion Life Insurance Co. v. Mills</u> 27th June 1828 III W. and S. 7 and fourth <u>Albion</u> <u>Life Insurance Co.</u>, supra; <u>McNaughton v. Baird</u> 1952 24 J. 623; <u>Parken v. Royal Exchange Assurance Co</u>. 1846 8 D. 365; <u>St. Patrick Assurance Co</u>. v. <u>Brebner</u> 1829 8 S. 51; Westlake §223\_7 categories are governed by the proper law of the contract between agent and third party.

It may be profitable to consider what effect the existence of a foreign principal has when deciding the proper law of the contract between agent and third party. If the agent has no power to execute contracts, but simply receives proposals for contracts, transmits them to his principal and then later delivers the contract, executed by his principal in his country, to the other contracting party, the place of the principal's business (and therefore the place where the contract is executed by the principal) is an important factor, and the place of the agent's business is of little or no importance. / Parken v. Royal Exchange, supra 7 But if the agent has power to conclude contracts, the place of the agent's business is important and that of the principal of little or no importance. / St. Patrick Assurance Co. v. Brebner, Albion Life Assurance Co., supra 7 supra; "If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered as mine where it is It is not an English contract actually made. because I actually reside in England. If my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland!" Albion Life Insurance Co. III W. and S. per Lord Chancellor Lyndhurst at p. 233 7

One of the questions that might arise in the second category is whether the agent was personally liable on the contract and this would be settled by the proper law of the contract between agent and third party. If the proper law laid down that an agent is personally liable in the event of the principal not being bound, it might be necessary to refer to a second system of law/

law, namely that indicated below for determining whether the principal is bound.

3.

Questions in the third category are governed by the law of the country where the agent has contracted, provided that the principal authorised the agent to contract there. [ Chatenay v. Brazilian Submarine Telegraph Co. 1890 1 Q.B. 79; Millar v. Mitchell Cadell & Co. 1860 22 D. 833; Bennett v. Inveresk Paper Co. 1891 18 R. 975; Dicey Rule 180. Contra Girvin Roper & Co. v. Monteith 1895 23 R. 129 (proper law of the contract between agent and third party) criticised below. 7 This law is often the same as the proper law of the contract between agent and third party, but not necessarily so. This is obviously the fairest rule. It would not be just to the third party that the question whether the agent has a certain authority and whether the principal were bound or not should depend on the proper law of the agency contract, of which he might not be aware; and it would be equally unjust to the principal to have this question governed by the proper law of the contract between the agent and the third party for he would have no protection against. the agent and third party subjecting him to liabilities which he had not intended to undertake simply by their stating that they contracted with reference to a certain law. This principle may involve a preliminary question of interpretation, namely deciding whether the principal's authority to his agent contained authority to contract in a certain country. If the authority, written - as in a power of attorney - this preliminary question must be determined from the evidence of competent translators and experts from the country in whose language the authority/

authority is written, including if necessary lawyers from that country. [Chatenay, supra 7 In one case where a power of attorney had been executed in Brazil in the Portuguese language in favour of a broker in London, Lord Esher, M.R., said: "The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, Brazilian lawyers, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the intent of the authority, in any country in which the authority is to be acted upon, is to be taken to be according to the law of the particular country where it is acted upon" / Chateney, supra, at p. 84 7 If a foreign principal sends an order to an agent in Scotland instructing him to buy, say, a cargo of wheat, the preliminary question will have to be determined whether this is an authority to buy wheat only in Scotland or anywhere in the British if it appears to be reasonable or customary Isles: that such instructions should include authority to buy in England and the agent does buy in England, then the main question as to the extent of the agent's authority and as to whether the principal is bound by that contract will be determined by English law. / See Girvin Roper & Co. v. Monteith 1895 23 R. 1297

The principle just enunciated for the third category is contrary to the ratio of <u>Girvin Roper & Co</u>. v. <u>Monteith</u>. <u>[1895 23 R. 129]</u> A foreign principal sent an order to an agent in Scotland in the following terms:-"Buy cargo Californian wheat well forward immediately remittance ready telegraph".

The/

- The agent, went to London and purchased a cargo of wheat from a grain merchant there, under a contract which contained a stipulation that disputes should be settled according to the law of England ..... The agent having failed to pay the price, the wheat was resold by the merchant, who then sued the principal in Scotland, after founding jurisdiction by arrestments, for the loss on the resale. The defender pleaded that he was not liable to be sued on the contract, in respect that he had not given the agent authority to make him a party to the contract. It was held that the question whether the foreign principal was liable to be sued on the contract was a dispute arising under the contract, and fell to be determined according to the law of England.

It is submitted that the ratio of this case, which appears to be that the English law applies because it is the proper law of the contract between agent and third party, is inconsistent with sound principle and would not be followed today. The actual decision however is unexceptionable if put on this basis: the foreign principal gave the agent authority to contract, among other places, in England, and the agent went and contracted there, therefore the question of A agent's authority as regards that contract and the question whether the principal is bound by it is governed by English law.

Agency, as well as arising by contract, may arise by implication and operation of law. Two cases may usefully be considered, that of a wife and that of the master of a ship :-

By many systems of law a wife has authority to pledge her husband's credit for necessaries for herself and the family. There is no reason to suppose that this/

49.

this authority, in questions between the husband and third parties, is subject to different rules from that obtaining when an ordinary principal and agent were involved. Thus the authority of the wife, and the question whether the husband is bound or not, in a question between the husband and a third party, is governed in regard to any contract made by the wife by the law of the country where that contract was made, provided that the wife was there with her husband or with his consent. But if the wife be separated from the husband, the wife's authority, and the question whether the husband is bound, **dsc** governed by the law of the matrimonial domicile. <u>Topham</u> v. <u>Marshall</u> 26th January 1808 F.C. 7

The authority of the master of a ship to deal with the cargo during the voyage and the conditions under which he may exercise it (e.g. the question whether a bond of bottomry effectively binds the cargo-owner) are governed by the law of the flag of the ship, <u>\_\_\_\_\_The Gaetano and Maria</u><sup>"</sup> 1882 7 P.D. 137; "<u>The Karnak</u>" 1869 L.R. II P.C. 505; Dicey p. 692;

When the question is between the cargo-owner and a third party with whom the master has contracted on behalf of the cargo-owner this is not a mere presumption for the law of the flag, but a rule. The rubic of "The Gaetano and Maria" [supra]7 reads: "The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag ... unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according/

according to the law of the flag of the ship, will be enforced by the English Admiralty Court ..... although the conditions imposed by English law as essential to the validity of such bond have not been complied with." The words in italics are valid enough if the question is one between the shipowner and the cargo-owner, as in Lloyd v. Guibert (1865) L.R. 1 Q.B. 115: "The August" 1891 P. 328; and other cases mentioned when considering the interpretation of contracts of affreightment\_7 but not when the question is between the cargo-owner and a third party with whom the master has contracted on the cargo-owner's behalf, as in "The Gaetano and Maria". For it is unfair to the third party that his position should be dependent on stipulations between shipowner and cargo-owner of which he may not be aware - that would be like allowing the authority of an agent in a dispute between the principal and a third party with whom the agent has contracted, to be governed by the proper law of the contract of agency, which, it has already been submitted, is unfair to the third party, who can not be expected to know or enquire about the proper law of the contract of There is no authority to support the words in agency. italics when the question arises between cargo-owner and third party.

It must be remembered in regard to the third category of questions, that the law of a country as to the extent of an agent's authority and as to whether the principal is bound or not may be different in the case of agents acting for principals who carry on business in the country on the one hand and agents acting for foreign principals on the other. When the law of a country has to be applied it is the law of that country as to agents acting for foreign principals. It/

51.

It must also be remembered, as Dicey points out [p.727] that however questions in category 3 are answered, the disposition by the agent of property which is at his apparent disposal to a third party may be valid because of a law of the situs of the property. [E.g. the English Factors Act 1889 Sec. 2, extended to Scotland by the Factors (Scotland) Act 1890; <u>Cammell v. Sewell</u> (1860) 5 H. and N. 728 7

Meaning of locus contractus When the places of signing and delivery of the contract are different, the <u>locus contractus</u> is the place where the contract is delivered, because there is no binding contract until delivery takes place. <u>Chapman v. Cottrell</u> 1865 3 H. and C. 865; <u>Stuart v.</u> <u>Potter Choate & Prentice</u> 1911 1 S.L.T. 377; Westlake § 233; Chalmers' Bills of Exchange, 10th Ed. p. 281;

Falconbridge, Banking and Bills of Exchange, 5th Ed. p. 865\_7

When a contract is entered into by offer and acceptance transmitted through the post, the locus contractus is the place where the acceptance is posted, and when a contract after having been signed is delivered by post, the locus contractus is the place where the completed contract is posted to the other party, for the post is regarded as the common agent of the contracting parties and delivery to the post is delivery to an agent for the addressee. / Dunlop v. Higgins 1848 6 Bell 195, 1 H.L.C. 381; Thomson v. James The Queen v. Doutre 1884 9 A.C. 745 at 1855 18 D. 1; Robertson v. Burdekin 1843 6 D. 17; pp. 750, 751; Strathern v. Masterman & Co. 1850 12 D. 1087; Benaim v. Debono 1924 A.C. 514 at p. 520 (P.C.); The Badische Anilin and Soda Fabrik v. Basle Chemical Works 1898 A.C. Parken v. Royal Exchange Assurance Coy. 1846 200: 8 D. 365: Henthorn/

Henthorn v. Fraser 1892 2 Ch. 27; Bank of Montreal v. Exhibit and Trading Co. 1906 XI Comm. Cas. 250; Westlake \$224; Falconbridge, loc. cit. pp. 865 - 866\_7

Meaning of locus solutionis If no place of payment is expressed, the <u>locus</u> solutionis is presumed to be the place where the contract was made. <u>Parken v. Royal Exchange</u> Assurance Coy., supra.

#### BILLS OF EXCHANCE:

The law as to Bills of Exchange is now almost entirely statutory, being embodied in the codifying Bills of Exchange Act 1882,  $\begin{bmatrix} 45 & 46 & \text{Vict. c. 61} \\ which has$  $including has provision for the Conflict of Laws. <math>\begin{bmatrix} \text{particularly sec. 72} \end{bmatrix}$ . The Act, however, is not completely exhaustive, and the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue to apply to Bills of Exchange, promissory notes and cheques.  $\begin{bmatrix} \text{Sec 97(2)} \end{bmatrix}$ . The undernoted are cases on the Conflict of Laws which fall outwith the Act.  $\begin{bmatrix} \text{In re Gillespie, ex parte} \\ \text{Robarts}, 1886, 18. Q. B. D. 286; \\ \text{In re Commercial Bank of South} \\ Australia 1887 36. Ch.D. 522; Alcock - v - Smith 1892 1 Ch. 238; \\ Embiricos - v - Inglo-Austrian Bank 1905, The K. B. 677; Moulis - v - \\ \\ Owen 1907 The K. B. 746 \end{bmatrix}$ 

The Act provides that where a bill drawn in one country is negotiated, accepted, or payable in another, the rights duties and liabilities of the parties thereto are determined as follows:- [Sec 72]

Requisites

in form

d & 165

The validity of a bill as regards requisites in form is determined by the law of the place of issue. Sec 72(1) | "Issue" means the first delivery of a bill, complete in form, to a person who takes it as a holder, [sec 2] and consequently the place of issue is the place where the bill is first delivered to a holder, e.g. the place where the drawer delivers an unaccepted bill to the first endorsee, or the place where the acceptor delivers an accepted bill to the drawer. The validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made. Sec. 72(1) The contract is made at the place of delivery, not where the signature is Falcon bridge, Banking & Bills of Exchange 5th Ed. p.865 attached; [Chalmers', Bills of Exchange, 10th. Ed. p. 281; Westlake § 233; Chapman - v - Cottrell 1865 3 H & C. 865 Bank of Montreal - v - Exhibit and Trading Co. 1906 X1 Comm. Cas. 250 and this is an important rule for

later/

later subsections also. In continental law the place of the contract is the place where the signature was affixed.  $\angle$  H.C. Gutteridge (1934) 16 Jo. Comp. Leg. 53 at pp. 62 and 70 ff - Art 4 of Geneva Convention of 1930\_7

a

The principle is in contrast with that applicable to contracts generally. The requisites in form of the <u>lex loci contractus</u> are not only sufficient but they are the only sufficient requirements. In contracts generally, there is an alternative between the requirements of the <u>lex loci contractus</u> and those of the proper law of the contract, if different.  $\sum$  See Contract, Formal Validity p.  $\sum$ 

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"Requisites in form" means such questions as :-

(1) the sufficiency of initials or a mark;

(2) a rule that a bill must express the value received; [Chalmers p.281.]
but the necessity or sufficiency of consideration for a contract is a matter of essential validity; [In re Bonacina (1912) 2 Ch. 394;
Stuart v. Potter Choate & Prentice 1911 1 S.L.T. 377; Falconbridge
p. 868.]

2.

(3) a rule that a verbal acceptance is valid;  $\overline{/}$  ibid.

(4) the question whether the words in which a draft is expressed make it conditional, and so not a bill of exchange; <u>Guaranty Trust Coy. of</u> <u>New York - v - Hannay & Co</u>. (1918) 2 K.B. 6237

(5) the question whether an indorsement or acceptance can be made by a duly authorised agent simply signing his own name without giving any indication of his agency;  $\sum Koechlin - v - Kestenbaum$  1927 1 K.B. 889.73 and

(6) the question whether an indorsement in blank transfers the bill. It is clear however, that if, by a foreign law, indorsement in blank transfers the bill to some extent, the question whether it transfers the right of property in the bill absolutely, or only to the extent that it is open to all the exceptions which would be available against the indorser himself, is one of "interpretation" to be governed by section 72 (2). <u>∑ Bradlaugh</u> - v - <u>De Rin</u> (1868) L.R. 3 C.P. 538, (1870) L.R. 5 C.P. 473; <u>Label</u> - v - <u>Tucker</u> 1867, L.R. 3 Q.B. 77; <u>Trimbey</u> - v -<u>Vignier</u> 1834 1 Bing. (N.C.) 151. But see <u>In re Marseilles Rlwy Co.</u> 1885 30 Ch. D. 598, where Pearson J. seems to regard the question as one of form.7

Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.  $\sum \text{Sec 72 (l) (a)}$ ; <u>Stewart - v - Gelot</u> 1871 9 M. 1057\_7 But of course this does not exempt a bill made abroad from the necessity of complying with the requirements of the United Kingdom Stamp Acts when the bill is sued on in this Country.  $\sum \text{Bank of Montreal} - v - \text{Exhibit and Trading Coy Ltd. 1906 XI Comm.}$ Cas. 250\_7

Where/

Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. [Sec. 72 (1) (b)] Thus where a bill was drawn in France on an English drawee and indorsed in France by the drawer to an Englishman domiciled in England by an indorsement irregular according to French law, the form of the bill was irregular on its first issue according to the lex loci actus, but it was valid to enable the applicants, who subsequently obtained the bill through an indorsement in England, to enforce payment against the drawee, because it was valid according to English law. / In re Marseilles Rlwy Co. supra. The bills however are dated before the Act, and it may be doubted whether the question raised is not rather the interpretation of an indorsement than a question of form ---- see Bradlaugh - v - De Rin, Lebel - v - Tucker, Trimbey - v - Vignier, supra, Falconbridge p. 891 The proviso probably applies also, in favour of a holder in this country, to the case where it is a subsequent indorsement that is invalid by the law of the country where it is made. Z Byles on Bills 20th Ed. p. 317. Contra, Falconbridge pp. 870, 871. / The words "For the purpose of enforcing payment thereof" do not include the obtaining of a declaration that the holder of a bill who has been paid is entitled to retain the money. / Guaranty Trust Coy of New York - v - Hannay & Co. (1918) 1 K.B. 43. The illogicality of this result is remarked on by Scrutton L.J. in the Court of Appeal, 1918, 2 K.B. 623 at p 670 ].

3.

"Interpretation"

Subject to the provisions of the Act [ see below], the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where the contract is made. [Sec 72 (2)] Provided that where an inland bill [ i.e. one both drawn and payable within the British Islands ---Sec 11 (1)] is indorsed in a foreign country, the indorsement shall as regards the payer [See Alcock -v- Smith 1892 1 Ch. 238] be interpreted according to the law of the United Kingdom. [Sec 72 (2); Lebel - v -<u>Tucker</u> (1867) L.R. 3: Q.B. 77]

The subsection on interpretation applies the lex loci contractus to interpretation. This is a departure from principle, because on principle the proper law of the contract should govern, and the proper law in most cases is the <u>lex loci solutionis</u>. / See Thomson on Bills 3rd. Ed. p. 84, Falconbridge, p. 875, Art 4 of Geneva Convention 1930 -H.C. Gutteridge in 1934 16 Jo. Comp. Leg. pp. 66 ff./ To surmount this objection, Chalmers, the draughtsman of the Act, quotes Story to the effect that the application of the lex loci contractus is not really a departure from the principle that the law of the place of payment should govern, but is in conformity with it: "The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree upon due notice to re-imburse the holder in principal and damages where they respectively entered into the contract". [Chalmers p. 283] He admits, however, that the case of a bill accepted in one country but payable in another gives rise to a difficulty. According to the literal interpretation of the Act the law of the place of acceptance should govern, although according to principle the law of the place of payment should. There is no doubt that because of the Act, the law of the place of acceptance is the appropriate one. <u>Bank Polski</u> - v - <u>Mulder</u>, 1941 2<sub>5</sub> K.B. 266, 1942 I.K. B. 497

The meaning of "interpretation" is obscure. The primary meaning of "interpretation" is the construction of expressions to determine their legal meaning. There is little doubt that under the "interpretation" of the drawing will come such questions as whether the bill is phrased in such a way as to be negotiable or not,  $\angle$  <u>Robertson</u> - v - <u>Burdekin</u> 1843 6.D. 17, Falconbridge, p. 874\_7 and where the bill is payable; that under the "interpretation" of indorsement will come such questions as whether the indorsement has been made in such a way as to avoid recourse or to constitute the indorsee a holder in due course, <u>Aberdeen Banking Co</u> - v -<u>Maberley Cane & Coy</u> 1835\_13 S. 827\_7 or the question whether it transfers the right of property in the bill absolutely or only to this/

this extent, that it is open to all exceptions which would be available against the indorser himself;  $\underline{/Bradlaugh} - v - \underline{De Rin}$  (1868) L.R. 3 C.P. 538; (1870) L.R. 5 C.P. 473 $\underline{/}$  and under "interpretation" of acceptance such questions as whether the acceptance is general or qualified. "Interpretation", in short, includes the legal effect and extent of the obligations of the parties.  $\underline{/}$  Chalmers p. 283; London & Brazilian Bank v. Maguire 1895 Quebec Reports 8 S.C. 358. Contra, Falconbridge p. 882 $\underline{/}$ 

There may be more doubt however about one of the illustrations which Chalmers, the draughtsman of the Act, gives in his book on the Act, as to the meaning of "interpretation" :- "An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognised. The title to the note passes by such delivery!  $\int p. 282_7$  Section 72(2) refers to the interpretation of indorsement, not of delivery. The case which Chalmers figured is in fact one which was not provided for by the Act, and might be compared to <u>Alcock</u> - v - <u>Smith</u>,  $\int 1892$  1 Ch. 238\_7 which considered the question of the validity or effect of a judicial sale in

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in Norway of a bill payable to bearer: thiswins a problem outwith the act, and to be determined by the **Co**mmon law, the appropriate common law rule being that the validity of a transfer of corporeal moveables must be governed by the law of the country in which the transfer takes place. Even if one went on the assumption that "indorsement" included "delivery" and that the Act covered such a case, Sec 72 (1) would be more applicable: "The validity as regards requisites in form of the supervening contracts such as..... indorsement,.... is determined by the law of the place; where such contract was made".

Another difficulty is whether "interpretation" covers essential validity. In Embiricos - v - anglo -Austrian Bank, (1905) 1. K.B. 677 the The English Court of appeal had to consider whether the ultimate holder of a cheque, which had been indorsed a number of times, had a good title to it. One of the indorsements was a forged one, made, by a person who had stolen the cheque , to a Vienna bank, who in turn indorsed it to the ultimate holder. By Austrian law, the Vienna Bank had, and therefore gave, a good title to the cheque as bona fide holders for value without gross negligence; by English law----- section 24 of the Bills of Exchange Act----- no right ptoretain the bill or enforce payment could be acquired through a forged signature. It was held that Austrian law should prevail: if section 72(2) did not apply, the rule of International law applied that the validity is valid which is valid of a transfer of moveable chattels must be governed by the law of the country in which the transfer takes place. Vaughan Williams L.J. did not think that "interpretation" in sec 72 (2) covered this issue of essential validity: Romer L.J. did not make the ground of his opinion clear, but appeared to be of the same opinion; Stirling L. J. thought that In an earlier case "interpretation" in Sec 72 (2) did cover this issue. in/ the Court of Appeal the similar problem of the validity of a judicial sale in Norway of a Bill payable to bearerwhs decided on the common law rule/

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rule that a transfer of moveable chattels is valid if valid by the law of the place where the transfer takes place, and not on this provision of the Act;  $\sum Alcock - v - Smith$  1892 1 Ch. 233: but this case has the additional feature to bring it outside the Act, that the question was not the validity of an indorsement but of a judicial transfer of a bearer bill. 7 and in a later case in the Court of Appeal, Sargant L.J. thought that in Embiricos they had carried the matter further than was contemplated by the actual language of the subsection.  $\sum Koechlin - v-$ Kestenbaum 1927 1 K.B. 889, at p. 899\_7 In Moulis - v - Owen / 1907 1 K.B. 746  $\overline{f}$  an action on a cheque which the defendant gave to the plaintiff in Algiers in payment of money lent by the plaintiff to the defendant to play at baccarat, a legal consideration according to the law of France but not according to English law, it was held that English law as the lex loci solutionis must prevail, and that the cheque must be deemed to have been given for an illegal consideration, and Sec. 72 of the Bills of Exchange Act was, cuite correctly, not even mentioned. / In <u>De Béeche</u> - v - <u>South American Stores Ltd</u>. 1935 A.C. 148, and Kleinwort - v - Ungarische etc. Aktiengesellschaft 1939 2 K.B. 678 the issue is the illegality of a contract and the bills are only an incidental feature 7

In short, both principle and authority seem to show that essential validity is not comprehended by "interpretation", and accordingly the common law applies.

The application of the common law instead of the statute makes a difference when the issue is the essential validity of the acceptance of a bill. The kind of problem which is referred to here is whether acceptance may be restricted to part of the amount of the bill; or whether the holder is obliged to accept part payment. If the place of payment is different from the place of acceptance the application of the common law instead of the statute will make a difference, because according to principle, as we have seen, the law of the place of payment should govern.  $\angle$  Cp. Geneva Convention of 1930 on Unification of International Private Law relating to Bills and Promissory Notes Art. 7, and Geneva Convention of 1931 relating to cheques Art. 7 (4).

However/

However, when the issue is the essential validity of indorsements or transfers, it is submitted that the application of the common law instead of the statute does not make any difference. The appropriate common law rule is that a transfer of corporeal moveables is valid if valid by the law of the place where the transfer takes place;  $\angle$  Embiricos - v - Anglo-Austrian Bank, Alcock - v - Smith, supra. Since the place of transfer and the situs of the bill are in these cases the same, it can be said that the transfer of a bill is "governed" by the law of the place where the transfer takes place\_7 and in the case of inland bills where the question is the liability of the payer, according to the common law the contract of the acceptor is to pay to an order valid by the law of this country, and therefore an inland

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inland bill transferred in a foreign country in a manner invalid there, but which is valid here, is sufficiently transferred to make the payer liable to the indorser. De la Chaumette - v - Bank of England 1831 2 B. & Ad. 385; The reasoning of Lebel - v - Tucker, 1867 L. R.  $3_{\frac{2}{5}}$  Q.B. 77, is just as applicable to the essential validity as to the interpretation of an indorsement, In Alcock - v - Smith, supra, in which the essential validity of the transfer of an inland bill was held to be governed by the foreign law of the place of the transaction, the question did not arise as between the indorsee and the payer If this is governed at common law by the same principles as the "interpretation" of the indorsement of a bill is under Sec 72 (2) and the priviso thereto.

Where the issue is whether a bill has been given for an illegal consideration, if Moulis - v - Gwen 1907 1. K.B. 746 is correct, the application of the common law make a great deal of difference. A gave B a cheque in Algiers on an English bank in Moslis - v - Owen payment of money lent by B for play at baccarat in Algiers. The consideration for the cheque was legal according to French Law, but according to English Law a bill given for a gambling debt us given for an illegal consideration, which, according to English Law, invalidated it in the hands of the payee or a person taking with notice of the illegality of the consideration. In an action on the cheque itwos held that English law, as the lex loci solutionis, must govern, and that B could not recover. The illegality and the effect of the illegality, ware judged not according to the law of the place of drawing, which would, according to Sec 72(2), have governed the interpretation of drawing, but according to the law of the place where the allegedly illegal act would have taken effect, namely But this decision is very doubtful. Admittedly if a contract England. is illegal according to the lex loci solutionis it eennot be enforced, but England was not the locus solutionis of the contract of drawing, and delivering that cheque: Algiers was. French law was both the lex loci contractus/

The illegality and the effect of the illegality were judged according to the law of the place of payment of the cheque. But this decision is very doubtful. The law as to illegality in contract is that our Courts will not enforce an agreement which is illegal either by the law with which the contract has the most connection or the lex loci solutionis. There is also a presumption determining the proper law that when the locus contractus and the locus solutionis are different, the proper law is the lex loci solutionis. These principles applicable to contract have been misunderstood and misapplied in Moulis v. Owen. England was not the locus solutionis of the contract of loan and of the drawing and delivery of the cheque: Algiers was. Nor was English law the proper law: French law was. French law was the only law interested to say whether the contract between A and B of loan and of the drawing and handing over of the cheque was one in which the consideration was illegal, and if so, what was the effect of the illegality. Further, even according to English law, the consideration for the cheque was not illegal, for the English statutes were to the effect that bills given for gaming in England were given for an illegal consideration, but not hills given for gaming in a foreign country where it was perfectly legal.  $\angle$  See dissenting judgment of Fletcher Moulton L.J.; and Dicey & Pollock in 1907 23 L. Q.R. 249 The majority of the Court of Appeal assumed that in applying English law they were bound to suppose, in opposition to the real facts, that everything took place in England. But if English law is to be applied it should be applied to the facts as they exist and not to a supposed case of the contract having been made and the transaction having occurred in England. Zarthur Cohen in 1912 28 L.Q.R. pp. 129, 130./

That <u>Moulis</u> v. <u>Owen</u> is wrong appears from the anomalous position of English law as to gaming which it involves.

At common law in England gaming was not illegal. However statutes intervened. The statute 1710 9 Anne c. 14 provided that all bills securities etc. granted for a gaming consideration or for the reimbursement of any money knowingly lent for gaming should be void. As a result, in England, not only the bills etc. are void but the gambling/

gambling debts are too and cannot be recovered.  $\sum$  Quarrier v. Colston 1 Ph. 147; Carlton Hall Club Ltd. v. Laurence 1929 2 K.B. 1537 Now money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts. / Quarrier v. Colston, supra; Saxby v. Fulton 1909 2 K.B. 2087 But if a bill payable in England has been granted for the money, recovery can not be obtained supra\_/ although it can on the loan or debt itself. / Robinson v. Bland, supra; Societé Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart 96 L.J. (K.B.) 789\_7 Thus the absurd position is that the bill or security on the one hand and the consideration on the other are considered to be/intimately connected that in regard to transactions within England the statutes which make the bill or security void also make the consideration void, but in regard to transactions occurring abroad it is possible to separate the bill or security and the consideration and hold the former void but the latter valid. But if Moulis v. Owen is admitted to be wrong, and Robinson v. Bland on which it is founded and the cases which have followed them, <u>Touquet</u> etc. supra\_/ this inconsistency would disappear.

It is submitted that the law which should govern the questions whether a bill has been given for an illegal consideration and if so what is the effect of that, is the law with which the transaction has the nearest connection, which in <u>Moulis</u> v. <u>Owen</u> was the law of the place where the gaming took place and the cheque was handed over for the loan; and was the same law as would have governed the matter if "interpretation" had covered the issue and it had been governed by section 72 (2).

The words "subject to the provisions of the Act" indicate the other subsections of Sec. 72, sec. 57, which is about damages and is considered below, and Sec. 53, which is in these terms :- (1) "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This subsection shall not extend to Scotland. (2)/

(2) In Scotland, where the drawee of a bill has in his hands funds', available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee." / This is a saving of the Scots common law prior to the Act: Bell, Princ. § 315, 359; Stewart - v - Gelot 1871, 9. M. 1057, per L.J.C. Moncrieff at p. 1060; British Linen Bank - v - Carruthers 1883 10 R. 9237 A bill drawn in England on a drawee in Scotland would, but for the words "subject to the provisions of this Act", be interpreted according to the law of England, as the law of the place where the drawing was made, and so the draft would not operate as an assignment of funds in the hands of the Scottish drawee; but because of the inclusion of those words, sec. 72 (2) must be read subject to Sec. 53, and whenever the drawee is in Scotland the drawing will have the effect of assigning the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee. In France the rule is similar to that in Scotland, namely that when the drawee has funds, drawing a bill operates as an assignment of them in favour of the holder, / Chalmers p. 210\_/ but the drawing of a bill in England on a drawee in France does not have the effect of assigning the funds, because according to Sec. 72 (2) the interpretation of the drawing must be according to the place where the drawing was made, and no exception to this rule in the case of France is contained in the Act.

Law, which will not do. See "The Law of a Country" p Dicey Feloritidge for the Act must be held to mean what its says and not what it should have said.

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Holders'

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The Act states that" The duties of the holder, with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured".  $\int \sec 72(3)$ 

This ambiguous section is probably to be construed, as Dicey says, reddendo singula singulis. Dicey p 710 "The duties of the holder with respect to presentment for acceptance or payment" refers to the law of the place "where the act is done" and " the necessity for or sufficiency of a protest or notice of dishonour, or otherwise" refers to the law of the place where "the bill is dishonoured" The section therefore says that the duties of the holder with respect to the presentment for acceptance of payment are determined by the law of the place where the bill should be accepted or paid; and the necessity for or sufficiency of a protest or notice of dishonour or otherwise are determined by the law of the place where the bill is In short the lex loci solutionis governs. [Dicey ibid; Falconbridge, ff. 907,908.] dishonoured. Cheshire p.p 291,2; Foote pp. 460,461; Elder - v - Young 1854 170.56; Welsh - v - Milne 1844 7.D. 213; Bank Polski - v - K.J Mulder & Coy 1941 25 K. B. 266, 1942 15 K. B. 497;, also cases cited below. Contra Cornelius - v - Banque Franco-Serbe 1941 1g K.B. 29 per Stoble J. at p. 32]. This is not an example of legislative stupidity where three events ----- presentment, protest, and notice of dishonour---are referred to two legal systems --- the law of the place where it is done, and the law of the place where the bill is dishonoured which. without saying how the two systems are to be distributed between the three events, but as Cheshire says, an example of lack of legislative clarity where the three events are referred to one system, which however

is/

is described in two ways, because to describe it as "the law of the place where the act is done, or should be done," is more appropriate to presentment for acceptance or payment, and not the law of the place where the bill is dispondured " is more appropriate to protest and notice of dishonour.

The text writers however, are far from agreedas to the meaning to be placed on the section. Westlake considers, "In case of failure by the drawee to accept a bill of exchange, or of failure in payment by the acceptor, the necessity and sufficiency of demand, protest, or notice of dishonour, by the last holder, in order to charge any other party to the bill or note, is determined by the law of the place where it is payable. 5231 And he considers that when an indorser has been made duly liable on a bill, the notice that he must give to his indorser, or to the drawer if there be no intermediate party, depends on the law governing the contract made by the indorsement to him or by the drawing. [\$232]A certain amount of support for this view can be obtained from the wording of the section; it commences by talking of the duties of the holder with respect to presentment for acceptance or payment, and which can only be done by the last holder; therefore, it is plausible view that "holder" means "last holder" and when the section goes on to talk about the necessity for or sufficiency of a protest or notice of dishonour, it is still referring to the last holder.But Horne - v - Rouquette (1878) 3g Q.B.D. a decision prior to the Act on which Westlake mainly relies, 5141 does not help him in the way he claims. In that case a bill of exchange, payable in Spain, was indorsed by A to B in England, and then by B. to C. in Spain. Acceptance having been refused in Spain, C delayed for twelve days before informing B of the dishonour. B immediately gave notice to A. No notice of dishonour by non-acceptancewas required by Spanish Law. It was held that the contract of indorsement by B to C had to be construed according to the law of the country in which it was made, namely Spain, and that since there was no need for hotice

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according to Spanish Baw, Buns liable to Cf: and that B being liable to C, Bwins entitled to recover from A, to whom he had given due notice according to the English law, that was the law which governed the contract between Acad B. This case decided that the question whether notice of dishonour had to be given, and if so how, was a matter relating to the construction of the contract of indorsement, and was to be governed by the law of the place where such contract was made. It proceeds on the rule which was later laid down in Sec 72(2) of the Act, that the interpretation of an indorsement is determined by the law of the place where the contract Now since the necessity for or sufficiency of indorsementwis made. of a protest or notice of dishonour is given a subsection by itself, namely 72(3), one presumes that this subsection says something different from The section is probably intended to embody the effect of the decision in Hirschfield & v - Smith, 1866 L. R. 1gC.P. 340 but avoiding the tortuous and unsatisfactory ratio of that case. A bill had been drawn in England and accepted by the drawee in France, payable in France. The defendant indorsed and delivered it to the plaintiff in England , and he indorsed and delivered it to a Banker in France for presentment. The bill was presented and dishonoured. The last holder protested and gave notice of dishonour to the defendant according to the formalities and within the time prescribed It was held that this was good notice. by French law. Now this decision is really to the effect that the lex loci solutionis governs the necessity for or sufficiency of notices of dishonour. But the Court, desiring to be consistent with the rule that a contract of indorsement is to be interpreted according to the law of the place where the indorsement is made, which is now embodied in Sec 72(2), argued thus: even though the contract of an indorser in England of a bill accepted payable in a foreign country is a contract to be governed by the law of England, and so the holder

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cannot sue such indorser unless he has given due notice of dishonour according to the law of England, nevertheless the law of England is that such notice must be given as can reasonably be required in the circumstances, and so notice valid according to the law of the place where the bill is payable ought, unless the case is exceptional, to be deemed due notice according to the law of England. The rule that an indorsement has to be interpreted according to the law of the place where it is made, has now been separated from the question of dishonour etc. by being treated in a different subsection, and this insatisfactory reasoning is not now necessary. Sec 72 (2) says that the interpretation of the indorsement is determined by the law of the place where it is made, and 72(3) that the duties of the holder with regard to notices of dishonour etc. are governed by the lex loci solutionis. Section 72(3) is simply prescribing the lex loci solutionis to govern the duties of the holder with regard to notices of dishonour etc. as 72(4) and 72(5)prescribe the lex loci solutionis to determine rate of exchange and date of payment respectively.

The contract that a party transferring a bill for value makes with the transferee is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by acceptance . His liability is therefore to be measured by that of the acceptor, whose surety he is, and as the obligations of the acceptor are to be determined by the lex loci of performance, so also must those of the surety. Rouquette- v - Overmann 1875, L.R. X.Q.B. 525 per Cockburn C.J. at pp 536,7 The obligations of the acceptor are to pay on presentment and protest being made according to the lex loci solutionis, and because the obligations of the sureties are to pay on notice of dishonour according to the lex loci solutionis. " It is at least reasonable to presume that these incidents of non-payment will be governed by the same law which applies to all the

incidents/

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of payment" Foote pp. 460 -1

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A final argument for the <u>lex loci solutionis</u> is to consider the problem confronting a holder, other than the last holder, who, after havin being made liable on the bill, wants to obtain recourse not only against the person who indorsed to him, but against all prior holders . According to the view adopted here of the meaning of 72(3) he should protest and give notice of dishonour according to the <u>lex loci solutionis</u>, but Westlake's view leaves the possibility open that he would have to protest and give notice according to the law of the place of each indorsement, which would be an unreasonable requirement. [ Which should be done is expressly said to be still an open question in <u>Horne - v -</u> <u>Rouquette</u>, supra, ----- see concluding sentence of judgement of Cotton L.J. ------ and according to Westlake is an open question<sub>s</sub> even since the Act i § 232. It would be very odd if 72(3) merely provided what has already been provided in 72(2) and did not deal with this supposedly outstanding question

Amount expressedWhere a bill is drawn out of but payable in the United Kingdom,in foreignand the sum payable is not expressed in the currency of the UnitedcarrencyKingdom, the amount shakl, in the absence of some express stipulation, be<br/>calculated according to the rate of exchange for sight drafts at the<br/>place of payment on the day the bill is payable. [Section 72(4+)]When a bill is drawn in the United Kingdom, payable in a foreign<br/>currency, the amount is also calculated, in the absence of some express

stipulation, according to the rate of exchange at the place of payment on the day the bill is payable. <u>Uliendahl - v - Pankhurst Wright & Co</u>. 1923, 39; T.L.R. 628; <u>Peyrae - v - Wilkinson 1924.</u> 2. K. B. 166; dissenting from <u>Cohn - v - Boulken 1920</u>, 36; T. L. R. 767.]

Where a bill is drawn in one country. and  $\int_{\Lambda}^{15} payable in another, the due date thereof is determined, according to the law of the place where it is payable. [Section 72(5)]. There may be a difference between the calendars used in the place of drawing, and those used in the place of$ 

DATE

DUE

payment: if so, a date expressed in a bill means that date according to the calendar of the place of payment. If days of grace are allowed by the law of the country where a bill of exchange is payable, but not by the law of the country where it is drawn, the payment of the bill is deferred until the expiration of the days of grace. and if vice versa, the payment is not deferred. / Rouquette - v - Overmann, 1875, L.R. X.Q.B. 525 per Cockburn, C.J. at p. 535 / If a day is a legal holiday in the place of payment but not in the place of drawing, the question whether it is counted in computing the days of grace is determined by the law of the place of payment. / Falconbridge pp.910, 911 7 When a bill is payable in a foreign country, and emergency legislation of that foreign country enlarges the time within which bills are payable, the bill is not due until the period prescribed by the foreign legislation has elapsed, even in a question with a drawer or indorser in this country. / In re Francke & Rasch (1918) 1 Ch.470; Rouquette - v - Overmann, supra 7

DAMAGES

Section 57 of the Act deals with damages in the event dishonour. Subsection (1) of Sec. 57 provides that damages shall be the amount of the bill, interest, and the expenses of noting and necessary In re English Bank of the River Plate, (1893) 2 Ch. 438 7 protest. Subsection (2) provides that in the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him the amount of the re-exchange with interest thereon until the time of payment. Re-exchange is the sum for which a sight bill, drawn at the time and place of dishonour at the then rate of exchange on the place where the drawer or indorser sought to be charged resides, must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its Chalmers p. 226 Z Subsection (1) deals with bills dishonour. dishonoured at home, and subsection (2) with bills dishonoured abroad. / In re Gillespie, ex parte Robarts, (1886) 18 Q.B.D. 286, per Lindley L'.J. at p. 292 / Subsection (1)/

Subsection (1) however does not apply to a foreign bill, which has been drawn and issued abroad and dishonoured in this country, and as subsection (2) does not apply to that case either, such a case is not covered by the Act, so the rules of common law governs, Falconbridgep813. Contra Dicey p. 714 /In re Gillespie supra; and see In re English Bank of the River Plate supra 7 The relevant common law rule is that the holder of a bill may recover damages at the rate payable by the law of the place in which the party sought to be charged has contracted to pay the bill. / Falconbridge pp.909, 910; In re Gillespie, supra; In re Commercial Bank of South Australia (1887) 36 Ch. D. 522. Cestlake \$234 7 Thus when a bill was drawn in Australia on London, negotiated in Australia, and dishonoured in London when presented for acceptance by the Australian holder, the damages for which the drawers were liable to the holders were determined by the law of the place where the contract between the drawers and holders was entered into, namely Australia. / In re Commercial Bank of South Australia, supra 7 If the drawer has been made liable in foreign damages to an indorsep, he is entitled to recover what he has paid from the acceptor in this country who has dishonoured, notwithstanding that this sum is more than, 57 (1) allows. / In re Gillespie, supra 7

When a bill of exchange has been dishonoured abroad the only damages which the holder can recover are those provided by subsection (2), and he has no option to sue for interest under subsection (1). <u>In re Commercial Bank of South Australia</u>, supra\_7

A cheque is a bill of exchange drawn on a banker payable on demand, and except as otherwise provided in Part 111. of the Act, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. <u>Section 73\_7</u>

Subject to the provisions of Part IV of the Act, the provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. <u>Section 89 (1)</u> The maker of a note shall be deemed to correspond with the acceptor of a bill, and/

CHECHES

Promissory Notes the drawer of an accepted bill payable to drawer's order. Zection

89. (2) <u>7</u> But the provisions as to bills relating to presentment for acceptance, acceptance, acceptance supra protest, and bills in a set do not apply. <u>Section 89 (3)</u> <u>There a foreign note is</u> dishonoured, protest thereof is not necessary. <u>7</u> Section 89 (4) <u>7</u> Section 22 (1) provides: "Capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is comp**letent** to it so to do under the law for the time being in force relating to corporations."

---- This probably only applies to a question of capacity when it has been determined that our law is the law which governs, so it does not assist the problem of the choice of law in regard to capacity, which is not dealt with in the Act. The common law therefore governs in view of section 97 (2), and the lex loci contractus is applicable to capacity in regard to bills of exchange, as with other mercantile contracts. / See Capacity p. ; and Chalmers p. 71; Falconbridge pp. 911, 912 / If the rule is correct which was tentatively suggested in regard to mercantile contracts generally, \_\_\_\_ that the capacity of corporations can only / See Capacity p. be determined by reference to the law under which the body was incorporated, the same result is arrived at by applying the common law rules of International Private Law by virtue of section 97 (2) as would be arrived at by regarding section 22 (1) as applying to the choice of law and not to cases to which our own law is applicable.

Discharge

Capacity

The discharge of an obligation on a bill is not dealt with in the Act, and so the common law applies.  $\_$  Dicey p. 714 n. (**L**). Contra Chalmers p. 285\_7 An obligation on a bill like any other contract is discharged if discharged according to the proper law, otherwise not.  $\_$  Ralli v. Dennistoun 1851 6 Ex. 483. See Contract p. and Bankruptcy p. where many of the authorities cited are concerned with bills.

#### QUASI - CONTRACT

Quasi-contractual obligations are obligations which are similar to contractual obligations, but which arise not from contract but from operation of law.

The obligations arising from <u>negotiorum gesti</u>, the obligation to restore money paid in error, and the obligation of recompense, <u>[Bell</u>, Frinc. § 538\_7 will be governed by the law with which the transaction has most connection; <u>[Westlake § 235;</u>] the obligation to restore money which has been paid in advance for a consideration which has not been received, by the proper law of the contract under which it was paid; the obligation to restore goods which have been stolen or found, <u>[See Todd v. Armour</u> 1882 9 R. 901\_7 and the obligations which arise from vitious intromission with the effects of a deceased person, <u>[Dingwal v. Vandosme</u> 1619 Mor. 4449; <u>Archbishop of Glasgow v. Bruntsfield</u> 1683 Mor. 4449\_7 by the law of the place where this took place.

General Average

When a voluntary sacrifice is made of the ship or cargo or part of either for the safety of all concerned in the maritime adventure, all the interests concerned, namely the owners of the ship, cargo, and freight, have to bear a rateable proportion of the loss. This quasi-contractual obligation, which has its origin in the Lex Ehodia de iactu, and was recognised in the civil law,  $\sum Digest$ , XIV, 2, 1,  $\sum And$  has formed part of all maritime codes since,  $\sum_{h}^{bat}$  with slight variations. International agreement on a common code for general average, which is known as the York-Antwerp Rules, was arrived at in 1864, and the Rules were revised in 1890 and 1924.  $\sum$  For the Rules see Carver, Carriage by Sea, Appendix C\_7 The York-Antwerp Rules differ slightly/

slightly from the law of this country, and have not been made part of it. The Rules are commonly adopted in bills of lading. According to the 1890 Rules. "Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice which would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules;" / Rule XVIII of 1890 Rules 7 but the 1924 Rules were intended as a complete code, and accordingly where they are adopted there will be no conflict of laws, but only a question of the construction of the Rules for the Court seised of the matter. / Vlassopoulos v. British and Foreign Marine Insurance Company 1929 1 K.B. at p. 195 per Roche J. 7 Where the Rules have not been adopted by contract between the parties, the following principles apply as to choice of law.

Average adjustment must be made according to the law of the port of destination, or, if the voyage has terminated at another port as a result of agreement or necessity, according to the law of the port where the voyage terminated. / Simonds v. White 2 B. & C. 805; Lloyd v. Guibert 1865 L.F. 1 Q.B. per curiam at p. 126; Hill v. Wilson 1879 4 C.P.D. 329; Fletcher v. Alexander L.R. 3 C.P. 375; Vlassopoulos, supra; Messina v. Petrococchino 1872 L.R. 4 P.C. 144; Dicey Rule 168; Carver, Carriage by Sea, §427\_7 Although average adjustment must be done according to the law of the port of destination or termination of the voyage, there is no necessity for it to be computed by an average adjuster at that port. [Wavertree] Sailing Co. v. Love 1897 A.C. 373\_7 To/

To hold that the voyage was rightly terminated by necessity at an intermediate port, circumstances must have occurred which were beyond the control of the parties, and such as rendered the completion of the voyage on the terms originally agreed upon physically impossible, or so clearly unreasonable as to be impossible in a business point of view; / Hill v. Wilson, supra, per Lindley J. at pp. 333, 4 7 such as the loss of the ship, or the ship being so damaged that repairs would take an unusually long time, <u>Mavro v. Ocean Marine Insurance Co. 1875 10 C.P. 414 7</u> or the greater part of the cargo being lost at the inception of the voyage and the remainder not being worth taking on. / Fletcher v. Alexander, supra, per Bovill C.J. at pp. 382, 3\_7-------- The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not warrant an average adjustment at that port. / Hill v. Wilson 1879 4 C.P.D. 329 7

It has been said that it does not necessarily follow that an underwriter of ship, cargo or freight, upon an ordinary form of policy, would be liable for the average so adjusted at a foreign port, <u>Harris</u> v. <u>Scaramanga</u> 1872 7 C.P. 481 per Bovill C.J. at p. 488\_7 but this difficulty is superseded by the inclusion in policies of a clause "to pay general average as per foreign statement", which makes the underwriters liable for whatever the insured has to pay according to foreign average adjustment. <u>Harris</u> v. <u>Scaramanga</u>, supra; "<u>The Mary Thomas</u>" 1894 P. 108; <u>De Hart</u> v. <u>Compania</u> <u>Anonima de Seguros Aurora</u>, 1903 2 K.B. 503; <u>Mavro</u> v. Ocean Marine Insurance Co. 1875, 10 C.P. 414\_7

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Salvage

The apportionment <u>Salvage</u> of salvage among the owners, master, pilot, crew, and other persons in the service of any foreign vessel, shall be in accordance with the law of the country to which the vessel belongs.  $\sum$  Maritime Conventions Act, 1911 sec. 7, 1 & 2 Geo. 5, c. 57.7

Contribution between co-insurers

In one English case the question of contribution between co-insurers was dealt with by the Court according to the lex fori :- An American Insurance Company and English Underwriters both insured an American firm. The proper laws of the contracts of insurance were American and English respectively. The American Company paid most of the amount of a claim and sued one of the English Underwriters for The English Court applied English contribution. American Surety Co. of New York v. Wrightson law. 1910, 16 Com. Cas. 37\_7 It is submitted that it would be sounder to apply the law of the place where the property insured is situated.

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### The Situs of Moveables

It is obvious that corporeal moveables have a situe, and the situe of a bale of cotton is a proc substion of fact. [As to the situe of goods at sea, see North Western Bank v. Poynter Son ? Mac-<u>donalds</u> 22 R.(H.L.) 1; <u>Inglis v. Robertson & Baxter 1898 25 R.</u> (H.L.) 70 per Lord Watson at pp. 73,4. ] In Corporal moveable such as febts and shares do not in fact have a situe, but it is necessary in law to attribute a situe to such intengible assets.

Stooks, shares, patents and trade-marks are situated where they can be affectually dealt with. In the case of stocks and shares this is where the register of members is kept. Attorney Ceneral V. Higgins 2 H.AN. 339; Braesard V. Smith 1925 A.C. 371; London & South American Investment Trust Ltd v. British Tobacco Company (Australia) Ltd 1997 1 Ch. 10"; Baelz v. Public Trustee 1928 Ch. 883 Thus England was held to be the situs of the shares of a company which carried on all its administrative work in Wolland, which was its residence for the purpose of the Income Tax Acts, and which only had its register of members at the registered office attuated in England. | Baolz v. Public Trustee, supra | British government stocks are not English or Scottish, but British, and the fact that they are registered at the Bank of England does not give them a local situation in England, and therefore they are held as being situated in that part of the United Kingdom where the question concerning them is being litigated . Cunninghame's Trustees 1924 S.C. 581; Drysdale's Trustees 1922 S.C. 741; Contra Egerton v. Forbes Nov. 27th 1812 F.C. ]

Debts are situated at the place where they are properly recoverable, that is in the residence of the debtor, where the he debtor can be sued. [<u>New York Life Insurance Co. v. Public</u> <u>Trustee 1924 2 Ch. 101; Lerentzen v. Lydden 1942 2 K.B. 202 per Atk</u> kinson **J.** at p. 205; <u>Republic of Guatemala v. Nunez</u> 1927 1 K.B. 669; <u>in re Maudslay Sons & Field</u> 1900 1 Ch. 602 If the debtor is a corporation having branches in different countries, it has more than one place where it can be sued, but in that event the terms of the contract are locked at to determine from it at what place the debt would be recoverable; so that an insurance policy, expressed to be payable at the London branch of an insurance company whose head office was in New York, was situated in London and not New York; [<u>New York Life Insurance</u> <u>Co.</u>, supra] and the debt due by a bank to a customer is situated at the branch where the customer has his account, and where alone he can demand payment. [<u>Richardsonv. Richardson</u> 1927 P. 228; <u>CLare & Co. v. Dresdner Bank</u> 1915 2 K.B. 576]

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# Assignments of Moveables

In dealing with the validity of assignments of moveables, the questions which arise may be divided into three categories:

(1) The assignability of the moveable.

(2) The capacity of the cedent to assign, or of the assignee to accept, an assignation.

(3) The formal and essential validity of the assignment.

(4) The meaning and legal effect of the assignment (6) against the original debtor, (b) between the cedent and assignee or a third party relying on the assignee's title, and (c) as regards the rights acquired by the assignee.

(1) The assignability of the moveable,. The nature of a fund, as transmissible or not, is determined by the law of the situs of the fund. [Grant's Trustees v. Ritchie's Executors 1886 13 R. 646; Knill v. Dumergue 1911 2 Ch. 199. It is submitted that in <u>Pender v. Commercial Bank of Scotland Ltd</u>. (0.H.) 1940 S.L.T. 306, the insurance policy there in question was situated in England, English law should have applied to determining the assignability of the policy, which was the only real question in the case, there being no question of capacity or validity of an assignation, and the policy should have been held to be transmissible.] But a bond does not acquire the quality a function which the property and all rights under it pass to a bona fide holder for value by mere delivery, and in his hands is free from all defects of title or defences which would have been

available against a prior holder) ) merely by being a negotiable instrument in the country where it is issued and is payable. Thus bearer bonds issued by the Prussian government, which were negotiable instruments in Prussia, but not so by English mercantile usage, were held in the English Court of Appeal not to be negotiable instruments in England when the question was the title of an English Bank, who had become bona fide holders for value, against the ewner, from whom they had been stolen. <u>Picker</u> v. Lendon & County Banking Co. 1887 18 Q.B.D. 515 ] But with Lendon & County ity the English Courts have held that an instrument issued and payable in England which is a negotiable instrument by English law, though not by French law, will pass to a bona fide holder for value, giving him a perfect title, by delivery to him in France. De la Chaumette v. Bank of England 1831 2 B.&Ad. 385

## (2) Capacity

The general rule is that capacity in regard to mercantile contra -acts is governed by the lex loci contractus, and in non-mercantile transactions by the law of the domicile of each party. | See 'Capacity'p. There is no authority that requires `that a different principle should apply to assignments: the capacity of the cedent and assignee in a mercantile assignment ( e.g. a sale ) will therefore presumably be governed by the lex-leet-centractus law of the place of assignment, and in the case of other assignments ( e.g. gift ) by the laws of the domicile of the cedent and assignee respectively. In <u>Republic of Guatemala</u> v. <u>Numez</u>, 1927 1 K.B. 669 which related to a non-mercantile assignment, one of the questions was the capacity of the assignee to receive a gift. By the law of his domicile, Guatemala, which was also the place of the assignment, he had no such capacity, and in the employed and the employed and the second s "Court of Appeal Scrutton & Lawrence L. JJ. decided that the law of Guatemala had to apply, and that he had no such capacity, and that the gift was invalid. These learned judges did not decide whether the law of Guatemala was applicable as the law of the assignee's domicile, or the law of the place of the assignment, but on general principles it is submitted that it was applicable as the law of the domicile. Had the assignment been a mercantile one \$ it would have been applicable as the law of the place of assignment In Lee v. Abdy 1886 17 Q.B.D. 309 the rule of South African law which rendered the assignment invalid was probably one of capacity - although the information as to South African law was so scanty that it is difficult to spay what kind of rule was involved

- and if so, the decision in that case was similar to that in <u>Republic of Guatemala</u> v. <u>Numez</u>, namely that an incapacity by the law which is the law of the domicile of the assignee and also the law of the place where the assignment was made invalidates a non-mercantile assignment.

(3) Formal and Assential calidity of resignments Incorporeal An assignment of incorporeal moveables is valid if Moveables validly made (1) according to the law of the situs of the incorporeal moveable: Republic of Guatemala v. Nunez 1927 1 K.B. 669, per Lawrence L.J., contra Scrutton E.J.; Creditors of York Buildings Co. 1783 Mor. 4472; Dicey Rule 153; Contra Les v. Abdy 1886 17 Q.B.D. 309) Taylor v. Hill 1847 9 D. 1504, and In re Anziani 1930 1 Ch. 407 or (2) according to the law with which the assignment has most connection, that is usually the law of the place where the assignment was made; | Scottish Provident Institution v. Cohen 1888 16 R. 112; Falconer v. Heirs of Beatie 1627 Mor. 4501; Sinclair v. Murray 1636 Mor. 4501; Erskine v. Ramsay 1664 Mor. 4502; Scot v. Toish 1676 Mor. 4502; Great Northern Railway Co v. Laing 1848 10 D. 1408 | er, (3) in the case of a voluntary universal assignment, such as a voluntary trust deed for creditors, according to the law of the domicile of the cedent; | Dulaney v. Merry 1901 1 Q.B. 536; Sill v. Worswick 1 H.Bl. 665 per Lord Loughborough at p. 690; Dicey pp. 621, 622 | and otherwise is invalid: provided that if there is any question that intimation or registration or other formality is required to complete a real right to the incorpercal neveables, the questions whether such registration or intimation is necessary to the acquisition of a real right, and whether sufficient registration or intimation has been made, are governed by the law of the situs of the incorporeal moveables. Donaldson v. Findlay Bannatyne & Co 1855 17 D. 1053; Connal & Co. v. Loder 1868 6 M. 1095 - Lord Justice Clerk Patton regarded the obligation there as a ius incorporale; Carrick v. Dickie 1822 1 S. 447(new ed. 485); Strachan v. McDougle 1835 13 S. 954; Gray v. Selkirk 1708 1 Rebertson's Appeals 1; Kelly v. Selwyn 1905 2 Ch. 117; In re Queensland Mercantile & Agency Co. 1892 1 Ck. 219; In re Maudslay Sons & Field 1900 1 Ch. 602. Centra Wallace v. Davies 1853 15 D. 688, per Lord Ordinary Rutherford: the question was reserved in the Inner House.

The first proposition is that an assignment of incorporeal meveables is valid if validly made according to the law of the situs and seems obvious: a Scottish insurance policy or an interest in a Scottish trust can be assigned in the Scottish form, no matter where the assignation is made. It is submitted that if Tayler v. 1847 9 D. 1504 is an authority to the centrary, it was Hill wrongly decided. Lord President Boyle in that case considered that an assignment valid by the lex situs, Scotland, but invalid by the law of the place of assignment, England, must be invalid, because if held valid and the debtor had to pay the assignee, the debtor might be sued again by the cedent in England. But the English Courts are bound by the principles of International Law and would, if the cedent sued there, have to recognise an assignment valid by the lex situs; and further, since the lex situs is, by definition, the place where the debt is recoverable, that is the forensic domicile of the debtor, it is unlikely that the cedent would ever have an opportunity of suing the debtor in the English Courts, In Lee v. Abdy | 1886 17 Q.B.D. 309 an English case which also seems contrary to this proposition, it is not certain, because of the scanty statement of the foreign law, that the rule of the foreign law was a rule about the essential validity of an assignment: it was possibly a rule about capacity, in which case the decision is unexceptionable, and irrelevant to this issue.

The second proposition is that a Scottish insurance policy can also be assigned in a foreign country according to the law of that country. Thus where it was shown that by English law a deposit of a policy in security of a loan operated as an assimment, such a deposit made in England was held a valid assignment of a Scottish policy, although the mere deposit of the policy without a written assignation would not have had that effect in Scotland. <u>Scottish</u> **Provident Institution v. Cohen, supra** 

The third proposition is that a voluntary universal assignment, such as a voluntary trust deed for creditors, is valid if valid by the law of the domicile of the cedent. An assignment of a particular meveable fund according to the law of the domicile of the owner would not, it is submitted, <u>eo ipso</u> be valid, although there are <u>dicta</u> to that effect. [Liverpool Marine Credit Co. v. <u>Hunter</u> 1868 L.R. 3 Ch. 479, per Lord Chelmsford L.C. at p. 482] A judicial bankruptcy dees not need to be by the Courts of the domicile of the bankrupt in order to be valid. [See 'Bankruptcy']

The proviso is necessary because a real right to moveables can never be acquired except by satisfying the lex situs as to the acquisition of a real right, and although an assignation may be a valid assignation if in accordance with the law of the place where it was made, as where the deposit of a Scottish insurance policy was a valid assignation because done in England where that was a valid assignation, such assignation does not confer a real right if something more has to be done by the lex situs for the acquisition of a a real right, such as the intimation of the assignation, not even if no intimation is necessary by the law of the place where the assig nation was made. Suppose the creditor of a debt situated in Scotland assigns it in country X to A, by an assignation valid according to the law of country X. If, after the assignation, but before A intimates it to the debtor, B arrests the debt in Scotland, B has the first completed real right to the debt, and will be preferred to it; nor will it avail A to say that by the law of X, where the assignment to him was made, there was no need of intimation. Strach an v. McDougle 1835 13 S. 954; Donaldson v. Findlay Bannatyne & Co. 1855 17 D. 1053; In re Queensland Mercantile & Agency Co. 1892 1 Ch. 219; In re Maudslay Sens & Field 1900 1 Ch. 602. Centra Lord Ordinary Rutherford in Wallace v. Davies 1853 15 D. 688 When the incorporeal moveables are situated in one country and the assignation takes place in another, if something more than an assignation is required by the law of the situs to transfer the real right, the assignation is a valid personal contract between the cedent and the assignee, by which the cedent is bound, so that he cannot compete with the title of the assignee; and can be called upor to do any acts which may be necessary to complete the assignee's tit. to the real right; Dicey p. 625; if nothing more requires to be dene according to the lex situs to complete a real right, an assignment valid according to the law of the place of assignment, or, in the case of a voluntary universal assignment, according to the law of the domicile of the cedent, would be a completely effective assignment as against the whole world. | Dulaney v. Merry 1901 1 Q.B. 536

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Corporeal moveables are subject to similar rules. An Corporeal assignment of corporeal meveables is valid if validly Moveables made according to the law of the situs of the corporeal moveables; Tedd v. Armour 1882 9 R. 901; Valery v. Scott 1876 3 R. 965 per Lord President Inglis at p. Oyy; Dicey Rule 152 | whether made in the situs or elsewhere; or according to the law with which the assignment has most connection, that is usually the law of the place where the assignment is made: Alcock v. Smith 1892 1 Ch. 238 provided that if there is any question that delivery or notice to the custodier is required to complete a real right to the corporeal moveables, the questions whether such delivery or notice is necessary to the acquisition of a real right, and whether sufficient delivery or notice has been made, are governed by the law of the situs of the corporeal moveable. Connal & Co. v. Loder 1868 6 M. 1095; Inglis v. Robertson & Baxter 1897 24 R. 758, Affd. 1898 25 R. (H.L.) 70 ] The question whether registration of the bill of sale of a ship is required to complete the transfer of the real right te the ship, is governed by the law of the flag of the ship. ( Schult v. <u>Rebinson</u> 1861 24 D. 120

In the transfer of corporeal moveables, the country where the moveable is situated is very often the same as the country where the transfer took place, and obviously a transfer valid according to that law is valid. Thus when a horse was stolen in Ireland and sold in market overt there, by which, according to the law of Ireland, a valid title was given to the purchaser, it was held that the purchaser had a valid title and that the owner could not succeed in an action for delivery of the horse which he had brought in the Scottish Courts; I Todd v. Armour, supra, But see Freeman v. East India Co. 1822 5 B& Ad.Ald. 617 ) Again, when a cheque was stolen and the theef forged the holder's signature in an indorsement tot a party in Austria and handed the cheque to that party in Austria, and by Austrian law the indersee had a good title to the cheque, that title was upheld in the English Courts, although the law of England, where the cheque was payable, was to the effect that no right to a cheque could be obtained through a forged signature. Embirices v. Anglo-Austrian Bank 1905 1 K.B. 677 | In these cases it is difficult to say whether the lex situs or the lex loci actus governed. (, The Directors of the Coty Bank v. Barrow 1880 5 A.C. 664; Cammell v. Sewell 1858 3 H.&N. 617 & 1860 5 H&N 728; in Alcock v. Smith, supra, too, although the judges said that the lex loci actus should govern, the lex loci actus and the lex situs were the It seems obvious however, that a transfer valid by the same ) lex situs is valid, and it seems from Inglis v. Robertson & Baxter | supra | and from analogous cases which deal with incorporeal moveables, [q.v.] that when the goods are situated in one country and the transfer takes place in another, a transfer valid by the law of the place of transfer is, if nothing more is required by the lex situs to complete a real right, a valid transfor, and if something more is required, will always be valid as between the parties to it and a good contract to transfer The proviso is illustrated by cases where goods situated in Sectland, have been assigned in England by endorsement of the delivery warrant granted by the Scottish storekeeper, and the goods have been arrested in Scotland before the assignee has intimated his right to the storekeeper as required by Scots law for the transfer of the real right: the arrester obtains the first real right the goods, and in a competition between him and the English assignee is preferred to the English assignee, even although intimation is not required by the law of England. [Inglis v. Rebertson & Baxter, supra]

The situs referred to in all the above principles is the situs at the time of the assignment in question. Intimation to the debtor, a Scotsman them residing in England, according to English law, was a valid transference of the real right in the debt to the assignee, so that a creditor of the cedent could not arrest the debt in the hands of the debtor when he came to Scotland.  $\int Gray v. Selkirk$  1708 1 Robertson's Appeals 1

Bills of - Bills of Exchange are subject to the same rules as other Exchange corporeal moveables, in so far as not covered by sec. 72 of the Bills of Exchange Act 1882, so that a transfer is valid if valid by the law of the place where the transfer was made. Embiricos v. Angle- Austrian Bank 1905 1 K.B. 677; Keechlin v. Kestenbaum 1927 & K.B. 889; Alcock v. Smith 1892 1 Ch. 238 The situs of a bill is the place where the piece of paper which forms the bill is situated and not the place of payment of the bill. Since the place of transfer and the situs at the time of transfer are the same in these cases, it can be said, as the cases do say, that the transfer of a bill is governed' by the law of the place where the transfer takes place. There is an exception in the case of inland bills where the question is the liability of the payer: an inland bill, transferred in a foreign country in a manner invalid there, but which is valid here, is sufficiently transferred to make the acceptor liable to the

inderser. De la Chaumette v. Bank of England 1831 2 B & Ad. 385; Lebel v. Tucker 1867 L.R. 3 Q.B. 77

A foreign bill, however, even one payable in this country, is subject to the normal rule: so that a bill drawn in France and accepted in England, which is indorsed in France in a manner which is invalid there, but would have been valid here, is validly transferred. [Bradlaugh v. De Rin 1868 L.R. 3 C.P. 538] Negitiable A negotiable instrument is one in regard to which the

instrupenperty and all rights under it pass to a bona fide holder for value by more delivery, and in the hands of a bona fide holder for value is free from all defects of title and defences which could have been urged against prior holders. The rules applicable to the transfer of corporeal moveables apply. The situs of such an instrument is the place where the actual paper instrument is situated, and the situs and the place of transfer are the same, so it can be said that the validity of a transfer is governed by the law of the place of transfer. [Alcock v. Smith 1892 1 Ch. 238 ( bill payable to bearer )]

An instrument is a negotiable instrument if it is so regarded by the law of the situs and place of transfer, and the character of an instrument as negotiable or not is not taken from the law of the country where the instrument was issued and is payable.  $\left[ \begin{array}{c} \underline{\text{Picker v. London & County Banking Co. 1887 18 & Q.B.D. 515;}\\ \underline{\text{Goodwin v. Robarts 1876 L.R. 1 A.C. 476 per Lord Selborne at}\\ p. 2496. Contra De la Chaumette v. The Bank of England 1831$ 2 B & Ad. 385 - see'Assignability of the Moveable; supra

(4) The meaning and legal effect of the transfer.

(a) Against the original debtor.

The rights of the debtor, for example a right of retention or stoppage in transitu, and the liabilities of the debter are always determined by the law governing the contract between him an the original creditor. (<u>McNaughton v. Baird</u> 1852 24 J. 623; <u>Inglis v. Usherwood</u> 1801 1 East. 515; Dicey Rule 153 Retention

and lien

may be made ex contractu, when the proper law of the contract governs, or ex lege, when the law of the situs governs. In McNaughton v. Baird | 1852 24 J. 623 | an English Merchant purchased in England from the agent of a Scotch merchant 500 tons of pig iron "in the Clyde, for immediate delivery on payment" ( according to the sale-note ). The English merchant paid the price, resold the iron, and thereafter made other purchases from the Scotch merchant. When the new purchaser claimed delivery of # the iron from the Scotch merchant, the latter pleaded that he was entitled to betain the same until secured of the balance due by the English merchant on his subsequent purchases. It was held that the plea of retention was to be decided by the law of Scotland as the law that governed the contractual relation between the Scotch and English merchant on this point. The new purchaser was only an assignee of the English merchant's rights in the contract, and only came into the English merchant's place, taking such rights as the English merchant had, and the right of retention arose out of the first contract of sale. | See also Inglis v. Usherwood 1801 1 East. 515

A claim to a right of retention or lien over moveables

On the other hand, when a person ledged goods which belonged to a third party in the warehouse of a foreign factor, and the factor advanced money to the person who lodged the goods, supposing them to be his property, the question whether the factor had a right of retention until he was paid his advance was held to be governed by the law of the situs of the goods: the claim that the owner made for the goods was not made on any contract, but on his right of ownershop. Mitchell v. Burnet 1746 Mor. 4468

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(b) Between the cedent and the assignee or a person relying on the assignee's title.

Any question between the cedent and the assignee as to the effect of an alleged assigned entered into between them is obviously to be governed by the law with which the assignment has most connection, which will usually be the plaw of the place where the assignment was made, as being the proper law of the contract [Higgins v. Ewing's Trs 1925 S.C. 440] between the cedent and assignee. Thus the question whether an assignee in security who delivered the pledge back to the cedent so that the cedent might act as the assignee's agent for sale, thereby lost possession of the pledge, was determined by the law with which the assignment had most connection. | North-Western Bank v. Poynter Son & Macdonalds 1894 22 R. (H.L.) 1 And where there had been no assignment from the alleged cedent to the alleged assignee, but a third party had relied on the belief that there had been an assignment, and averred that the alleged eeds codent was estopped by his actings from denying an assignment, the question whether he was estopped or not was determined by the law with which these actings had most connection, even although the lex situs of the right in question was said to be to a different effect. | Celenial Bank v. Cady L.R. 1890 15 A.C. 267; Goodwin v. Robarts 1876 L.R. 1 A.C. 476

(c) The rights acquired by the assignee.

Any question as to the extent of the rights acquired by the assignee is governed by the law with which the assignment has most connection, which will usually be the law of the place where h the assignment was made. This question most often arises when the cedent has made two or more assignments of the same subject. The second assignee can only claim such right as he acquired by the law of the country under which the assignation to him was made, and he can not subsequently enlarge the right he received under that law by intimation or registration according to the law of the situs, or by appeal to the law of the situs. If the law of

the place where the assignment to him was made has no

objection to his completing a real right to the debt by intim ating to the debtor according to the lex situs, then the second assignee may acquire the first real right to the debt by intimating his right before the first assignee does so; but where a Scottish policy of insurance was deposited by the insured in Ireland with A in security of a debt, and subsequently assigned, also in Ireland, to B. who had notice of the prior deposit, in security of another debt, and B intimated his assignation to the insurance company first, B. although claiming the first completed real right according to the law of the situs, was not preferred to the proceeds of the pelicy, since the law of Ireland was that B, as an assignee with notice of a prior deposit, was deferred to the prior depositary, and could not succeed in a competition with the depositary. / Scottish Provident Institution v. Robinson & Newett (0.H.) 1892 29 S.L.R. 733. Cp. Le Feuvre v. Sullivan 10 Moo. P.C. 1 The justice of this finding is that B only acquired a deferred sight by the law of the country under which the assignment was made to him: he could not claim more than had been assigned to him, or enlarge his right by his own acts. Conversely A had received a right preferable to a subsequent assignation with notice of the deposit, and was only receiving what was assigned to him. | It was pointed out by the Court that if the insurance company had paid in good faith to B, it could not have been made to pay again to A, but that was a different position to the one which had arisen. namely that the insurance company obtained notice of both claims before paying, and the competition was between the two assignees. The same principle would apply if B had received an assignation by the law of the situs, and the law of the situs was that a second assignee with notice of a prior one could not compete with the prior one. A similar ratio appears in certain bankruptcy cases. Thus in Forbes v. Official Receiver in Bankruptcy. (0.H.) a beneficiary, demiciled in England, with a 1924 S.L.T. 522 vested right to a share of funds held by a Scottish marriage contract trustee, assigned his share by a mortgage in the English form, and was then made bankrupt in England. Thereafter the assignee intimated his assignation to the trustee. In a competition, between the assignee and the trustee

on the bankrupt estate for the share it appeared that by the law of England the right of a trustee in bankruptcy is postponed to that of a creditor holding a charge over the estate of the bankrupt given prior to bankruptcy but not intimated, and the law of England was applied and the assignee preferred: the trustee could not have a right higher than that allowed to him by the only law by which he came to have a right at all.

This principle applies equally to assignments of corporeal moveables. [ Connal & Co. v. Loder & 1868 6 M. 1095 ]

However when it is only the law of the first assignation that says that subsequent assignations taken in the knowledge of it are deferred to it, and not the law of the second assignation, the result which has just been noticed does not occur. Thus in Inglis v. Rebertson & Baxter | 1897 24 R. 758, Affd. 1898 25 R. (H.L.) 70 ) a domiciled Englishman resident in London who owndd whisky in a warehouse in Lenden Scotland, endorsed over te another Englishman the warehouse-keeper's delivery warrant. A Scotch creditor of the original ownerarrested the whisky in Scotland after the assignation but before the assignee had intimated to the warehouse-keepers. The assignee argued that by the law of England the endorsement and delivery of the warrant to him gave him a right to the whisky which was preferable to that of any creditor doing diligence subsequently, but in spite of the similarity of this argument to those that prevailed in the cases just considered, it did not avail. The law of Scotland, which was the law by which the arrester was claiming his right, was not to the same effect as the law of England. The arrester obtained a full and complete assignation of the real right by the law by which the assignation to him was made, namely the lex situs, the law of Scotland.

Of course a second assignation might be an assignation not from the cedent, but from the first assignee, as for example where there is a public sale which gives the purchaser a good title against the whole world, and thus <u>inter alios</u> against the first assignee. In that event, even although the first assignee have a completed real right according to the <u>lex situs</u>, if such second assignation was according to the law of the situs at the time of the second assignation, and gave the second assignee a real right thereby, he will have the real right. [<u>Cammell</u> v. <u>Sewell</u> 1858 3 H. & N. 617, 1860 5 H & N 728; but see <u>Freeman</u> v. <u>East India Co.</u> 1822 5 B. & Ald. 617 ] And in this connection it must be remembered that the situs may change.

In Ferbes v. Official Receiver in Bankruptcy ( supra ) Cp. Bankes L.J. in also, Republic of Guatemala v. Nunez 1927 1 K.B. 669; and Cheshire p. 419 the following dictum of Lord Watson in North Western Bank v. Poynter Son & Macdonalds | 1894 22 R. (H.L.) 1 at p. 12 was adopted: "When a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law." It is submitted that this dictum is too unqualified and might prove a dangerous test: suppose the creditor of a debt situated in Scotland assigns it to a domiciled Englishman A, and before A intimates his right to the debter according to Scote law, another domiciled Englishman arrests the debt in Scotland; this would give rise to a competition between two domiciled Englishmen for a moveable fund situated in Scotland, but the matter would be decided by Scots law the lex situs, the question being who had first acquired a real right. | In re Queensland Mercantile & Agency Co. 1892 1 Ch. 219; In re Maudslay Sens & Field 1900 1 Ch. 602; Strachan V.M. Dougle, Denaldson v. Findlay Bannatyne & Co, supra; Inglis v. Robertson & Baxter, supra

second assignation was according to the law of the situe at the time of the second assignation, and gave the second assignee a real right thereby, he will have the real right. ( Cammell v. Sewell 1858 3 H.&N. 617, 1860 5 H&N 728; but see Freeman v. East India Company 1822 5 B. AMd. 617 ) And in this connection it must be remembered that the situs may change. (

Requisition Assignments of both corporeal and incorporeal and conflicat- moveables may occur as a result of requisition or ion by a for- conflication by a state, and the following rules eign state are applicable to such circumstances.

The Courts of this country will not enquire into the validity of the acts of a foreign government, which is recognized by the government of this country as a de facto government, with regard to acts done within its own territory in respect of property belonging to its own subjects. | Luther v. Sagor 1921 3 K.B. 558; Princess Paley Olga v. Weisz 1929 1 K.B. 718; Kelbin & Sons v. Kinnear 1930 S.C. 724 per Lord Justice Clerk Alness at p. 738 Thus in Luther supra when the Seviet Republic confiscated timber belong v. Sagor ing to a Russian company and sold it to a purchaser who imported the timber into this country, the former owner could not claim delivery of the timber from the purchaser by action in our Courts. Luther In this respect it does not matter that the foreign V-Sagor, supragovernment has only been recognized as the de facto government, and not as the de iure government. ( Luther v. Sager, supra The Court accepts the Foreign Secretary's statement as to the recognition that is accorded to a foreign government. Hervey, Legal Effect of Recognition in International Law supra ) Princess Paley Olga v. Weisz, supra, Re Luther v. Sager pp.25-53 Recognition of a foreign government as the <u>de facto</u> or <u>de iure</u> government of a country is retreactive to the time when such government commenced its existence; | Luther v. Sager, supra; Underhill v. Hernandez 168 U.S. 253; Oetjen v. Central Leather Co. 246 U.S. 297; Princess Paley Olga v. Weisz, supra; Lazard Brothers v. Midland Bank 1933 A.C. 289,- per Lord Wright; Kolbin & Sons V. Kinnear, supra) and accordingly the decree confiscating timber, which was made after

the Russian government had established itself as an effective government, but before it was recognised by our government as a de facto government. | Luther v. Sagor, supra | It may be necessary in some cases to consider at what stage in its development the govern ment so recognised "commenced its existence", that is apparently, when it in fact became an effective governmental force. | Luther v. Sagor, supra, per Bankes L.J. at p. 542 A decree by a revolutionary government which had no effective control, but which afterwards acquired it, and still later was recognised as the de facto government, would, of course, have no validity. If the Foreign Secretary also certifies the date at which the de facto government came into existence, that will be accepted by the Court ey, op.c too. Luther supra | In Luther v. Sagor the decrees Sagor, of the Soviet government effected the confiscation of timber without compensation being paid to the former owners, and a fortiori the requisition of goods with payment of compensation would be valid. But confiscation by the Soviet government of goods situated in Russia which belonged to a British subject or company, instead of a Russian company, would not have been valid, Wolff v. Oxholm 1817 6 M. &S. 92/ although requisition with payment of compensation night have been. Whether a decree of a <u>de facto</u> foreign government can annex property outside the territorial limits of the foreign country, depends firstly on the purport of the decree and its effect accordthe if the decree does not have extraterritorial ing to/foreign law: effect when construed by the law of the foreign country concerned, "The Jupiter" naturally our Courts will not give it such effect. (No 3) 1927 P. 122, Affd. 1927 P. 250; Lecouturier v. Rey 1910 If the foreign decree dees, according to the law of the A.C. 262 foreign country, annex goods outside its territory, our Courts will not recognise such extra-territorial effect if the decree is a confiscatory one that takes the property without compensation, er is of the nature of a tax, even if the owner of the goods is a subject of the country concerned, on the principle that no country is bound to recognize the penal or revenue laws of another; Lecouturier v. Rey 1910 A.C. 262; Sedgwick Cellins & Co. V. Rossia Insurance Co. 1926 1 K.B. 1, per Sargant L.J. at p. 15;

Banco de Vizcaya v. Don Alfonso de Borbon Y Austria 1935 1 K.B. 140; The Manufacturing Co. etc. v. Frederick Huth & Co. B.Y.I.L. 1930 235; "The Jupiter" (No 3) 1927 P. 122, per Hill J. at p. 144; In re Russian Bank for Foreign Trade 1933 Ch. 745, per Maugham J.; <u>Ffolliott v. Ogden</u> 1789 1 H.Bl 124 at p. 135; <u>Lynch v. Provisional Government of Paraguay</u> 1871 L.R. 2 P. & D. 268\_7 but will recognise such extra-territorial effect as valid to annex goods belonging to its own subjects, even goods belonging to its own subjects which are situated within this country, when the decree is of the nature of a requisition or "nationalisation" with payment of compensation. <u>/ Lorentzen v. Lydden 1942 2 K.B. 202 7</u>

The principle that the Courts of this country will not enquire into the validity of the acts of a foreign government excludes from the consideration of our Courts any enquiry whether the foreign Act of State was ultra vires or unconstitutional: / Contra F.A. Mann 1943 LIX L.Q.R. at p. 43; Wolff p. 175 7 if the foreign decree or act can be attacked on those lines it should be so attacked in its own Courts. The first decision in Re Amand / 1941 2 K.B. 239 7 seems to run counter to this principle. Viscount Caldecote C.J. said there: "An Act of Parliament of the United Kingdom This is so with the proves itself and cannot be challenged. legislative act of a foreign Power. Evidence is required to prove what is a question of fact, namely the foreign law." /at p. 253 7 He then proceeded to review the evidence upholding the validity of the decree according to the law of the Netherlands, and decided in favour of the validity of the But here the Court may not have fully appreciated decree. that the argument presented was whether the foreign decree was constitutional according to the law of the Netherlands. They may have been dealing only with the question of how a foreign decree is proved and have been simply disposing of the argument that the certificate of the Netherlands government

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as to this decree excluded and superseded the necessity for further evidence. / F.A. Mann, LIX L.Q.R. at p. 1597 In Re Amand (No. 2), / 1942 1 K.B. 445 7 however another Divisional Court undoubtedly dealt with the argument that our Courts could examine whether the Dutch decree was ultra The Court accepted the principle that the convires. :stitutionality of the decree could not be so examined, but refused to apply the principle in the very unusual circumstances: during the war, while Germany was in occupation of The Netherlands and the Dutch government was operating from Britain, the Queen of the Netherlands had made a decree which subjected Amand, a Dutchman resident in England, to compulsory military service in the Dutch Forces. It was held, as the rubric puts it, that although it was well settled that the courts of this country cannot question the validity of the acts of an independent sovereign in relation to property and persons within its jurisdiction, yet in the absence of authority that that principle applies to the acts of an independent sovereign, temporarily resident in this country .... it was open to the Courts of this country to investigate the validity of the decree, according to the law of the Netherlands, more especially as the Netherlands courts, which were the only Courts which could investigate the validity of the decree, were not then functioning.

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Title to Sue Whether an assignee can bring an action in his own name or only in the name of the cedent is governed by the <u>lex fori. [Wolff v. Oxholm</u> 1817 6 M. & S. 92 per Lord Ellenborough at p. 99; Jeffrey v. McTaggart 1817 6 M. & S. 126; Cheshire p. 647; Dicey p. 849; Westlake sec. 342. Most of the old English cases, however, are to the other effect, namely that such a rule is a question of substance and the proper law of the transaction rules: <u>Innes v. Dunlop</u> 1800 8 T.R. 595; <u>O'Callaghan v. Thomond 3 Taunt 82; Trimbey</u> v. <u>Vignier</u> 1834 1 Bing. (N.C.) 151; <u>Alivon v. Furnival</u> 1834 1834 1 C.M.&R. 277; <u>Suwerhop v. Schmanuel</u> 1824 2 L.J.(0.S.)150/ Real actions relating to moveables

A decree by the forum situs in a real action relating to moveables will, if it has been obtained without fraud and accords with Scottish notions of substantial justice, be accepted as conclusive in the Scottish Courts. The forum situs has both exclusive and conclusive jurisdiction in real actions relating to moveables. <u>Castrique v.</u> <u>Imrie 1870 L.R. 4 E. & I. App. 414; Cammell v. Sewell 1858 3 H. & N.</u> 617, 5 H. & N. 728; <u>Alcock v. Smith 1892 1 Ch. 238; Jones v. Samuel</u> 1862 24 D. 319; <u>Bannatyne v. Newendorff 1841 3 D. 429; Duncan & Dykes</u> pp. 142 - 148. Contra Bar p. 911 <u>7</u> Of course personal actions relating to moveables are competent in any forum to which the defender is subject.

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-----By a real action relating to moveables is meant one in which the ownership or a right in security over the moveables is determined or adjudged so as to be binding not only on the parties to the action or diligence but on the whole world. A multiple --- poinding is such an action.

Only the Courts of the situs can make an order for removing or altering the name of the person in whose name the title to moveable property stands. But only the Courts of the domicile of a trust can remove or appoint a trustee. Therefore when the sole trustee on an English trust, which had moveable property in both England and Scotland, became incapax, new trustees were appointed by the Chancery Division in England and a vesting order made as regards the property situated in England, but the new trustees had to ask for liberty from the English Court to apply to the Court of Session, and then to apply to the Court of Session to have their names substituted for the trustee who had been removed in the case of the Scottish property, since the English Court did not have any jurisdiction to make a vesting order in respect of the property in Scotland: the appropriate order was made by the Court of Session in the exercise of its nobile officium./ Evans-Freke's Trustees 1945 S.N. 427

## IMMOVEABLES

The general principle is that all questions with regard to immoveable property are governed by the law of the situs of the immoveable property.  $\angle$  Story secs 424, 428; Bar p. 483; Dicey Rule 150; Cheshire p. 536;  $\angle$ 

The rules about capacity to deal with immoveables, and wills and contracts about immoveables, and the like are dealt with under the various headings of 'Capacity', 'Wills', and 'Contract', and in the main illustrate the general principle. Some further applications of the general principle are :-

The <u>lex situs</u> determines who are entitled to own land, so that if the <u>lex situs</u> forbids aliens to own land, as the law of Scotland formerly did, or corporations, they may not own land, no matter what the law of their nationality or domicile may say. <u>Story sec. 430</u>

Only such dispositions of land may be made, and such interests in land created, as are permitted by the lex situs. Thus if the lex situs does not permit the transmission of land by a mortis causa deed, [See "Wills.. Formal Validity (Immoveables)" 7 or does not permit charities to take land under a mortis causa deed, /Duncan v. Lawson 1889 41 Ch. D. 394 (Hewit's Trs. v. Lawson 1891 18 R. 793) 7 or does not permit or allow effect to trusts, Brown's Trs. v. Gregson 1920 S.C. (H.L.) 87 7 then even although the law of the domicile of the testator and the law of the place of making the will do so permit, the will is invalid and ineffectual quoad any such dispositions. Similarly if the lex situs strikes at accumulations, perpetuities, or entails, then these can not be made, even if competent by the lex domicilii and lex loci actus. / Nelson v. Bridport 8 /

8 Beav. 547; Freke v. Carbery 1873 L.R. 16 Equ. 461; In re Grassi 1905 1 Ch. 584 / \_\_\_\_\_\_\_ "The incidents of the estate which can be created in English land must be determined by the law of the country where the land is situated and not by the law of the country where the testator is domiciled or where the will is made" / In re Miller, Bailie v. Miller 1914 1 Ch. 511, per Warrington J. at p. 519\_7

When an English will bequeathed, inter alia, long leaseholds in the Transvaal to the testator's wife for her widowhood, with remainders over, the question whether they ought to be converted as English law would have required, or whether the widow was entitled to the usufruct without finding security, as the Roman Dutch law said, was determined by the latter, as the <u>lex situs. / In re Moses 1908 2 Ch. 235</u>

Real actions relating to immoveables

The forum situs has exclusive and conclusive Jurisdiction in real actions relating to immoveables, <u>/ British South Africa Company v. Companhia de</u> <u>Mocambique</u> 1893 A.C. 602; <u>Foster v. Foster's Trs.</u> 1923 S.C. 212; <u>Ruthven v. Ruthven</u> 1905 (O.H.) 43 S.L.R. 11; Ersk. 1, 2, 17 ; Duncan & Dykes pp. 135 -142

But a personal action relating to immoveables can be brought in any forum to which the defender is subject [ Ersk. ibid; Duncan & Dykes, ibid; Cranstown v.
v. Johnston 1796 3 Ves. 170

Thus when an action was brought in the Court of Session against a Scotsman to have him ordained to grant a conveyance of land situated in Ireland, which he had contracted to convey, since the action was a personal one and the defender was subject to the jurisdiction in personal actions, he was so ordained; but when the defender refused to implement the order of the Court

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of Session and application was made to the Court of Session to direct the Clerk of Court to sign a conveyance, the application was refused because that would have been a proceeding <u>in rem</u> in regard to the lands, for which the Scottish Courts, not being the Courts of the situs, had no jurisdiction. <u>Ruthven</u> v. <u>Ruthven</u>, supra\_7 The pursuer could have enforced the personal decree against the defender which ordained the defender to execute a conveyance, by imprisoning the defender in Scotland, but the order craved would have been a judgment <u>in rem</u> which the Scots Courts could not make.

An action, for which the Scots Courts would otherwise not have jurisdiction.may be competent in the Scots Courts if necessary to a question about the right to Scottish land. Thus an action of declarator of legitimacy of a person who had never had a domicile in Scotlandwas competent in the Scots Courts, because t wasbrought in conjunction with an action of reduction of the titles of a Scotch estate, and the real questionwas the right to succeed to the Scotch estate. <u>Shedden</u> v. <u>Patrick</u> 1849 11 D. 1333\_7

Only the Courts of the situs can make an order for removing or altering the name of the person in whose name the title to property stands. When the Judicial Factor on the estate of a deceased Scotsman wanted to complete title in his own person to heritage of the deceased in both England and Scotland, he presented a petition to the Court of Session for the completion of title in his own person to the Scottish estate and for leave to apply to the appropriate English Court for the appropriate order there, and thereafter applied to the English Court in respect of the English heritage. <u>Ayton's J.F.</u> (O.H.) 1937 S.L.T. 86\_7 The conveyance of immoveables The validity of a conveyance, <u>Dalkeith v. Book</u> 1729 Mor. 4464; Cheshire p. 541 <u>Jease</u>, <u>Adams v.</u> <u>Clutterbuck</u> 1883 10 Q.B.D. 403 <u>J</u> or mortgage of immoveables is governed solely by the <u>lex situs</u>. An assignment of immoveables, which is invalid by the <u>lex loci actus</u> and the law of the domicile of the granter, but valid by the <u>lex situs</u>, is valid. <u>(In re Anziani</u> 1930 1 Ch. 407 <u>J</u> <u>A contract to convey</u>, lease, or mortgage, is in a different position, being governed by the law applicable to contract. <u>(See "Contract"</u>]

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## DELICT

In order to recover damages for a delict committed abroad, it must be shown that the act complained of gives [It rot ficient that the act complained of gave the pursuer a right to damages and at the time of committing the act, if the act has been subsequently legalised by an Act of Indemnity - <u>Phillips</u> - v - <u>Eyre</u> 1870, L.R. 6 Q B.1] gives the person alleged to have been wronged a right to damges from the alleged wrongdoer according to both the <u>lex fori and the lex loci</u> and the <u>lex fori</u>. <u>deliction</u> If these requirements are present, an action for damages will lie, [There are no further requirements: it is immaterial that there is no claim by the personal law of the pursuer -- <u>Convery</u> - v-<u>Lenarkshire Tramways Co. 1905 S F. 117; Davidsson</u> - v - <u>Hill</u>, 1901 2. K.B. 606] and the <u>lex loci delicti</u> will determine what separate items of reparation can be recovered.

The primary principle was simply put by Lord Shend as follows: " But just as the lex loci contractus must be applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the lex loci (delicti) must be applied, with reference to the acts committed in order to ascertain whether there be liability" (Goodman - v - L.N.W.R (0.H.) 1877 14- S.L.R. 449 at p. 451; quoted with approval by Lord President Dunedin in Convery - v - Lanarkshire Tramways Co. 8 F. 117, and by Lord Hunter in Nagtalin - v - L.M.S. 1933 S.C. 259. Inother words, the obligation to make reparation for a delict arises from the law of the place where the delictwiss committed, its existence ir non-existence is determined by that law, and the various items of reparation are determined by it. When an action is raised in a country other than the locus delicti, the duty of the Courts of the forum is to recognise and give effect to the poligation ex delicto which has arised under The lex loci delicti is appropriate because the lex loci delicti. everyone is bound to obey the laws of the country where he is for the time./

theory, after the word used by the American judge, Holmes J., who gave the theory its most extreme application in an American case, Slater - v -194 U.S. 120 In that case a widow Mexican Nat, Rlwy Co. 1904) brought an action in Texas for damages for the death of her husband as a result of the fault of the railway Goy, in Mexico. By Mexican law the only redress given whis a Biscree for periodical payments for the support of the widow during the period the deceased might have lived. The obligation ceased when notnecessary for her subsistence, or on her marriage, and the defendant could have "aliment" ( that is whatit amounted to) reviewed if circumstances changed. Further, according to Mexican Baw, it whs impossible to compromise the "aliment" and pay a lump sum. According to Texan law, the lex fori, the only redress possible whas the final award The Supreme Court held that the widow could not recover of a lump sum. a lump sum, because not given by the lex loci delicti, and as the lex fori was not adapted to her receiving the "aliemnt" the effect was that she could not recever anything in Texas. The result arrived at is wrong, for reasons which are advanced below, but the case is worth paying attention to for the clear manner in which it propounds the "obligatio" The judgment of the Supreme Court was given by Mr. Justice theory. Holmes, whoe said: [at p. 126] " The theory of the foreign suit is that the act complained of ... gave rise to an obligation, an obligatio, which, like other obligations, fellows the person, and may be enforced wherever But as the only source of this obligation the person may be found. is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its It seems to us unjust to allow the plaintiff to come here extent. absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on

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his liability that law would impose.... therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act is a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. " [Cp. Phillips - v - Eyre 1870, L.R. 6.Q.B., per Willes J.

An alternative to thestheory is to determine whether the act is a delict by the lex loci delicti, and if it is, give the redress recognised by the lex fori, on the principle that the matters of remedy are for the lex fori . This alternative is the ratio of Machado - v - Fontes [1897 2 Q.B. 231] and of the argument of the unsuccessful pursuer in <u>Naftalin</u> - v - L.M.S. 1933 S.C. 259 It is quite illogical, for the result will be to give the puruser either more or less than he would have been entitled to had the cause of action been submitted to the system with which alone it has any real connection. [Cheshire pp. 295, 6] Savigny is rather lenely in still another opinion, namely that the lex fori alone must decide, since the laws relating to delicts are always to be reckoned among the coercitive, strictly positive This overlooks the fact that a State can make no claim statutes. p.253 to rule men's conduct and behaviour except within its own boundaries. Bar. p. 635

This then is the primary principle, that the obligation to make reparation arises from, and the items of reparation which are due are determined by, the <u>lex loci delicti</u>. But to make the <u>lex loci</u> <u>delicti</u> exclusively applicable might entail the Court of the forumgiving a remedy for an act, which was quite innocent according to the fundamental principles of its own law, or refusing a remedy for an act which, according to its own notions of elements justice, was a grave wrong. Thus the requirement has been imposed, that also be actionable according to the <u>lex fori</u>. This addition is subject to the criticism that it would have been sufficient to refuse to apply the <u>lex loci delicti</u> when application of it would infringe the the/

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the principles of distinctive policy as recognised in the forum. [Cheshire p. 296; Lorenzen 47.L.Q.R. p. 498] " $_{A}^{A}$  contract must be peculiarly objectionable before its enforcement will be denied in England on grounds of public policy. In the matter of torts, however, the mere fact that the English law would not give an action is sufficient to preclude recovery". [Lorenzen, ibid] The requirement that the act complained of must be actionable, according to the lex fori is too severe for the purpose that it serves.

Such then are the principles underlying the rules that in order to recover damages for a delict committed abroad it must be shown that the act complained of gave the person alleged to have been wronged a right to damages from the alleged wrongdoer according to both the lex fori and the lex loci delicti; and that the lex loci delicti will determine what separate items of reparation can be recovered. The rule is put somewhat differently in a well known English case in the Exchequer Chamber, Phillips - v - Eyre, 1870, L.R. 6, Q.B. lat p. 28]. Willes J. said that two conditions must be fulfilled: "First the wrong must be of such a character that it would have been actionable if committed in England .... Secondly the act must not have been justifiable by the law This statement of the law has often been of the place where itwhs done" approved, and has been approved by the House of Lords and Privy Council. Carr - v - Fracis Times & Co. 1962, A.C. 176, per Lord Macnaghten at Walpole - v - Canadian Pacific Rlwy Co. 1923, A.C. 113 (Privy p.182; Council); McMillan - v - Canadian Notthern Rlwy Co. 1923, A.C. 120. (Privy Council); Machado - v - Fontes 1897, 22Q.B. 231 (English Court of Appeal); "The M. Moxham 1876, 1 P. 107 (English Court of Appeal); Naftalin - v - L.M.S. 1933, S.C. 259, per Lord Marray at p. 273 a But the rule enunciated above states the law more clearlys. The rule as stated in Phillips - v - Eyre leaves open the question whether damages might be recovered if the act complained of were (a) actionable, according to the lex fori, and (b) according to the lex loci delicti where a not-innocent act that did not give a right to damages to the pursuer --- e. g. a criminal/

criminal act or one that gave a right to damages to some one else. The English Court of Appeal, misled by the difference between "actionable" in the first part of the rule and "not justifiable" in the second part, held in Machado - v - Fontes (1897, 2. Q.B. 231) that a libel published in Brazil is a crime but not an actionable wrong according to the lex loci delicti, the law of Brazil, and the it will an actionable wrong according to the lex fori, English law, and would sustain an action for damages in England. And in Scott - v - Seymour, 1862, 1 H & C. 219 Wightman J. in the Exchequer Chamber said that a British subject might maintain an action in this country against another British subject to recover damages for assault that occurred abroad, although by the law of that country no damages wfscrecoverable and the only liability to which the wrongdoer issas subjected Ais penal proceedings. There is no doubt however, that these views are wrong. Westlake § 200; contra Dicey p. 776 The act complained of must be actionable, i. e. give rise to damages, according to both the lex fori and the lex loci delictig Machado - v - Fontes wds expressly disapproved by Lord Murray in Naftalin - v - L. M. S., 1933 S.C. 259. at p. 274 and as he there points out, it is inconsistent with the decision of the Court of Session in Naftalin and in the previous cases of Kendrick - v - Burnett, 1897, 25.R. 82 Convery - v - Lanarkshire Tramways Co., [1905 8 F. 117] Goodman - v -L.N.W.R. (O. H.) 1877 14 S. L.R. 449 in which cases the Court of Session held that a father suing in Scotland would not recover solatium for the death of his son in England, because there was no right to solatium by the law of England, the lex loci delicti. It is noticeable that when Viscount Haldane was delivering the judgment of the Privy Council in Canadian Pacific Rlwy - v - Parent, 1917. A.C. 195 he guarded himself against approving of Machado - v - Fontes. As for Scott - v - Seymour, the statement of Wightman J. was the opinion of only/

only one of the judges. The case was decided on the ground that the defendant had not pled, when his plea was critically examined, that according to the law of Naples no damages could be recovered for assault, and without a clear averment to that effect, it must be taken that damages might be recovered. Williams J. said he was not prepared to assent to the opinion expressed by Wightman J. Crompton J. and Willes J. reserved their opinion, as did Blackburn J., although he was inclined to agree with Mr. Justice Wightman. It is clear in Rosses - v - Singhjæ [1891, 196R. 31] that the Scottish judges do not approve of the opinion expressed by Mr. Justice Wightman. [See The Lord Ord, Stormonth -Darling, at p. 34, and Lord Justice Clerk MacDonald at p. 37] His opinion is referred to with approval by L. J.C. Moncrieff in Horn - v - N. B. Rlwy [1878, 5, R. 1055] but Hornwas doubted and not followed in Naftalin - v - L.M.S. [supra]  $\epsilon$ 

A view similar to that held by the Court of Appeals in Machado - v - Fontes and by Mr. Justice Wightman in Scott - v - Seymour was advanced by the unsuccessful pursuer in Rosses - v - Sinhjee, supra In that case a woman who alleged that she had been seduced in England According to English Law, the lex loci sued in Scotland for damages. delicti, a woman had no right of action for seduction, but only her father or employer, who was entitled to damages for the loss of her services. According to Scots law, the lex fori, the woman herself had a right to The pursuer argued that seduction to a " non-justifiable" damages. that therefore damages were due act in England, that it was actionable in Scotland, And these should be assessed by the lex for1, that governed the remedy, that therefore It was held, however, that the pursuer could not recover. damages is due. " An act, in order that it should give rise to action as being a wrong, must be recognised as a wrong, giving rise to a legal remedy, by the law of the place where it is committed". [per Lord Trayner at p. 38].

<u>Machado - v - Fontes</u> and Mr.  $J_u$ stice Wightman's dictum are contrary to the whole theory behind giving damages for delicts committed abroad, which, as already stated, is that a person must obey the laws of the country where he is for the time: if he commits a wrong which gives a right of reparation to the wronged person arising from the laws of the place; that right is recognized abroad if not inconsistent with the policy of the forum. The lex fori only comes in on the question of public policy. It is not the source of the right.

"Not justifiable" in the rule Phillips - v - Eyre means nothing else that the "actionable", [cp. Cheshire pp. 298- 302] and to use the word "not-justifiable" simply invites error. The position has been more clearly stated in these judicial opinions:- " There seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad, when such injuries are actionable, both by the law of England, and also by that of the country where they are committed" "The Halley" (1868); L.R. 2; P. C. 193 at p.p. 202, 3. " In order to maintain an action ex delicto in the Courts of this country, when the wrong is committed in another country, the wrong must be one for which an action can be maintained both by the law of this country and by the law of the country in which it is said to have been done,"  $\int Evans - v - v$ Stein 1904, 73F. 65, per Lord Kinnear at p. 70; adopted by Lord Ormidale in Soutar - v - Peters (0.H.) 1912 The S.L.T. 111 " If there is no obligation ex delicto by the law of the place where the alleged wrong is done, and under that the complainer is Living, there is no action anywhere" "[Evans - v - Stein, supra, p. 71] " By International Law, if a claim is wrongful and actionable by the lex loci delicti, and also by the lex fori, it is actionable in either territory, if jurisdiction exists" [Naftalin - v L.M.S. 1933 S.C. 259, per Lord Anderson at p. 269. " The person convened as defender cannot be made liable unless these two factors concur: The first that he is liable to the claim made against him by the laws of hiw own country, and in the second place, that the injured would be entitled by the law of his country to what he claims" [Kendrick - v -Burnett 1897, 25, R. 82, per Lord Pres. Robertson at p. 91).

But it is not accurate enough to say that the act complained

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of must be actionable both by the lex fori and the lex loci delicti, for the act must have been given a right to damages to the person alleged to have been wronged from the alleged wrongdoer, both by the lex fori and and the lex loci delicti.

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Firstly the act complained of must give a right to damages to the person alleged to have been wronged according to the lex fori. If a relative of a person who had been killed in Scotland sued in England for solatium he would fail, because according to English Law -- the lex fori, --- only the executor or administrator of the deceased can sue under Lord Campbell's Act.

Secondly the act complained of must give a right to damages to the person alleged to have been wronged according to the lex loci delicti. In Rosses - v - Sinhjee 1891 19. R. 31 a woman sued in Spotland claiming damages for having been seduced in England, According to the lex loci delicti, English Baw, a woman had no action for damages for seduction, but only an employer or parent had, bhat, damages being given for the loss of her services; but according to the lex fori, Scots law, a woman could sue for damages, seduction being a wrong to the woman herself. Tt was held that no action could be maintained, the act complained of not being, according to the lex loci delicti, a wrong which gave a right to damages to the person who was alleging that she had been wronged. If the rule given in the first place above is correct, that there must be a right to damages to the pursuer according to the lex fori, the parent or employer of Mrs. Ross whuld have had no more success in suing in Scotland for Again when a person 485 killed in England, damages for her seduction. and his father sued for solatium in Saotland, the claim for solatium is not maintainable, because according to the lex loci delictir a father had no right to solatium for the death of his son, the only person entitled to sue in respect of the death being the executor or administrator of the deceased according to Ld. Campbell's Act [ Nagtalin - v - L.M.S. 1933, S.C. 259; Kendrick v. Burnett 1897 25R.82; Horn - v - N.R. Rlwy Co. 1878, 5.R. 1055 has not been followed

Thirdly the act complained of must give a right to damages against

against the alleged wrongdoer according to the <u>lex fori.</u> Westlake § 197) When the owners of an English ship were sued for damages in England for a collision which occurred in Beglian territorial waters while the ship was in charge of a compulsory pilot, and according to the <u>lex loci delicti</u>, hut not the <u>lex fori</u>, the owners were liable for the pilot's negligence, The Privy Council held, that an English Court will not give damages for an act committed abroad which by its own principles imposes no liability on the alleged wrongdoer. ["The Halley" 1868, L.R. 2% P.C. 193]

Fourthly, the act complained of must give a right to damages against the alleged wrongdoer according to the lex loci delicti. Westlake \$196 Thus where the widow was excluded, according to the lex loci delicti, from claiming damages for the death of her hysband, because her husband had, during life, agreed that the alleged wrongdoes had to be free of liability in the event of his death, no action was maintainable by the widow, although according to the lex fori such an agreement by the husband, during life would not have prevented the widow from suing in respect of his death. ( Canadian Pacific Railway - v - Parent 1917, A.C. 195(Privy And no interdict was granted against an act which would have Council) been wrongful if it had been committed here, but was not so according to the lex loci delicti. Potter & Co. - v - Braco de Prata Printing Co. Ltd. 1891, 18.R. 511. No action will be maintainable against the employers of the actual wrongdoers if, according to the lex loci delicti, they are not subject to damages in respect of the delicts of their servants, "The M. Moxham" 18767 1.P. 107 or if, the according to the lex loci delicti, the defence of common employment, McMillan - v - Canadian Northern Railway 1923 A.C. 120 (Privy Council) or any similar defence, would have entailed their being free of liability, notwithstanding the fact that they are liable according to the lex fori.

For example, in <u>Walpole - v - Canadian Pacific Railway</u> [1923 A.C. 113 (Privy Council)] a man resident in British Columbia  $\frac{145}{16}$  killed there in the course of his employment with the Canadian Pacific Railway through the negligence/

negligence of fellow employees. Under the Workemmis Compensation Act of British Columbia the deceased, had he lived, and on his death his dependants, have a right to Workmen's Compensation, that is expressly in lieu of all other rights of action against the employer, Workmen's Compensation barred. A W. O. Board assessed employers for contributions to the Workmen's Compensation fund on the basis of their payrolls, collected the contributions, and paid the claims. The Widow such the Failway where such an action was maintainable **So**mpany for damages in Saskatchewan, A It was held by the Privy Council that she shuld not succeed: The act complained of did not give rise according to the lex loci delicti to a claim for damages against the employers, but only to a claim against the Workmen's Compensation Board for compensation.

The case just referred to also illustrates another principle, namely that the remedy given by the <u>lex loci delicti</u> must be damages <u>for a wrongful act</u>. No action will be maintainable by a workman against his employers if, according to the <u>lex loci delicti</u>, the employer is not liable in damages as for a fault or wrong in respect of the act complained of, but only liable to pay compensation for an accident, as a result of a Workmen's Compensation statute. Even though according to the <u>lex loci delicti</u> the employers are persohally liable to pay the compensation for an accident, as contrasted with the case where a Workmen's Compensation Board is liable, that is not sufficient: there must be liability on the alleged wrongdoer, according to the <u>lex loci</u> <u>delicti</u>, to pay for damages for a wrongful act. <u>[McMillan - v - Canadian</u> <u>Northern Railway Co</u>. 1923; A. C. 120. (Privy Council)

Meaning of lex loci Delicta The lex loci delicti means the law of the place where the delict occurred. When a wrongful act commences in one country and takes effect in another, the locus delicti, is the country where the effect occurs. [Evans - v - Stein 1904, 7zF. 65; Thomson - v - Kindell (o. H.) 1910,  $2\xi$  S.L.T. 442; <u>R. - v - Nillins</u> (1884) 53z L. J.M. C. 157; <u>R. - v - Godfrey</u> 1923, (K.B. 24; "The Lotus" The Pitt Cobbett 230. (Permanent Court of International Justice)

Thus when two letters and a telegram which ware alleged to be defamatory were sent from Scotland to England, the allegedly defamatory statements were made in England, that is the locus delicti. [ Evens - v - Stein, supre --- The ratio of this rule is that the offender places himself within the ambit of the law of the country where the effect occurs by intending that effect to occur there and taking deliberate steps to bring it about. Concequently this theory is not applicable to the collision through negligence of a ship of one nationality with a ship of another. It is not valid to argue, that when ship A has been negligently navigated so as to run down ship B whereby a person on B is injured, that the locus delicti is ship B where the effect occurred, and that therefore the lex loci delicti is the law according to the nationality of ship B, altough that would be valid reasoning if a person on ship A deliberately shot a erson on ship B. [ The Queen - v - Keyn (1876) 2 Ex. D. 63, Contra "The Lotus" | Pitt Cobbett's Cases 230 | Permanent Court of International Justice)

In the case of wrongful killing, the <u>locus delicti</u> is not the country where the death occurred, but the country where the impast on the body took place. [Lorenzen in 47; L.Q.R. at p. 491, and American cases quoted there] Thus if a person standing in country A fires a gun over the border, and hits someone in country B;, who subsequently dies in country C, the <u>locus delicti</u> is B. Where a father suing for solatium for the wrongful death of his son lives in country A, and son is killed in country B, the <u>locus delicti</u> is country B, although the effect of the wrong (i. e. injury to the father's feelings) took place in A. [Convery - v - Lanarkshire Tramways Co. 1905, 6.F. 117]

A wrongful act may consist of a chain of component acts, which that extend over a long period and are capable of being committed in a number of different countries. In that case the place where the majority or most important of the component acts took place is the <u>locus</u> <u>delicti</u>. In one action of damages for breach of promise of marriage and seduction/ seduction in the Court of Session, the Lord Ord whs faced with averments of promise of marriage and blandishments in Scotland followed by sexual connection in England. The exercise of wiles alone is not seduction, it must have culminated in intercourse; not and carnal intercourse without the wiles is seduction. To ascertain the locus delicti regard had to be taken both of the place where the woman's bodywhs eventually surrendered and to the place where the preliminary steps were taken by the wrongdoer. Lord Ormidalewhs of the opinion that if, as alleged, the surrender of her personwhs made a few hours after she left Scotland, where her affection had been undergoing the process of fraudulent capture for months, that might be gound for maintaining that the locus delictiwhs Scotland. and he allowed a proof before answer. Soutar -m - Peters (0.H.) 1912. The S. L. T. 111]

Ascertainment

such/

of damages:

If an action for damages is maintainable, the lex loci delicti will determine what separate items of reparation can be recovered. In Naftalin - v - L.M.S., 1933 S. C. 259) a father who suing in Scotland in respect of the death of his son in a railway accident in England due to the negligence of the Pailway employees, and inter alia he claimed solatium. This was held not to be recoverable because not admitted by English law, the lex loci delicti. Cp. Kendrick - v - Burnett 1897, 25 R. 82; Horn - v N.B. Rlwy Co. 1878, 5g R. 1055 has not been followed z -Lord Pres Robertson in another case Kendrick - v -1897, 25. R. 82. at p. 86 tested the question thus: Burnett "The simplest, and , in my opinion, a perfectly legitimate way to consider this question is to assume the case --- of an action, raised solely to recover solatium .... Is the claim good because it is sued for in a country according to the common law of that

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such a right does arise out of such an act? It seems to me impossible to support the affirmative on any reasonable ground. The question is not of theremedy, it is whether a right exists or ever existed, to found an action of any kind?

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The details of the measure of damages however are to be referred to the lex fori, on the principle that the lex fori governs questions of the remedy. The distinction is difficult to where the question is whether a "separable head of claim" draw: Kendrick - v - Burnett, supra per Lord Pres. Robertson, at \$.87 is ar is not to be included in the damages the lex loci delicti rules, but where it is clear what separable heads of claim are recoverable and the question is the quantification of the obligation into money, the lex foriwill rule. An example of the latter case is where there has been destruction of cargo, and the obligation is restitutionin integrum: the law of one country might prescribe as the measure of compensation the price at which the owner could supply himself in the nearest market, while the law of the other country would give the cost price of the goods plus fair merabtile profit. The judge trying the case would quantify the damages in money according to the law which he administered. Kendrick - v - Burnett, supra, per Lord McLaren at p.88

It is difficult to reconcile <u>McLarty - v - Steele</u> with the other cases. [1881, 8. R. 435]  $\int_{\Lambda} [None - Miller - v - Shaughnessy(0.H.) 1944 per$ Gleggen Reparation A. S7(m)Lord Russell, opinion dated 9th. November, 1944 with the other easers.That an action of damages in Scotland between two Scotsmen for oralslander uttered in Penang. According to the law of England whichprevailed in Penang, no reparation is due for verbal slander unlessinhere special damages are alleged and proved to have been sustained.It is held that an issue should go to a jury to determine thequestion of damages according to Scots law. Lord Young said that ifthere is sufficient evidence to entitle the pursuer to damages under

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the law of Scotland, that was enough, and it would not be relevant to prove that something elsewhs necessary according to the law of Penang. This decision, that damages might be recovered although no damages are due by the lex loci delicti seems contrary to fundamental There is very little difference if the matter is principle. realistically examined, between the facts of McLarty - v - Steeles and those of Evans - v - Stein, 1904; 7; F. 65 where a different, and it is submitted correct, decisionwas given; This was an action of damages brought in Scotland for defamation which occurred in England. The defamatory statements are contained in two letters and a telegram that are not published to third parties. According to English law itwis necessary to prove publication, but not according to Scots law. It is held that the action would not be maintained because the statement, not having been published, wits not an actionable wrong in England the lex There seems to be little difference in effect from the loci delicti. rule of English law, that to obtain regaration for slander special damage must be proved to have been suffered, and the rule that publication must be proved to have occurred, and the language of Lord Kinnear in the latter case [ at p. 71] seems equally appropriate to the former. "If there is no oblication ex delicto, by the law of the place where the alleged wrong is done, and under which the complainer is living, there I think that principle also goes to meet the is no action anywhere. pursuer's argument that the defence in this case is founded upon the law of remedy, and not upon the law of obligation ... That appears to me to be a confusion of things ..... which ought to be distingusihed. The method by which a right may be enforced is a question of procedure, but whether there is any remedy at all, or in other words, whether there is a right of action, is not a question of procedure but a question of leggl right depending on the existence of an obligation ex contractu or ex delicto and the question of obligation must be determined first before/

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before we can consider what the remedy is? It is significant that  $\underline{Mc^Larty - v - Steele}$  was one of the cases relied on by the Lord  $\operatorname{Ord}_{\Lambda}$  in <u>Naftalin - v - L.M.S.</u>, [1933 $\xi$  S.C. 259] and that his judgment was reversed by the Inner House.

But While the "obligatio" theory is the principle underlying our law, the extreme application given to that theory in <u>Slater - v - Mexican National Railway Co.</u> 1946 U.S. 120; for summary of the case see above 1 (can not be approved. The result there arrived atwins that the pursuer could ohtain no remedy in Texas even though the act complained of was both wrongful and actionable in both the lex fori and the lex loci delicti ... a result that one immediately suspects as wrong, because it stultifies one of the main purposes of International Private Law, namely the extra-territorial recognition of rights duly acquired under a foreign system of law. The reasoning by this result arrived at seems to be therefore, the Texan Court could not make an award like the Mexican one, namely, a decree for aliment, variable on change of circumstancés, because its procedurewips not designed to such an end, nor could an award of a lump sum be made for that would be to grant a right different from that acquired under the lex loci delicti. The fallacy of this reasoning is that the right to reparation is first of all considered as a question of remedy which the lex fori must rule, and then as a question of substance which the lex loci delicti must rule. The correct result would have to determine athe extent or quantity of reparation by the lex loci delicti, and to give this in a form The value of the Mexican alimant as a permitted by the lex fori. lump sum should have been assessed, and this given in a decree in common form by the Texan Court. Admittedly, as the Court pointed out, it would have been difficult to assess the capital value of the Mexican aliment, but that is no excuse for refusing to attempt to as**sess**/

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assessit. Perhaps nowadays experience of redeeming future payments of Workmen's Compensation by agreed lump sums would make lawyers bolder in approaching such a problem. The "Obligatio" theory is better modified in the words of another American Judge:" When a Court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises... however no Court can enforce any lawy but that of its own sovereight, and, when a suitor comes to a jurisdiction goreign to the place of the tort, he can only invoke an obligation recognised by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs! <u>Guiness - v - Niller</u> 2914 Fed. 769, per Judge Learned Hand at p. 770

Since the <u>lex fori</u> must agree with the l<u>ex loci delicti</u> that the wrongdoer is liable to a claim by the sufferer before an action will lie, the question arises, whether all the separate items of damages have to be due by the <u>lex fori</u> as well as the <u>lex loci delicti</u>. Considering the principle underlying reference to the <u>lex fori</u>, the answer is probably no. If both the <u>lex fori</u> and the <u>lex loci delicti</u> agree as to actionability, the <u>lex loci delicti</u> alone will determine what separate items of damages are recoverable, subject of course to the over-rifing consideration which is always present that our Courts will never enforce a foreign law, if to do so would be contrary to morality, religion, or the distinctive policy of our law. (Cheshire p.p 658, 659.)

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#### WORKMEN'S COMPENSATION

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### The Applicability of the United Kingdom Workmen's Compensation Acts.

The United Kingdom Workmen's Compensation Acts apply to all accidents arising out of and in course of employment in the United Kingdom. <u>Hunter - v - Stadtische etc.</u> <u>Gesellschaft</u> 1925, 2,K.B. 493] A person otherwise entitled to the benefits of the Workmen's Compensation Acts is not depréved of them merely because he is an alien <u>Baird - v -</u> <u>Birzstan</u> 1906, 8,F. 438] or, in the case of a dependant, because he is resident abroad. <u>Krzus - v - Crow's Nest Pass Coal Co. Ltd.</u> 1912, A.C. 590. (P.C.) If the employment is in the United Kingdom, the employer will not escape liability because he is resident abroad. <u>Hunter - v - Stadtische etc. Gesellschaft</u> 1925, 2, K. B. 493]

Conversely the Acts do not apply to accidents occurring outside the United Kingdom except where they specifically provide sp in the case of seamen, even though both employer and employee be British.  $\frac{\text{Tomalin} - v - \text{Pearson}}{1909_{\text{F}}} 2_{\text{F}} \text{ K.B. 61}; \quad \frac{\text{Schwartz} - v - \text{India Rubber}}{1912, 2_{\text{F}}} \text{ K.B. 493}$ 

#### The Applicability of Foreign Workmen's Compensation Acts.

The soundest view is to regard a statutory obligation to pay compensation as an implied term of the contract of service [W.E. Beckett (1934) 15 B.Y.I.L.(.62. n.2]. If a person suffered an accident in a country where he became entitled to compensation for the accident, [1945-44 LVII Hervard Law Review 242] he should be able to sue for that compensation here. He would sue of course by the normal procedure, and not by our Workmen's Compensation procedure. It has been said that in regard to our own Workmen's Compensation statutes\_" The legislature by the Act has thought fit to enact that it shall be one of the conditions of the employment of a workman in this country, that if in such employment personal injury by accident/

accident arising out of and in course of his employment is caused to him, his employer shall in general be liable to pay compensation. A Foreign employer under such circumstances, (Employing a British wormaan in this country) must in my opinion be taken to employ the workman upon all the terms and conditions by which, under the laws of this country, the employment is regulated, including in particular, the cond: :itiom entitling the workman to compensation for injury by accident." Hunter - v - Stadtische etc. Gesellschaft. 1925, 2.K.B. 443, per Warrington L.J. at p. 503 At first sight, McMillan - v - Canadian Northern Railway Co., 1923. A. C. 120 a decidion of the Privy Council; appears to be against this view, but it is submitted that on examination this is not so. In that case a resident in Ontario was injured in the course of his employment in Ontario, by the negligence of a fellow servant. In Ontario the workman had a right to Workmen's Compensation from his employers, which was recoverable by action against the Workmen's Compensation Board, and he had no right to damages. He sued for damages in Saskatchewan, the law of which would have given him damages. It was held that the action could not be maintained. As a result of this case the conclusion has been drawn that compensation can be recovered. only of the country where the action is being brought, if the case somes within the compensation statutes and a right to compensation under the statutes of one country cannot be vindicated elsewhere of the country where the action is being brought. Dicey X. 773(n); E. G. Lorenzen in 47. L.Q.R. 483 at p. 495.) But it is exceedingly doubtful that this is what the case decided. What was sued for in Saskatchewan was damages for a tort, and it was held that the Saskatchewan Court could not give damages for a tort when no damages for a tort were due by the lex loci delictix If the claim in the Saskatchewan Court had been for the equivalent of the compensation due [Assuming that the Ontario (ompensation Board could have been made subject to the Juris diction according to the law of Ontario, would that claim not have succeeded? of the The first is a right 3ask-Compensation is quite different from reparation. atchewan Counts] arising impliedly ex contractu, while the second is a right arising ex

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delicto.

The fact that they are different is the ratio of the case. It is difficult to see why, if extraterritorial effect is given to rights arising under other laws of foreign countries, it should not be given to rights arising under their workmen's compensation statutes. That would be to hold that extraterritorial recognition is only to be accorded to rights arising from the old laws of foreign statutes and not to rights arising from new statutes with an enlightened purpose.

## DELICTS AT SEA:

A distinction is taken between delicts where damage is done to property by a ship, and where there is injury to persons. McMillan, -Scottish Maritime Practice gop 160, 192). The reason for the distinction is that claims for damage to property were formerly heard in the Admiralty Courts, until they were absorbed by the Sheriff Courts; and the Court of Session, Court of Session Act. 1830 the Will. IV. c. 69, secs 21-29 and so were, and still are, adjudicated by maritime law, whereas claims for personal injury have only had the benefit of Admiralty procedure, and the maritime rules of division of loss have only been applicable to them, since the Maritime Conventions Act 1911, [ 1 & 2 Geo 5, c. B and so they were, and still are, subject to Common law rules. (a) Damage to Property by a Ship: Where damage is done to property by ships, whether on the kigh seas, in Scottish territorial waters or navigable rivers, Bogttcher & v - Carron Co. 1861, 235D. 322) or in foreign territorial waters, or navigable rivers, "Owners of as "Reresby" Owners of v - s.s. Cobetas" (0,H)1923, S.L.T. 719 (0.H.). Contra, Dicey pp. 987-990, and a number of English cases ..... "The Halley" 1868 L.R. 2.P.C. 193 (damage to another ship); " The M. Moxham" (1876) 1.P. 102; (damage to a pier); Chartered Mercantile Bank of India - v - Netherlands Steam Navigation Co. (1883) 10g Q.B.D. 521 per Brett L.J. at p. 536; Carr - Fracis Times & Co. 1902 A.C. 176; from which the conclusion might

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be drawn that where damage is done to property by a ship in foreign territorial waters, the normal rules of delict apply, namely that both the lex forig and the lex loci delicti must be satisfied before a claim is exigible, the lex loci delicti being the law of the littoral state. However the decision in "The Halley" though perhaps not some of the dicta in it, is consistent with the application of the maritime law of the The "M. Moxham" is a curious case, which is considered in forum alone. detail below, and the statement in the Chartered Mercantile Bank is an obiter dictum in reference to the M. Moxham which does not do justice to the peculiar facts of that case. Carr - v - Fracis Times & Co. was distinguished by Lord Blackburn in Owners of s.s. Reresby - v. Owners of s.s. Cobetas, supra, (at p. 722) as not dealing with a maritime question, similar to that arising from the collision of a ship./ and irrespective of the nationality of the ship, the maritime law of Scotland alone is applied. [Marsden p. 213; Cheshire p. 306; Dicey p. 778; Contra: Westlake  $\frac{1}{2}$  202 to 205 The maritime law of Scotland is the old general maritime law as altered by British statutes.

Before maritime law was invaded by statute, as it is now, the maritime law of Scotland was our interpretation of a general maritime law recognised by all commercial nations. "From the earliest times the Courts of Scotland exercising jurisdiction in Admiralty causes have disregarded the municipal rules of Scottish law and have invariably professed to administer the law and customs of the sea generally prevailing among maritime states." <u>Currie</u> - v - <u>McKnight</u> 1896 24 R. (H.L.) 1 per Lord Watson at p. <u>3</u> In Bell's Commentaries [Comm. i, 3,1,4] where our maritime law is set forth in some detail, some of the authorities relied on are our own Institutional Writers, the Rhodian Laws, Il Consolato del Mare a Mediterranean compilation of rules of the 11th to the 13th centuries, the laws of Oleron and Wisbuy, the Ordonnances of the Hanseatic Towns and of Louis xiv, the decisions of maritime and mercantile courts, not only of Scotland, but of Genoa, Friesland and England and other countries, and the civil law and the commentators thereon. The English Admiralty Courts have proceeded on the same theory, that they were applying the general maritime law.---

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"The Johann Friederick" (1839) The W.Rob. 36; "The Zollverein" 1856g Siga 96; "The Wild Ranger" (1862) Lush. 553; " The Leon" 1881 P. 76; Chartered Mercantile Bank of India - v - Netherlands India Steam Navigation Co. (1883) 10; Q.B.D. 521 English and Scots maritime law therefore are the same. - Boethcher - w - Carron Co. 23 D. 265, per Lord Pres. Inglis; Currie - v - McKnight, per Lord Chancellor Halsbury at p. 2. Lord Watson has pointed out a cubious incident which resulted from this theory in 1788: The Court of Session in a case relating to a lien for furnishings made to a ship (Wood - v + Hamilton M. 6269) ordered the opinion of English counsel and gave judgment in accordance with that opinion, although it was contrary to previous decisions of the Court of Session Currie - v - McKnight, supra at p. 4 and when a fresh maritime question arose in regard to whaling it is plain that our Courts applied the legal custom which whalers of all nations had established for themselves, and ignored the municipal rules of law of our country and 1861, 23D. 465, Revel. 4 The Queen 355; other countries. [Sutter - v - Aberdeen Artic Co.] Addison - v - Row

1794 3 Pat. 334

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In short, before marit me law was invaded by statute, as it is now, the maritime law of Scotland was our interpretation of a general maritime law recognised by all commercial nations.

It was therefore perfectly just to apply only the general maritime law as it was understood in our Courts. Indeed no other law could be applied because in theory no other existed. Since the maritime laws of all states were homogeneous, no conflicts could arise.

maritime law. Then conflicts ware bound to occur.

In this country it was held that these statutes were not applicable when one of the ships was a foreigner, because it Was beyond the power of the legislature to make rules applicable to foreign vessels at sea, and in that event the old general maritime law was enforced, [ "The Zollverein" 1856, Siva 96; "The Carl Johan" 1821, cited in "The Dundee" Hagg. Adm. 113 and "The Girolamo" 3 Hagg. Adm. 186; " Cope - v - Doherty" (1858) 4. K & J. 367, affd. 1858, 2De G.& J. 614; " The Wild Ranger" 1862, Lush. 553 even when the incident occurred in the Solent. "The Saxonia and the Eclipse" Lush. 410. So far as regards the rules for preventing collisions at sea, this was a great inconvenience to shipping, for it meant that when a British ship met another ship on the high seas, it had to adopt one course if the other ship were British and another if it were foreign; Marsden, Collisions at Sea p.216 and with regard to the limitation of the liability of shipowners, it resulted in such legal anomalies as the decision in the "Wild Ranger", 1862 Lush 553 a cause of collision between a British and an American ship in which the latter was at fault: although by a British statute, shipowners, and by an American statute all shipowners had a limited liability, the American defendantwhs not entitled to limited liability, butwhs the liable in full according to the old general maritime law; English Court had to apply the old maritime law except where it had been altered by a British Atatute, and though it had been altered by a British Statute as regards British shipowners, this had not been done as regards foreign shipowners.

The confusion about the regulations for preventing collisions at sea and limitation of liability were resolved by the Merchant Shipping Act 1862; (25 & 26; Vict. c. 63) which provided, as regards regulations for preventing collisions, that whenever foreign ships were/

were within British jurisdiction, the regulations for preventing collisions contained in the Act should apply to such foreign ships, and that in any cases arising in any British Court concerning matters happening within the British jurisdiction, foreign ships, be treated as if they were British ships; further, that whenever any foreign country was willing that the regulations for preventing collisions should apply to their ships when beyond the limits of British jurisdiction, Her Majesty could by Order in Council provide that the regulations did so apply. Secs LV11 and LV111 The present Merchant Shipping Act of 1894 57 & 58 Vict. c. 60 sec 424 has similar provisions. The existing statutory regulations for preventing collisions at sea made under sec. 418 of the Merchant Shipping Act 1894 by Order in Council of the 13th October, 1910: Note that during the war these were suspended by Defence (General) Regulation 43, made under the Emergency Powers (Defence) Act, 1939/ have been agreed to by most maritime nations, and the King has provided by Order in Council that the regulations shall apply to their ships, 13ths October 1910

If a collision occurs between a British vessel and a vessel of a State concerning that no Order in Council has been made, however, presumably our statutory rules would be ignored and the old general maritime law applied. ["The Zollverein", " The Saxonia and the Eclipse", supra; see " The Kining Willem 1" 1903; P. 114; Dicey p. 780n, p.782; Marsden p.213]

The Merchant Shipping Act 1862 provided, as regards limitation of liability, that it should apply to the owners of any ship, whether British or foreign [Sec LIV], and it was held to apply no matter where the collision occurred. ["The Amalia" 1863, 1 Mop. P.C. (N.S.) 484] Sec. 503 of the Merchant Shipping Act 1894, that is the present statutory limitation of liability, is also stated to be applicable to the owners of ships both British and foreign and the decision mentioned will be applicable under it. See also Merchant Shipping (Liability of Shipowners) Act 1898, 61 & 62 Vict. c. 14; Merchant Shipping (Liability of Shipowners and Others) Act 1900, 63 & 64 @ Vict. c. 32, and Merchant Shipping Act 1921, 11 & 12 Geo. 5 c 28. sec 1 The legislature, having corrected its mistake by the Merchant Shipping Acts 1862 and 1894, hag been careful to provide in subsequent Acts which modify the old general maritime law, that they should, universally, Thus the Submarine Telegraph Act 1885 48 & 49 Vict. c. 49 enacting an International Convention on submarine telegraphs that was signed in 1884, applies to the whole of her Majesty's Dominions, to all places within the jurisdiction of the Admiral of England, and to all places where Her Majesty has jurisdiction, [Sec 11] and the provisions of the Maritime Conventions Act 1911, 1 & 2 Geo Vg c. 57] which was passed as a result of two International Conventions on collisions and salvage respectively, which were signed at Brussels in 1910, apply in all cases heard and determined in any Court having jurisdiction to deal with the case and in whatever waters the damage or loss in question was caused, or the salvage services in question rendered. [Sec 9 (3) Other Acts enacting International Conventions have alse; been passed, e. g. Merchant Shipping (International Labour Conventions) Act 1925,15 & 16 Geo 5. c. 42, enacting a Convention adopted by the International Labour Organisation of the League of Nations at the General Conference at Genoas in 1925 as to our unemployment indemnity payable to seamen on the loss of their ship, that however applies only to ships registered in certain parts of the British Empire (56), and the Merchant Shipping Act 1932, 22 & 23. Geo 5 c.9, enacting a convention signed at London in But at least one comparatively 1930 relating to load lines etc. recent instance, ... a statutory change in the old general maritime

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law/

law was not made to apply sufficiently universally to avoid conflict. The International Convention of September 23 1910 provided by art. 5 that " The liability imposed by the preceding articles appaches in cases where the collision is caused by the fault of a pilot even when the pilot is carried by compulsion of law" and the Pilotage Act 1913 Sec. 15 (1) A enacted, which is contrary to the rule under the old marttime law and S. 633 of the Merchant Shipping Act, 1894; but Sec 61 of the Pilotage Act 1913 confined the application of the Act to the United Kingdom U. KA and the Isle of Man, and when a collision occurred at Gibraltar when a compulsory pilot was in charge of it, it was held that as the old law had not been changed there, it still applied , and the owners ware not liable ["The Arum" 1921 P. 12 Further, power was given in the Merchant Shipping (Equivalent Provisions) Act 1925, [15 & 16 Geo. 5. S.c.37) to make Orders in Council where His Majesty is satisfied that the ships of a foreign country are required by their own law to comply with any provisions which are substantially the same as, or equally effective with, the provisions of the Merchant Shipping Acts which apply to foreign ships while they are within a port of the United Kingdom, and that that country has made provision for the exemption of British ships while in a port of the foreign country from the corresponding requirement of their law, to the effect that such provisions of the Merchant Shipping Acts shall not apply to the foreign ships while within a port of the United Kingdom if it is proved that the ship complies with the foreign law. [Sec 1. See Merchant Shipping (Wireless Telegraphy) French Ships Order, S.R.& O 1926. No. 218; Merchant Shipping (Passenger Steamers & Emigrant Ships) Italian Ships Order S.R & C. 1929. No. 1154

To sum up, in questions of damage to property by ships, our Courts apply only the Scottish Maritime Law, Law, that is the old general maritime law as applied in our Courts, as modified by British otatutes. The statutes that modify it are now, generally speaking,

universal/

universal application to all ships in all waters, See however "The <u>Arum</u>", supra] just as the old general maritime law had universal application. so, in all cases arising in our Courts, the maritime law of the forum only is applied.

It may be remarked that, just as the application of the old maritime law of Scotland could be justified in the past on the ground that it was our interpretation of a generally recognised system of law, so now the application of the old maritime law as modified by British statutes can be justified in principle by observing that the statutory alterations, such as the limitation of the liability of shipowners and the new rules for preventing collisions at sea, have now been made the subject of intermational agreement. Our Courts still apply the law of the forum in maritime questions, and it is still justified because it is still our interpretation of a homogeneous maritime law.

Meaning of property The "property" need not be abother ship or cargo, but may be a pier or landing stage, ("The Veritas" 1901 P. 304, per Gorell Barnes, J. at p. 311: McMillan p. 161] or a submarine cable, Submarine Telegraph Co - v 9 Dickson (1864) 15. C.B. (N.S.) 759; Cheshire p. 308; See the Submarine Telegraph Act 1885, 48 & 49 Vict. c. 49 or the case may be the invasion by one ship of a right that another ship has acquired to a sea animal like a whale, Sutter - v - Aberdeen artic CO. 1861, 23, D. 465, Revd. 4 McQueen 355; Addison - v - Row. 1794, 3, Pat. 334; Dicey gives a different rule for whales, p. 778 or to a wreck of which it had taken possession. [" The Tubantia" 1924 p. 78 p. But not all invasions of rights of property from ships are comprehended, for when an action in tortwis brought against a British meval officer for the wrongful seizure of goods from a British ship while within the territorial waters of Muscat, the House of Lords held that/

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that the question was ruled by the normal principles in cases of tort, which that were laid down in <u>Phillips - v - Eyre:</u> <u>Carr - v - Fracis Times</u> & Co. 1902 A. C. 176] this was not a maritime question, similar to that srising from a collision between ships. <u>Owners of s.s. "Reresby</u> <u>- v - Owners of s.s. "Cobetas"</u>, supra, per Lord Blackburnat p. 722]

To the rule that all questions of damage to property by a ship are to be governed by the maritime law of Scotland alone, there are two exceptions:-

(i) Special regulations as to navigations in a foreign port or river, which have been imposed by the littoral state, have to be observed by all ships, including British ships, failure to observe the regulations may be relied on as showing fault, and if one ship is exempt from liability because it has observed the regulations, out Courts could not hold that it is liable because of some of our rules. ["The Chatwood" 1930; P. 272; The Sheaf Steamship Co. Ltd - v - THE Compania Transmediterraneau 1930; S.C. 660; "The Hagen " 1908; P. 189, at p. 203; "The Maria Cristina" 66; Ll.L. Rep. 256; "The Melrose Abbey" and the "Pan Europe" 63; Ll.L. Rep. 291; "The Polo" [4] L.T. 290; "The Fairplay" XLV\*(No.2) 63; Ll.L. Rep. 210; "The Malacca Maru" 61; Ll.L. 161, D.T. 290;

It should be noticed that if the cause of action arose in foreign territorial waters and foreign port regulations were an issue, it is quite likely that the Scots Courts would refuse to exercise jurisdiction, (assuming that they had it) on the ground of forum non conveniens, especially if both of the ships were foreign. [The Sheaf Steamship Co.Ltd. supra]

a member of a <sup>Ship-owning</sup> defendent corporation (ii) When the question is whether the defender is responsible for the acts of the actual wrongdoer, the law appropriate to the status was incorporated of the defender may have to be examined. Thus in <u>General Steam</u> <u>Navigation Co. - v - Guillou</u> (1843) 11. M & W. 877) an action in England/ $\leq$  England by British shipowners against a person whowns a director and shareholder of a French corporation whose ship had collided with theirs; itwis pled that by French law the defendantwas not responsible for the negligence of the master of the French ship, but only that the master or the corporation were. The Court of Exchequer thought that, assuming this plea to mean that the defendantwas not liable at all by the law of France for the Acts of the master, that whis a good defence. It is obvious that the nature of the Corporation, the rights of its members inter se, and the position of third parties vis-a-vis the corporation, could only be determined by reference to the law under But this is entirely which the body was incorporated. different er individe (ombany) issue to that raised if the owner of the defendant ship, pled that by his national law, or by the lex loci delicti , whether individual or Company, he was not liable for the delicts of his master and crew because the rule of respondent superior was not recognised by that law. That would be an irrelevant defence, for the question whether the rule respondeat superior applies or not. is for our own maritime law. "The Leon" 1881 P. 76; Mar5den p. 213

In "The M. Moxham" [1876 1. P.D.107] an English Company, possessed of a pier in a port in Spain, instituted an action of damages in the English Courts against an English ship for negligently injuring the pier. The onipowners replied that by the law of Spain only the master and crewware liable for negligent navigation, and not the owners, This case is often relied on for the and this plea was upheld. propositions that if there is no liability by the lex loci delicti there is no liability, and that the applicability or not of the rule respondent superior depends on the lex loci delicti. Marsden pp 214, 215 But in truth the case establishes no such rules. The true principles are: for delicts occurring on land, there is no liability unless there is liability by the lex loci delicti, and the applicability or not of the rule respondent superior, depends on the lex loci delicti; for delicts/

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even in foreign territorial waters,

delicts occurring at sea, ["Owners of s. s." Reresby" - v - Owners of s. s. "Cobetas" 1923; S.L.T 719 the maritime law of the forum alone is applicable, and the applicability or not of the rule respondeat superior depends on the maritime law of the forum. The decision in "The M. Moxham", though admittedly not some of the dicta, does not trangress, but acts upon these principles. The Ebglish Courts had no jurisdiction, because it was an action of delict about foreign immoveables. See post p. 1 But the ship had been arrested in Spains and released upon an agreement that all remedies against the ship and against the owners should be tried in this country. This gave jurisdiction by contract, and the English Courts had to decide the case as the Spanish Courts would have done. The defender admitted that he could not succeed unless he showed that it would have been the duty of the Spahish Courts to apply the English Law. Of course the Spanish Courts would have done no such thing, but would have applied Spanish Law, either on the ground that in maritime questions only the maritime law of the forum is applied, or on the ground that in regard to immoveables only the law of the situs is applied.

(b) LAjury to persons The delict may have originate and have its effect within the same ship, as when one member of a crew assaults another. The effect of this is criminal law is as follows:-

On the high seas the country of the ship's nationality has exclusive jurisdiction in criminal matters, irrespective of the nationality of the offender. This jurisdiction is claimed for our Courts in respect of British vessels on the high seas by the Merchant Shipping Act 1894.  $\int 57 \& 58$  Vict. c. 60 sec. 686 Our Courts also have jurisdiction in respect of crimes committed by British subjects on a British ship in foreign territorial waters, [Ibid; <u>R. - v - Anderson</u> L.R. 16. C.R. 161; <u>R. - v - Carr</u> 1882 **x** Q.B. D.76] but jurisdiction is not claimed with regard to non-British subjects on board British ships

in foreign/

foreign territorial waters. MacDonald, Criminal Law p. 280. In the English case of R. - v - Anderson (1868) L.R. 1 E.E.R. 161, however, it was held that all seamen, whatever their nationality, serving on board a British ship in foreign territorial waters, we sesubject to the jurisdiction of the English criminal wourts, because the English Admiralty jurisdiction so extended . Where our Courts have jurisdiction over British subjects on British ships in foreign territorial waters, the littoral state has also a concurrent jurisdiction, if it claims it,  $\int \frac{\text{Regina} - v - \text{Anderson}}{1868}$  L.R. 1 5 C.C. R. 161 and the littoral state of course hay jurisdiction over the non British subjects on board while in their territorial waters. Our criminal Courts have jurisdiction over foreign ships in our our territorial waters whatever is the nationality of the offender. Territorial Waters Jurisdiction Act 1878, Sec. 2,41 & 42g Vict. c. 73 If the law of the nationality of the ship claims it, there may be a concurrent jurisdiction to its Courts. Wheneveraa Court has criminal jurisdiction it applies its own law.

The admitted existence of concurrent jurisdictions raises a difficult problem of Private International Law where the question is not criminal responsibility, but civil responsibility. If the incident occurs on the high seas the matter is simple, the law of the nationality of the ship is presumably the <u>lex loci</u> <u>delicti</u>, [Dicey p.778] and any claim, to be exigible, must be maintainable both by the law of the nationality of the ship and by the <u>lex fori</u>. But where the incident occurs in territorial waters, is the law to be looked at that of the littoral state or that of the ship's nationality.? The solution of the matter is probably indicated by the dictum of an English judge :- " When vessels go into a foreign port they must respect the laws of that nation, to which the port belongs; but they must also respect the laws of the nation to which the vessel belongs," [<u>R. - v - Anderson (1868)</u> L.R.

L. R. The C.C.R. 161, per Bovill, C.J at p. 166 Thus a claim for reparation is exigible if it is maintainable either by the law of the littoral state or by the law of the nationality of the ship, and is also maintainable by the lex forig However the delict may have commenced on one ship and taken effect on another, as when one ship, through the negligence of its crew, rams another and injures someone on board the other. When both ships are of the same nationality, the law applicable is that of the common nationality. (Article of the Antwerp Congress of 1885, after quoted, which was adopted in Kendrick - v - Burnett 1897 254R. 82, and Convery - v - Lanarkshire Tramways Coy 1905 8gF. 117 and presumably the claim would have also to be exigible by the lex fori. When the ships are of different nationality\_" To found a claim there must be a concurrence between the law of the country of the injurer and the injured ..... the person convened as defender cannot be made liable unless these two factors concur: first that he is liable to the claim made against him by the laws of his own country, and in the second place, that the injured would be entitled by the laws of his country to what he claims" Kendrick - v - Burnett 1897 25. R. 82, per Lord Robertson at 1. 91. But see Davidsson - v - Hill 1901 21 K. B. 606 By"the laws of his own country" Lord Robertson in the above passage meant the law of the flag of his ship. Convery - v -Lanarkshire Tramways Coy 1905, 8.F. 117 per Lord Pres. Dunedin at p 121 Kendrick v. Burnet adopted this 1885 They article of the Antwerp Congress, is as follows:- "L'abordage en plein Kendnick v. Burnett adopted this mer, entre deux navires de même nationalité, est règle par la loi nationale. Si les navires sont de nationalité differente, chacun est oblige dans la limite de la loi de son pavillon et ne peut recevoir plus que cette loi lui attribue"). It has not been laid down whether the claim must also be exigible by the lex fori as well as by the laws of the flags of both ships, but probably it will have to be.

This rule is sound in principle. A ship on the High Seas is for many purposes to be regarded as a floating island of the country to which she belongs. The law of the country to which she belongs

prevails/

prevails on board, and the persons on board are bound to obey that law. It is therefore proper that the rightful ness or wrongfulness and the legal effects of the actions of persons on board should be judged by that law. But the law of the other ship must come into consideration also, for a delict is considered to have happened where its effects occur, and persons on board the other ship may well be said to have entrusted themselves to the laws of its country. The law of the other country cannot be looked at solely, for it would be unfair to the offender to subject him to a law about which he may have known nothing, or with which he may have had absolutely no connection. In short the laws of both ships must be looked at.

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Perhaps, however, it would be sounder to say that the laws to be looked at are the laws of the nationality of the ships, and not the laws of the flags of the ships, for they are not always the same, and if the ship were truly a British ship because the ownersware British, the fact that it carried a foreign flag would not make the foreign law the one to be looked at. <u>(Chartered Mercantile Bank of India - v - Netherlands India Steam Navigating Co.</u> (1883) 10; Q.B.D.521

The law of the nationality of a British ship is the law of the country to which the ship is attached by registration. Thus for a British ship registered at London, the law of the nationality is English Eaw, and for a British ship registered at Glasgow, the law of the nationality is Scots law. Dicey p. 686

# Delicts in uncivilised or unsettled Gountries.

When a delict is alleged to have been committed in unsettled territory, the rule is supplied by the principle, that "Every person carries with him in such circumstances so much of the laws of his native country: as is necessary for the regulation of the ordinary affairs of life." <u>Kendrick - V - Burnett</u>, 1897, 25, R. 82, per Lord Mc<sup>L</sup>aren at p. 88] Thus is a Frenchman domiciled in France

assaulted/

assaulted another Frenchman domiciled in F<sub>w</sub>ance in an unsettled country, the lex loci delicti would be French Law, and the lex fori would also have to be satisfied before a claim became exigible. When the native countries of the two persons are different, e. g. if a Dutchman domiciled in Holland assaulted a Frenchman domiciled in France in an unsettled country, two factors would have to concur: Firstby the offender would have to be liable to the claim made against him by the laws of his own country, and saconday the injured party would have to be entitled by the laws of his country to what he claims. [Ibid; (f. Dicey p. 881] and the lex fori, if different, would presumably also have to be satisfied. If the question has to be settled "The laws of his own country" means the laws of his nationality or of his domicile, considerable difficulty will arise. In Kendrick - v - Burnett supra the judges are obviously thinking of the law of the domitile, but doubt exists as to the correctness of their view because of a later case, Convery - v - Lanarkshire Tramways Coy 1905 8 F. 117, per Lord Pres Dunedin at p 121 When British subjects go to unsettled countries they would appear to take English law with them, no matter whether they are domiciles in Ebgland or Scotland, for it is always English Law which has become established in our colonies. It is submitted that not the law of his own country would mean the law of his nationality, and when the nationality is British, the law of England.

# Delicts against Foreign Immoveables:

Our Courts have no jurisdiction to entertain actions for damages in respect of debiets to foreign immoveables. [Ersk. Inst. 1,2, 17; Duncan & Dykes pp 21, 136; British South Africa Eompany - v - The Companhia De Mocambique, 1893, A.C. 602. (House of Lords); Cheshire p. 305 Diceyp.203; In "The M. Moxham" 1876 st page 107, the parties had consented to the jurisdiction of the English Courts. In The Golaa" 1926 P.103 the point was not taken <u>Foreign warlike</u> acts

Dicey states that warlike operations undertaken by order of a foreign government against British territory create no civil liability. Zp. 2157 He gives as an example  $\angle p$ . 218 Example 11\_7 X, an alien enemy in charge of hostile forces, landing in England and destroying A's property. X revisits England after peace has been declared. A brings an action to recover damages for the injury done by X to his property. The Court, says Dicey, has no jurisdiction. Now if X lands here and commits an act contrary to Fublic Inter-:national Law he is, according to Public International Law, punishable either in our Courts, ZE.g. Art 29 of the Geneva Convention of 1929 provides: "The Governments of the High Contracting Parties will likewise adopt, or lay before their legislative assemblies for adoption, in the event of the inadequacy of their criminal laws, the necessary measures for the prosecution in war time of any action contravening the provision of the present Convention." Cp. The Washington Conference 1921 Art. 3 or in special International Courts set up for the purpose. [E.g. The Treaty of Versailles 1919 Articles 227, 228; The Treaty of St. Germain 1919 Art. 173; The Five Power Agreement of August 8th 1945 setting up the Nuremberg Court for the trial of the chief Nazi criminals. The only reason for saying that X is not responsible in private law for a civil wrong is that his action is authorized by the state. But it is beyond the power of his state to authorise acts which are contrary to Public International Law. The question whether X is liable for delict therefore should depend on whether his act is contrary to Public International Law or not. Cp. F.A. Mann LIX L.Q.R. at p. 46\_7 Any act contrary to the laws and usages of war such as the use of poison gas/

gas would make X liable, and since an aggressive war can now be said to be contrary to Public International Law, Covenant of the League of Nations Art. 16; Briand-Kellogg Pact 1928; Five Power Agreement of August 8th 1945, Charter of the International Military Tribunal Art. 6 (a); Charter of the United Nations Organisation Arts. 1 and 2 (3) and (4) at passim; Lord Wright 1946 62 L.Q.R. 40 7 any act performed by X in pursuance of such a war which caused damage would be a delict.

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### THE REMEDY:

The Lex fori governs all questions relating to the remedy. Lippmann 1837 25.& McL.682; Cheshire p. 632; Dicey p. 849; Westlake, 341- 352; Bar pp. 845 et sequ " The distinction is taken between the contract and the remedy. Whatever relates to the nature of the obligation which ad valorem contractus, 2000. is to be governed by the law of the country where it why made when the lex loci; whatever relates to the remedy, by suits to compel performance, or by action for a breach ad decisionem litis, which is to be governed by the lex fori that the law of the country to whose courts the application is made for performance or for damages" Don - v - Lippmann 1837 25 & McL 682 per Ld Brougham at p. 723 The reason for this rule is succinctly stated by Id. Brougham in the case just quoted from;" The manifest inconvenience of Courts proceeding in different ways, according as the subject matter of each suits may have originated in one countrys or in another and having to ascertain in each case which comes from a foreign country the course of the courts in that country, renders it absolutely necessary that such questions of procedure should be excluded, and the rule be adopted that

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It would be absurd, for example, for a Scotsman suing abroad for damages for defamation to claim a jury trial on the grounds that the merits of the action  $\frac{1}{16}$  to be governed by Scots Eaw, and that in Scotland he would obtain a jury trial, when perhaps the procedure of the foreign country had no provision for impabelling juries and knew nothing of jury practice.

requires all suitors to take the law of the country as they find it."

The most helpful way of defining "Remedy", will be to enumerate the categories of legal rules which are classified as dealing with the remedy/ remedy. They are five in number (1) Rules limiting the right of action, either in respect of (a) the time within which an action must be brought, or (b) the grounds of action; (2) Rules relating to the procedure in bringing and conducting an action; (3) Rules of evidence; (4) Rules relating to the remedies which the Courts will grant and the means of enforcing the Courts' orders; (5) Questions of priority among competing creditors.

## (1) RULES LIMITING THE RIGHT OF ACTION

# (a) In wespect of the time within which an action must be brought.

Rules which provide that if action is not brought within a certain time either it can not be raised at all, or that the mode of proof is altered or the onus of proof shifted, are applied if they are the rules of the <u>lex fori</u>, and if they are not are ignored. [See "Prescription", page

# (b) In respect of the grounds of action.

Many countries have rules that no action may be brought where the ground of action is of a certain kind. Thus it is a rule of Scots Eaw that gaming contracts cannot be enforced because they are sponsiones [Cf. Gaming Act 1845 (England) Sec. 18; Divery p. 632; Mauliov. Quert 1907 ludicrae, unworthy to occupy judicial time. A Such rules are applied if it B. fu colling M. they are rules of the lex fori, and otherwise are ignored. But a law at p. 753 that a gaming contract is illegal and void relater to the essential validity of the contract, and the proper law rules.

## (2) RULES RELATING TO THE PROCEDURE IN BRINGING AND

#### CONDUCTING AN ACTIONS

Rules relating to the procedure in bringing and conducting an action are governed by the <u>lex forik</u> Thus the <u>lex fori</u> determines the court in/

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in which the action may be brought; [Bar p. 881] the form which it may take; / MacKenzie - v - Hall 1854 17D. 164; Don - v - Kealey 12, D. 1016]; the citation of the defender and of witnesses;  $\overline{/}$  Bar pp 851 et sequ $\overline{/}$ ; the conduct of a proof; whether a counter-claim is competent;  $\sum$  Dicey p. 851: Westlake § 346 7 and the right of appeal.  $\sum$  Mrs Steele (O.H.) 1894, 1 S.L.T.: Westlake \$ 352 7 Whether an unincorporated firm can be sued socio nomine or only by suing the partners individually, <u>Paton - v - Neill Edgar & Co.</u> (0.H.) 1873 10. S.L.R. 4617, whether the firm has to be sued before the partners can be sued,  $\sum Bullock - v - v$ Caird 1875 X.Q.B. 276; In re Doetsch 1896 2 Ch. 8367 and whether a single partner or co-obligant can be sued without calling the other partners or co-obligants  $\angle$  Westlake  $\langle 347;$  but the question whether the obligation of the partner or co-obligant is joint and several or each is only liable for his own share depends on the proper law of the transaction, Westlake, ibid ] are to be governed by the lex fori. The House of Lords has however held that the question whether the principal debtor has to be sued before the cautioner, or whether both can be sued in the same action, is to be determined by the proper law of the contract of cautionry. / Municipal Council of Johannesburg v. Stewart 1909 S.C. (H.L.) 537

In General Steam Navigation Co. v. Guillou, /(1843) 11 M. & W. 877\_/ an action in England by Shipowners against a person who was a director and shareholder of a French corporation, whose ship had collided with theirs, it was pled that by French law the defendant was not responsible for the negligence of the Master of the French ship, but that only the master or the corporation were. Parke B., speaking for the Court of Exchequer, laid down this distinction: " If the defendant is not liable for the acts of that other by the law which governs this case, he has a good defence to the action .... On the other hand, the plaintiff contends that the plea only means, that in the French Courts the mode of proceeding would be to sue the defender jointly with the shareholders of the Company under the name of their association, and if this be the true construction of the plea, we all concur in the opinion that/

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that the plea is bad".  $\sum p$ . 895 Whether the mother of an illegitimate pupil child has a title to bring an action on its behalf,  $\sum Jones$  v. Somervell's Trs. 1907 S.C. 5457 and whether an assignee or attorney can bring an action in his own name or only in the name of the assignor or constituent, <u>Wolff</u> v. <u>Oxholm</u> 1817 6 M. & S 92 per Lord Ellenborough at p. 99; Jeffrey v. McTaggart (1817) 6 M & S 126; Cheshire p. 647; Dicey p. 849; Westlake \$ 342. Most of the old English cases, however, are to the other effect, namely that such a rule is a question of substance, and that the proper law of the transaction rules: <u>Innes</u> v. <u>Dunlop</u> 1800 8 T.R. 595; O'Callaghan v. Thomond 3 Taunt 82; Trimbey v. Vignier 1834 1 Bing. (N.C.) 151; Alivon v. Furnival 1834 1 C.M. & R. 277; Suwerhop v. Schmanuel 1824 2 L.J. (0.S.) 150\_7 are similarly governed by the lex fori. On the other hand when the question is whether a person exists or not and so whether that person can sue or not, the answer is supplied in the case of a corporation by the law of the country under which it was incorporated <u>ABank</u> Internationale de Commerce de Petrograd v. Goukasson 1923 2 K.B. 682, 1925 A.C. 150; Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse 1923 2 K.B. 630, 1925 A.C. 112; Lazard Bros. v. Midland Bank 1933 A.C. 289; In re Russian Bank for Foreign Trade 1933 1 Ch. 745; Bank of Ethiopia v. National Bank of Egypt 1937 1 Ch. 513; Westlake sec 214(a); But see Lecouturier v. Rey 1910 A.C. 262 7 and in the case of a natural person by the law of his last known domicile [Bar p. 291]

The effect of such preliminary pleas as "All parties not called", "forum non conveniens", "competent but omitted", / contra <u>Hendly</u> v. <u>Guillin</u> 1741 Mor. 4465\_7, are governed by the <u>lex fori</u>.

In some countries there is a rule that an agreement to refer to arbitration prevents the contracting parties having their rights adjudicated by the Courts, while in others such an agreement does not exclude the jurisdiction of the Courts. The <u>lex fori</u> will determine the effect of a cloud of arbitration on the right of action, even though a different law may be applied to the construction and essential validity of the clause of arbitration. Thus in <u>Hamlyn</u> v. <u>Talisker Distillery</u> / 1894 21R. (H.L.) 21. See also <u>Robertson</u> v. <u>Brandes Schonwald & Co</u>. 1906 8F.815; <u>Styring v</u>. <u>Borough of Oporovec</u> 1931 S.L.T. 493 per Lord Pitman at p. 494. 7 a contract between/ between an English and a Scots firm contained a clause that disputes arising out of the contract were "to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way". When the Scots firm sued the English firm in the Court of Session, the defenders maintained that action was excluded by the clause of reference. It was argued in reply that the clause was invalid, because it was a reference to un-named arbiters, which at that time was ineffectual in Scots law. It was held, however, that the arbitration clause fell to be construed and governed by the law of England as the proper law of the contract, and that by English Law it was valid. In short, the proper law of the clause of arbitration determined its essential validity. But then the House of Lords applied the lex fori, Scots law, by holding that the valid clause of arbitration excluded the action. They did not say so in terms, but the English law then was that a reference to arbiters did not necessarily exclude the Courts, the Courts having a discretion under the Arbitration Act of 1889 as to whether or not to apply the arbitration clause.

It must be confessed however that in <u>The Municipal Council of</u> <u>Johannesburg v. D. Stewart & Co.</u>, <u>/</u>1909 S.C. (H.L.) 53.<u>7</u> also a decision of the House of Lords, the Lord Chancellor, Loreburn, has a dictum directly to the contrary. <u>/</u>About which Lord Dunedin in <u>Sanderson</u> v. <u>Armour</u> 1922 S.C. (H.L.) at p. 127 reserved his opinion\_7

When evidence has to be taken on commission in a foreign country, the rules of the law of the country where the action is being conducted apply, and not the rules of the country where the evidence is taken. In two old cases when a commission had been granted to take the evidence of a witness abroad, and the deposition was returned not signed by the witness according to Scots law, but only by the Commissioner, according to the foreign law, this was held sufficient; <u>[Burnet</u> v. <u>Lutgrue</u> 1675 Mor. 4433; <u>Cuming v. Kennedy</u> 1707 Mor. 4433\_7 but these old cases are

doubtful, and when a commission was granted to a judge in Norway to refer to the defender's oath, and the deposition was not signed by the defender as required by Scots law, but only by the judge according to Norwegian law, it was held that the defender had to be re-examined and that he should subscribe his oath according to Scots law.  $\sum Davidson v. Middleton 1673$ Mor. 4432; Dickson ii, § 1802; Bar p. 846; Gillespie in Bar p. 857\_7

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But the law of the country where the action is proceeding would not be applied to such matters as whether a witness can be required to answer an incriminating question, or the necessity for supplying witnesses with conduct money, that relate to public policy and not to the value of the evidence, and to the law of the place where the evidence was being taken would apply. We have statutory provision for the case where foreign courts want evidence taken here in connection with a cause pending before them, [ 19 & 20 Vict. C. 113] and it is provided that the witness shall be entitled to the like conduct money as for attendance at a trial, and need not answer incriminating questions, as in causes here.

#### (3) RULES OF EVIDENCE:

All questions relating to evidence are governed by the <u>lex fori</u>, (<u>Yeats - v - Thomson & Ors</u>. 1835 The S & MeL 795, Affg. <u>1 DS. 565.</u>)

Thus the following are governed by the <u>lex foris</u>-(a) The admissibility of evidence. [<u>Mrs. Steele</u> (0.H.) 1894 The/S.L.T. 652; Dickson § 1003; Westlake § 348.] The privilege that our law accords to a witness to decline to answer a question that would entail his admission of a crime, applies equally where the criminal proceedings that the witness might incur are in a foreign country, provided that the Court is sufficiently informed as to the foreign law. [<u>U.S.A. - v - McRae</u> (1867) L.R. 4 Eq. 327, 3 6h. App. 79; Westlake § 349.]

(b) Whether certain facts establishes presumption or are conclusive of an issue. Owners of Immanuel - v - Denholm & Co. 1887 15R.152; Contra, <u>Girvin, Roper+Co. v. Monteith</u> 1895 23R. 129; In The Cohn 1944 171 L.T. 377; <u>Gordon - v - Worlie</u> 1623 Nor. 4460, is over ruled

(c) Where the onus of proof lies. [MacKenzie - v - Hall 1854; 17D. 164] the lex fori is applied as to onus of proof even though this alters the onus from that which would be applied by the lex Daviae.

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For an interesting argument for taking the onus of proof from the <u>lex causae</u> see W.W. Cook: The Logical and Legal Bases of the Conflict of Laws p.p. 166-169, and Bar p. 869 et sequ

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(d) The method by which facts can br must be proved. <u>Strathern - v-</u> <u>Masterman & Co.</u> 1850 12D. 1087; <u>Fraser - v - Lookup</u> 1748 Mor. 4590: <u>Creditors of Grays - v - Grant</u> 1789 Mor. 4474; <u>Robertson - v -</u> <u>Burdekin</u> 1843 6 D.17; <u>Thomson - Thouson</u> Sh. Ct. Rep. 33, 84]

This head is concerned with such questions as whether corroborating evidence is necessary, and whether written evidence is required or parels evidence will be sufficient. [Wiedemann - v -Walpole 1891 2 Q.B. (Osto) 534: Dickson §1003], and whether written evidence is required for parels evidence will be sufficient; With regard to the latter, 2 common cases are:-

- (1) Does a contract exist ---- e.g. has there been a loan of £200 by B to A?
- (2) Has an obligation been discharged e.g. has a loan of £200 been paid?

(1) DOES A CONTRACT EXIST? This fact must be established by evidence satisfactory to the lex fori, and it is only the evidential requirements of the lex fori which need be observed. A distinction, however, must be made between the requirement of writing as a solemnity in the constitution of a contract, and the requirement of writing simply as a matter of the proof of a contract. In Scots law for instance, there are certain obligationes literis, namely contracts relating to heritage, contracts of service for more than a year, and cautionary obligations, for which writing in a certain form is necessary as a solumnity or formality in the constitution of the contract: without probative writing the debtor is not considered finally and formally to have consented to the contract, and even though he admits that he has entered into the agreement, he may resile, if matters are entire. Other contracts in Scots Saw, e. g. loans, may be entered into without any formalities beyond the agreement of the parties, but where the loan is over £8. 6. 8df Scots law demands that the loan be proved by the

writing/

writing of the debtor (or his oath), this being purely a requirement of the law of evidence. Where writing is required as a solemnity in the constitution of the contract, the lex fori contractus rules, Thus if a contract is entered into by a simple writing without witnesses, in a country where that is sufficient to constitute the contract, the contract will be validly constituted, even though by Scots law contracts of that description have to be constituted by a formal writing Govan v - Boyd 1796, Mor. 4476; Ersk. Inst. 3, 2, 40: Dicksoni § 997, 1007 and if the contract does not satisfy the requirements of the lex loci contractus as to the constitution of that type of contract, the contract is invalid, even in Sgotland, where perhaps such a contract could have been entered into informally, Tayler - v - Scott 1847 9 D.1504; Dickson 35 998, 1007. The lex loci solutionis is an alternative to the lex loci contractus, but is not mentioned, in order to simplify exposition. See Contract," formalities p. But if writing is required only for proof, the <u>lex fori</u> rules. Thus if a loan is made in a country where a loan may be proved by witnesses, and it is sued on here, the lex fori applies, and the action will fail through failure to prove the loan; Creditors of Gray - v - Grant 1789 Mor. 4474 ; Leroux - v - Brown (1852) 12 C.B. 801; Dickson § 1007] and conversely a contract entered into abroad, which by the lex loci could only be proved by writ, would, if Scots Law admitted parole for the proof of that class of contract, be probable by parole. Fraser - v - Lookap 1748, Mor. 4580. This result has been criticised See Willes J. in Williams - v - Wheeler 1860, 8 C.B. (N.S.) 299 at p. 316, and in <u>Gibson - v - Holland</u> 1865, W.E.B. Chett 1934 XV B.Y.I.L. 69; Ralel, j. 50,51; A.H.Robertson, Churcherization in the Conflict L.R. / C.P.I, at p. 8; / Cheshire p. 636 on the grounds that to refuse of Laws, PP 254,5 recognition of a right duly acquired under a foreign law, that is the proper law of the transaction, is to stultify the very purpose of International Private Law. But Leroux - v - Brown has been approved in the House of Lords, Morris - v - Barron & Co. 1918, A. C. 1 per Viscount Haldane at p. 15 and the ratio is defensible on principle: in the case of a contract made abroad that cannot be proved here because of the stricter

requirements/

requirements of our law of evidence, to say that we are refusing recognition to a right duly acquired under the proper law of the contract is begging the question, that is, whether a contract has been entered into. At one time it was the law in England, that if there had been witnesses to a deed, when the deed was put in suit, the witnesses, if alive, had to appear and depone to their signatures. The requirement of the witnesses appearing what a matter of proof, not formality, the lex fori ruled, and so when an English deedwis out in suit in Scotland, there wds no need to bring the witnesses into the Scottish Court to depone to their signatures; [ Chatto - v - Orde 1702 Mor. 4447; contra Dickson § 1005, and certain dicts in Earl of Hopetoun - v - Scots Mines Co 1856 18D. 739 and a Scotch probative deed did not receive effect in England without the instrumentary witnesses being examined. [Dickson \$ 1004]

(2)HAS AN OBLIGATION BEEN DISCHARGED? This fact too must be established by evidence satisfactory to the lex fori, and it is only the evidential requirements of the lex fori that need be observed. Á different conception formerly held sway in Scotland. Itwis believed that a debt could be proved to have been discharged by evidence sufficient according to the lex loci contractus: Thus in Galbraith - v - Cunningham, [1626 Mor. 4430, 4446] te an action in the Court of Session on an Irish bond payable in Ireland, the defence was that the bond had been paid, and it was offered to prove this by witnesses, which was competent by Irish Law but not by Scots Law. It was held that Irish law was applicable and that the payment could be proved by witnesses,"for this being according to the law of the place, he had reason to trust the payment to that sort of not evidence, since he could, foresee the creditor would be so unjust as to make a demand in another country. Mor. 4446; See also Balbirnie - v -M. Morland V. Melaill 1666 Mor. 4447. 1634 Mor. 4447 1 In Urtill 1633 Mor. 4431; Hyde - v - Williamson 1634 Scot - v - Henderson 1664 Mor. 4450. it is not certain whether Scots Law is applicable as the lex fori or as the proper law of the transaction, but this may be the first case of enforcement of the lex fori

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It is the practice in many countries, as it is in Scotlandy with the Books of Council and Session, and the Sheriff Court Books, to register the originals of important contracts or bonds in public registers or Court registers, or in the Notarys! Protocol Books, and to use extracts or authenticated copies. In the Courts of the several countries such official extracts or authenticated copies are regarded as equally good evidence as the original. But as a result of the rule that the lex fori governs evidence, the fact that an extract from a French register is good evidence of the contract in a French Court, doesnot mean that the extract is good evidence in a Scots Court, If the existence or tenor of the contract is disputed, the contract will have to be proved in a manner satisfactory to the Scots law of evidence, which does not accord foreign extracts the same privilege as it does extracts from the Books of Council and Session. There are early cases to the contrary. Thus in one case an extract of a bond from a Register at Bordeaux was held sufficient to sustain action, because it was known to the Courts that it was the custom of that part to make the Bond after that form [ Lamington - v - Kincaid 1627 Mor. 4443], and in another, the extract by a Dutch Notary of an assignation was admitted instead of the principal deed, because by the custom of Holland, the principal was kept by the Notary when he granted the Extract. [ Davidsons - v - The Town of Edinburgh 1682, Mor. 4444 Dickson on Evidence (ii \$ 1321) too, states that the practice of the Scots Courts is to receive an extract or copy certified by the Reeper of the Records, provided that the person tendering the extract proves that it is a formal office copy according to the rules of the Register from which it was taken. Also Gillespie in Bar p. 868) These cases, however, would probably not be followed now. Story 630, 635 . In a more recent English case, Brown - v - Thornton 1837 6 Ad. & E. 185 it was proved that in Batavia charter parties were entered into by the instrument being written in the Book of a Notary and there signed by the parties. The Notary made copies which he signed and sealed, and delivered to sach of the In the Courts of Java, to prove the charter party, it was parties.

necessary/

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necessary to produce the Notary's Book, but this book was never allowed to be taken out of Java, and in Dutch Courts out of Java, faith was given to the copiesg as to an original. It was held that in the English Courts such copies were not receivable. There was nothing to give the copies the weight of evidence, except the Dutch law, and the English Courts could not adopt a rule of evidence from foreign courts, per Lord Denman C. J. at p. 191 It is submitted that this is the correct view. The procedure that should be followed when it is desired to prove a contract, bond, or any entry in a foreign public register, the existence or tenor of which is disputed, is to obtain a commission for the examination of the foreign Registrar as a witness. " If the entry is a short one, the simple way is to take it down in terms as part of the witness' deposition, and the evidence is thus obtained to the effect that the entry is in the book" As regards originals of deeds ... " The witness can exhibit the originals, and if he is unable to produce these, he can give copies, which will be evidence in the case and part of his deposition as a witness  $\int Maitland - v - V$ Maitland 1885, 12, R. 899 per Lord Bres, Inglis at page 904 The Evidence ( Foreign Dominion and Colonial Documents) Act 1933 / 23 Geo. 5 c. 4 provides that if Colonial, Dominion or Foreign, Country reciprocates as to our public registers, it shall be lawful to secure by Order in Council that official extracts from their public registers, authenticated as provided in the Order, shall be receivable as evidence,  $\int$  See Evidence (Belgium) Order 1933, S.R & O. 1933 No. 383} North - v - North 1936 52-T.L.R. 380; Evidence (France) Order 1937 S.R & O. 1937 No. 515; Evidance (Commonwealth of Australia) Order 1938 S.R.& O. 1938 No. 739

Where the existence and tenor of the entry in a foreign register is not contested, but it is still necessary to prove it, e.g. in divorce proceedings, where it is desired to prove the registration in another country of the marriage or of the birth of children, something less than these requirements suffices. It is the custom in these circumstances, to receive foreign extracts of registration of marriage or birth if certified,

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say by a Notary Public, to be formal extracts according to the law of the register from which they are taken, and to receive extracts from the Dominion or Colonial registers if <u>ex facie</u> regular even without this authentication. Such extracts are <u>prima facie</u> evidence, valid until challenged; if challenged, it is necessary to prove them in the usual way.

# 4. THE REMEDIES WHICH THE COURTS WILL GRANT? AND THE MEANS OF ENFORCING THE COURTS AWARDS

A court will grant the remedies recognised by the <u>lex fori</u>, and those only. Thus, on the one hand, when it was competent by the <u>lex fori</u> to arrest a debtor, arrestment was available for a debt which accrued in Portugal, although Portuguese law did not allow  $\operatorname{arrest}_{A}^{\operatorname{for}}$  debt; [<u>De la</u> <u>Vega - v - Vianna</u> 1830 the(E & Ad. 284; Westlake § 345] summary diligence in the Scots manner was available in Scotland on an English bill; [<u>Don - v</u> <u>Kealey</u> 12 D. 1016; <u>Mackenzie - v - Hall</u> 1854 17 D. 164] and for infringing a foreign copyright by distributing copies in England, the English Court granted the English remedy of injunction, although by the law of the foreign country no such remedy was competent. [<u>Baschet - v - London fllustrated</u> <u>Standard Co</u>. 1900 the(Ch. 73] And conversely, a foreigner cannot come to the Scottish Courts and ask for a decree of specific implement compelling his wife to live with him, even though that be competent by the law of the place of celebration of the marriage and the law of his domicile, **Faicey** page 855]

Two subjects will repay more detailed consideration, namely interdict and damages.

INTERDICT:

The Courts of any country have jurisdiction to interdict the commission of a wrong within the territory of that country, even if the wrongdoer is resident outside it, and can give a decree for the costs of the preventive procedures (Waygood Bennie 1855 12 R. 651 They can grant interdict in respect of any thing within their territory, and prevent its removal from their territory. Jones - v - Samuel 1862 24 D. 319 The Courts of a country may interdict the commission of a wrong outwith their territory, if the person or property of the wrong: :doer is present, within the territory to enable the decree to be rendered effective. It is quite common, for instance, for interdicts to be granted to prevent the prosecution of actions in foreign Courts, Lindsay - v - Paterson 1840 2.D. 1373: Young - v - Barclay 1846, 8gD. 774; Dawson's frs - v - MacLeans 1860, 22, D. 685; Liquidators of the Pacific Coast Mining Co. Ltd - v - Walker, 1886 13, R. 816; California Redwood Co. Ltd - v -Merchant Banking Co of London 1886 13 R. 1202 The acts committed abroad which are sought to be interdicted must however be such, that they would be wrongful if they had been committed in this country, and also they must be wrongful in the foreign no interdict will be granted where country where they occur: the acts would have been wrongful if committed here, but are not wpongful according to the lex loci delicti. Potterf & Co. - V - THE Braço de Prata Printing Co. Ltd. 1891 18 R. 511 Similarly; the Courts of a country may ordain a person to perform an act outwith their territory if the person ordained is within the territory so as to enable the decree to be enforced, if necessary, by compulsitor of imprisonment, even when the act prdered to be done abroad relates to land abroad. Ruthven - v -Ruthven (0.H.) 1905 43 S.L. R. 11

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As already mentioned, interdict will be granted here against the infringement in this country of a right duly acquired under a foreign law, although by that foreign law, which is the one with which the right has the nearest connection, interdict is not competent.  $\int \underline{Baschet} - v - \underline{London Illustrated}$ , supra

DAMAGES:

What separate items of damages are recoverable is determined by the lex causae, not the lex fori, but the details of the measure of damages are settled by the lex fori. Slater - v - Mexican National Railroad Coy 194. U.S. 120. 6p. Cheshire ppp 654-662; Story § 307; Contrast Dicey p.852 Thus where damages are claimed for breach of contract, the proper law of the contract, and where damages are claimed for delict, the lex loci delicti, will determine what "separable heads of claim" Kendrick - V - Burnett 1897, 25R. 82 per Lord Pres. Robertson at page 87. are recover: :able: Naftalin - v - L.M.S. 1933 S. C. 259; Kendrick - v -Burnett, supra; Convery - v - Lamarkshire Tramways Coy. 1905 8 F. 117; Slater - v - Mexican National Railroad Coy. 1943U.S. 120. Contra :- Horn - v - N. B. Railway Co. 1878 5 R. 1055; McLarty - v-Steele 1881, 8 R. 435; Baschet - v - London Illustrated Standard Co. 1900 thel Ch. 73; Machado - v - Fontes 1897 2 Q.B. 231; <u>Hansen v. Dinor</u> 1906 237 L.R. 56 <u>Scott</u> - v - Lord Seymour 1862 thel H. & C. 219, per Wightman J. but where it is clear what separable heads of claim are recoverable and the question is the quantification of the obligation into money, the lex fori will rule. Kendrick - v - Burnett, supra, per Lord McLaren at page 88 An example of the former case is where a fatal accident has occurred abroad and an action of reparation is being sued here and the question arises whether the relatives of the deceased are entitled to include in the claim for/

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for damages a claim for solatium. The answer to this question depends on whether solatium is or is not allowed by the lex causae, namely the lex loci delicti. / Naftalin - v - L.M.S., Kendrick - v - Burnett, Convery - v - Lanarkshire Tramways Co. supra. Contra: Horn - v - N.B. Rlwy Co. supra 7 Another example is that the question whether interest is or is not payable on a foreign debt, and the rate of interest, depends on the lex causae, the proper law of the debt. <u>Lauretan</u> v. <u>Kennedy</u> 1627 i Brown's Sup. p. 141; Fergusson v. Fyffe 16 S. 1038, 1841 II Robin, 267; Palmer & Co. v. Glas 13 S. 308; Gillow - v - Burgess 33S. 45, (new ed. p. 29); <u>Campbell</u> v. <u>Ramsay</u> 15th Feb. 1809 F.C.; <u>Price</u> v. <u>Wise</u> 1862 24 D. 491; Evans - v - Earl of Buchan 8 D. 296; Wilkinson - v - Monies 1821 1 S. 89; <u>Hyslop</u> - v - <u>Gordon</u> 1824 2 Shaw's App. 451; <u>Cochrane</u> - v -Gilkison 1857 20 D. 213; over-ruling Savage - v - Craig 1710 Mor. 4530, and Lamington - v - Kincaid 1627 Mor. 4443 (lex fori)/----- There are conflicting decisions as to whether the lex fori or the lex causae is to be applied to the question of allowing interest after an action has been brought: interest at the rate allowed by the lex fori was given from the date of citation in <u>Wood</u> - v - <u>Granger</u> 1779, Mor. 4532; Gillow & Co. - v - Burgess 3 S. 45 ( New ed: p. 29); and Hyslop - v -Gordon 1824 2 Shaw's App. 451; interest at the rate allowed by the lex causae was allowed right up to the date of payment in Price - v - Wise 1862 24 D. 491, and Wilkinson - v - Monies 1821 1 S. 89; while in Graham v. Keble 1820 II Bligh 126 interest was given at the rate allowed by the lex cause up to the date of the judgement on appeal, and thereafter interest at the rate of the lex fori. None of these courses seem seem to be founded on any obvious' principle. The position would be understandable if the interest were allowed at the rate of the lex causae up to the date of litis-: contestation, and at the rate of the lex fori thereafter. Litiscontestation does not take place with the serving of the summons - see however, Stewarts Exrx. - v - L.M.S. 1944 S.L.T. 13 (House of Lords)\_7

15.

An example of the latter case is where there has been destruction of cargo and the obligation is restitutio in integrum; the law of one country might prescribe as the measurement of compensation the price at which the owner could supply himself in the nearest market, while the law of the other country would give the cost price of the goods plus fair mercantile profit; The judge trying the case would quantify the damages in money according to the law which he iste admitted. [Kendrick - v - Burnett supra, per Lord McLaren at p. 88] Another example of the latter case is the rule that all decrees for damages must be given in British currency at the rate prevailing when the damage occurred, "The Volturno" 1921 2. A.C. 544 (House of Lords); Barry - v - Van des Hurk 1920 2 K. B. 709; Di Ferdinando - v -Simon Smits & Co 1920, 3g K. B. 409; Ralli Bros - v - Companhia Naviera etc. 1920, 1, K. B. 614; Lebeaupin - v - Crispine 1920 5 24 K. B. 714; Hyslop - v - Gordon 1824 2 Shaw's App. 451; Contra Wood - v - Granger 1779 Mor. 4532 . When the liquidate sum of 18,035 france was payable in Paris under a French Contract, the payment of 18,035 francs in Francewis a good discharge of the debt even in the eyes of the Courts in this Country where an action for payment in Sterling had been commenced for payment, though the franc may have depreciated internationally since the debt was incurred, / Societé des Hôtels Le Touguet Paris-Plage - v - Cummings 1922 The K.B. 451 but when for reparation an illiguidate claim for damages wis in issue the lex fori rules the question as to whether payment had been made. ["The Baarn" 1933 9. 251]

Damages in relation to Bills of Exchange q.v. are in a special position.

The execution of decrees and diligence on decrees is governed by the lex fori. Strother - v - Read 1st; July, 1803; F.C) Only the kinds of diligence recognised by Scots Eaw can be carried out in S<sub>c</sub>otland, and Scots diligence cannot be carried out abroad: thus a <u>meditatione fugae</u> warrant could not be put into execution furth of Scotland Adam - v - Crowe 1887 14; R. SCO; Cook - v - Sauliere Sheriff Court<sub>5</sub> G. 1. 257

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• The prescription of diligence is governed by the <u>lex fori</u>, and accordingly the only prescription of diligence in Scotland is the quinquennial prescription imposed by the Act 1669 c. 9. / Now 3 years, Personal Diligence Act 1838, 1 & Vict. c. 114, Sec. 22.7

## (5) <u>PRIORITIES OF COMPETING CREDITORS</u>

Priorities of competing creditors, whether in bankruptcy,  $\int q.v.$ ; <u>Lusk v. Elder</u> 1843 5 D. 1279: <u>Ex parte Melbourn</u> (1870) L.R. 6 Ch. 64; <u>The Colorado</u> 1923 **P**. 102, per Scrutton L.J. at p. 109. Contra, <u>Williamson</u> v. <u>Taylor</u> 1845 8D. 156  $\int$  succession,  $\int q.v.$ ; <u>In re Kloebe</u> 1884 28 Ch. D.175; Dicey p. 791; Westlake §110; <u>The Colorado</u>, ibid; <u>Contra</u>, <u>Lawson</u> v. <u>Maxwell</u> 1784 Mor 4473 (proper law of the debt)  $\int$  or to the proceeds of the judicial sale of a ship,  $\int Clark$  v. <u>Bowring & Co</u>. 1908; S.C. 1168; <u>The</u> <u>Colorado</u> 1923 P. 102; "<u>The Tagus</u>" 1903 **P**. 44. Contra, <u>Honeyman</u> v. <u>Actie sel kabet United</u> 1910 26 Sh. Ct. Rep 243  $\int$  are governed by the <u>lex fori</u>.  $\int$  Westlake §351; Story §423; b.  $\int$ 

If the matter is looked at realistically it will be appreciated that no other course would be practicable. There must be a single law to determine priorities: they could not be settled by reference to the proper law of the debts, for each debt might have a different proper law with a different order of priority: by the proper law of debt A, A might be preferred to all debts, while by the proper law of debt B, B might be preferred to all debts including debts like A.

The adoption of the enly practicalle epurse is justified in principle by saying these are matters relating to the remedy. However the remson for applying the lex fori to questions of priorities in the judicial sale of a ship is more likely this: Our Courts apply their own law in maritime causes because the theory is that the Maritime law which we enforce is a code generally recognised by all trading nations. [This seems to be the ratio of Clark - v - Bowring & Co. supra, though in the English cases, the English Courts seem to be applying their own law <u>qua</u> the <u>lex fori</u>, as being applicable to the remedy. For the theory that the law which our Courts enforce in maritime causes is a general maritime law of all nations, see <u>Currie - v - McKnight</u> 1896, 24.R. (H.L) 1 per Lord Watson at p. 3; <u>Boetteher - v - Carron Co.</u> 23. D. 265]

This theory also explains why, to questions of legal hypothecs over a ship, ( often called maritime liens) our Courts apply their own law solely.

A legal hypothec is a right of security, without possession, arising not by contract, but by operation of law. Seamen, and persons who have supplied necessaries to a ship in a foreign port, have a hypothec over the ship for their wages and disbursements respectively. Other legal hypothecs in Socts law are those of a Landlord over his tenant's invecte et illata for rent, of a superior over his vassal's invecta et illata for feuduty, and of a solicitor over expenses which have been awarded to his client for disbursements that On principle the most reasonable way of regarding a he has made. hypothec would be to consider it as an implied contract, valid and enforceable everywhere in its original extent. This we should have thought that a seaman engaged in a French port on a French ship would have by French law a certain hypothec over the ship for his wages. This right/

, right of securitywhs not conventional, but it was originally as effective as if it had been, and it could be regarded as an implied term of the contract of services that he should have a sight of security over the ship for his wages.  $0_{\overline{n}}$  this view the existence and extent of the seamen's hypothec would be the same, i. e. as fixed by French law, no matter where the question arose, whether in a French Court or a Scots one. Admittedly one of the main features of a hypothec is the preference that it gives to the holder over the holders of postponed hypothecs, and overmortgagess and ordinary creditors, and , as we have seen, it is impossible to regulate priorities other than by the lex fori, and so all questions relating to the priorities to which the helder of a hypothec is entitled must be decided by the lex fori. But the existence or non-existence of a hypothec --- e. g. whether there is a hypothec over the freight as well as the ship, or only over the ship\_and the extent of the security - e.g. whether one year's past wages are secured or all past wages --- could be determined by the proper law of the contract. However it is clearly settled that all questions in relation to maritime hypothecs, their existences and extent g as well as their degree of priority, are ruled by the lex fori. Thus in Clark - v - Bowring [1908, S. C. 1168, at p. 1174.] Lord President Dunedin said " In respect of very much the largest sum they claim, they aver, and offer to prove, that by the law which would apply in the American Court in New York, they have a good maritime lien. But it is admitted by both sides of the Bar, that, according to the maritime law applied in this country, there is no maritime lien for these particular sums. That being so, I think the Lord Ord is perfectly right, when he practically disposed of this matter in a sentence in his first judgment, where he said - " I can only apply our own law in determining the ranking of claimants on a British ship, locally situated in Scotland, and they (i.e. these claimants) must be treated as unsecured/

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unsecured creditors of the bankrupt owner". In "<u>The Milford</u>", [1858 1 Siwa. 362] in a suit in England Law by an American master against the freight for his wages, it was held that the question whether the freightwas liablewas to be determined by English Eaw, and the argument that by American law, the <u>lex loci contractus</u>, a master has no hypothec over the freight for wages was irrelevant. Again, in "<u>The Tagus</u>", [1903  $\beta$ .44] in proceedings <u>in rem</u> in England by the master of an Argentine vessel, it was held that though by the <u>lex loci</u> he could only claim his wages and disbursements for the last voyage as a privileged debt, the <u>lex fori</u> applied so as to enable him to claim, in priority, the whole of his wages and disbursements as master.

These decisions can only be justified on the theory that our **Co**urts when applying their own maritime law are applying a general maritime law.

And it is submitted that if an issue ever arese in our Courts on a foreign legal hypothec, which uss not concerned with ships, and to that therefore the theory of a general maritime law has no application, the proper law of the contract should apply to the determination of the existence or non-existence of the hypothec, and to the assessment of its extent, and the lex fori, should only be applied to the question of its degree of priority.

### PRESCRIPTION:

Precription is of two kands: The positive, whereby a title is gained over the property or person of another; the negative, whereby one loses has own rights or privileges. [Kames: Essays, on Prescription, p. 166; Salmond, Jurispradence, § 162]

Positive Prescription

As to the positive prescriptions, the prescriptions of the law of the situs of the object are applied, whether the object is immoveable, or moveable, and the prescriptions of all other laws So far as this rule affects immoveables, it is in ignored. accordance with the over-riding principle that the lex situs governs all questions concerning immogeables. The rule is equally applicable to moveables, some countries, unlike Scotland, having rules of positive prescription which affect moveables. Thas in Waters - V - Barton, U.S. The Coldwell 450, 3 Beale 80 a person who resided in Texaswhs given, while in Tennessee, two slaves, which he kept in his possession in Texas, claiming to be the owner, for more than two years, after which they were enticed back to Tennessee. He brought an action in Tennessee for the recovery of Itwis uncertain whether the transaction in Tennessee the slaves. was a gift or a loan, and he pled the Texan 2 years prescriptions, which had the effect not only of barring the rights of action of the former owner, but of extinguishing the right itself and vesting the right of property in the adverse possession, so that after the years of the prescription, if the former owner should regain the possession, the possessor might maintain an action against him for the recovery of the property \_\_\_\_\_ in short a positive prescription. The Tennessee law, which was at once the law of the place of the transaction (the handing over of the slaves), the lex fori and the law of the other claimant's residence, provided that an adverse possession/

possession of 3 years was required. The Tennessee Supreme Court held that the law of Texas should apply, as the law of the situs of the property. "Every sovereignty possesses the undoubted power to regulate the rights of property situate within its own jurisdiction... if a positive title to property be then acquired, and perfected by the local law of the place, where situate at the time, upon what sound principle can it be maintained that such title can be affected or defeated by the removal of the property to another country; by the possessor, or by its removal by another without his consent?"  $[3 \text{ Beale}_{6}^{4}82]$  The property of course would have to lie within the jurisdiction of the law of the situs: during the whole period of its prescription for the prescription to affect it.

#### Negative

### Prescriptions

Negative prescriptions have been admirably classified by Dickson into three types:-Dickson, Evidence,  $i, \xi \leq 531 - 540$ 

(1) Rules which do not affect the right or obligation, but limit the right of action, by providing that if action is not brought within a certain time, either it cannot be raised at all, or the mode of proof is altered or the onus of proof shifted Dickson is 532 These might be more accurately described as "Limitations of Actions" Examples of such rules in Scots Baw instead of "prescriptions" are the triennial, quinquennial, [ prescription imposed by the Article 1669 c.9. The as regards diligence is now 3 years: Personal Diligence Act 1838, I & 2 Vict. c. 114 § 22 sexennial, and vicennial prescriptions of holograph missive letters and holograph bonds and subscriptions in compt books without witnesses, established by the Act 1669 c. 9. limitations, and the six months limitations imposed by the Public Anthorities Protection Act 1893. 56 & 57 Vict c. 61 (2) Rules which extinguish the right or obligation itself though an ex post facto operation, and not through the medium of an implied condition limiting its duration. An example of such a rule in Scots

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Baw is the long negative prescriptions. [ It is reasonably certain that the long negative prescription extinguishes the right itself, and not simply the right of action: <u>Nepier</u> - v - Campbell 1703. Ersk. Inst. 3, 7, 8. ; Bell's Princ. \$\$607, 614\* M. 10656; Although the act 1617 c.12. provides " Tant all actions competent of the law, upon heritable Bonds, Reversions, Contracts, or others whatsoever.... shall be pursued within the space of forty years after the date of the same, that seems to be a limitation of the right of action, the Acts 1469 c. 28 and 1474c. 54, which established the prescription, are in these terms: " Sall follow the said obligation within the space of fourtie yeires, and take document thereupon. And gif he dois not, it sall be preserived and be of name availe"..... "All auld Obligations maid of before, that is elder than the dait of fourtie yeireg,... sall be prescribed and of na strength; and in likewise in time to cum, all Obligationes maid, or to be maid, that beis not followed within fourtie yeires, sall prescrive, and be of mane availe" x? which indicates the extinction of the obligation (3) Limitations of the right or obligation itself, which enter into it ab: initio. An example of this type of rule in Sots law, is the septennial limitation of cautionary obligations, imposed by the Act 1695 c.5 in these words: " That no man binding and engaging for hereafter, for and withianother conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than 7 years after the date of the bond, but that from and after the said 7 years, the said cautioner shall be eo ipso free of his caution". [slexander - v - Badenach 1843 6D. 322] Limitations of this type may be present in an obligation to make reparation. Thus in England before Lord Campbell's Act.

[9 and 10 Vict. c. 93], while a person who sustained injury through

another's

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another's delict had a claim for damages, yet, if the injured party died, there was no claim against the wrongdoer by his representatives or relatives. Lord Campbell's Act provided that an action could be brought within 12 calendar months of the death in the name of the deceased's executor or administrator for damages, for behoof of the relatives. "The case is not one of a statute introducing a limitation or prescription on a previously existing common law right. The statute for the first time gave the right. It gave a limited right only viz, a right for 12 months".  $\angle$  Goodman v. L.N.W.R. (O.H.) 1877 14. S.L.R. 449, per Lord Shand at p.450.7

The English writers in Private International Law, due perhaps to their having a less varied range of prescriptions than we have in Scotland, distinguish only two types of negative prescriptions, namely rules which extinguish or restrict the right of action after a certain time, and rules which extinguish the rights or obligations themselves after a certain time. [Cheshire p. 640; Dicey p. 852] But there is a fundamental difference between rules which extinguish the right or obligation by an <u>ex post facto</u> operation, and those which limit the duration of the right or obligation by entering into the contract <u>ab</u> <u>initio</u>, although both extinguish the right itself, and attention to this difference is necessary both on principle and to harmonise perfectly the precedents.

The principles applicable to each of the 3 types of negative prescriptions are as follows:

(1) Rules which provide that, if action is not brought within a certain time, either it cannot be raised at all, or that the mode of proof is altered or the onus of proof shifted, are applied if they are the rules of the <u>lex fori</u>, and if they are not, are ignored. It is submitted that this principle applies even to actions relating to immoveables situated in another country, <u>[Dicey p. 601]</u> although certain English cases suggest that the <u>lex situs</u> and not the <u>lex fori</u> applies in such a case <u>[Pitt v. Dacre 1876 3 Ch. D. 295; <u>In re Peat's Trusts 1869 L.R.</u> 7 Equ. 302; <u>Hicks v. Powell</u> 1869 L.R. 4 Ch. App. 741\_7</u>

The Scots cases have wavered between three principles in the matter of limitation of actions: (i) that the prescriptions of the proper law of the contract, and of it only (ii) that the prescriptions of the law of the/ the debtor's domicile or forum, and of it only, and (iii) That the prescriptions of the <u>lex fori</u> only, should be applied.

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The proper law of the contract was first in the field, that is the predominant ratio of the decisions up to 1767. Graden - v - Ramsay 1664 Mor. 4503; Philips - v - Stamfield 1695 Mor. 4503; Rogers - v - Cathcart & Ker 1732 Mor. 4507; Fulks - v - Aikenhead 1731 Mor. 4507; Rutherford - v - Campbell 1738; Mor. 4508; Grove . Gordon 1740, Mor. 4510; Lovat - v - Forbes 1742 Mor. 4512; Cathcart 1755 Mor. - v - Middleton 1742 Mor. 4514; Renton's Trs. - v - Baillie, 4516; MacNeil - v - MacNeil 1761 Mor. 4517; Ewart - v - Gourlay 1767 Mor. 4519) Rickmann - v - Maclachlan 5 Shaw & Duntop 653 (New Ed.) although it may have been, as regards mercantile contracts and not gentlemen's personal accounts, that the rulewis considered to apply. | Philips - v - Stamfield 1695 Mor. 4503; Hay's Exors - v - Linlithgow 1708 Mor. 4504; contra Rutherford - v - Campbell 1738 Mor. 4508. Where the action whos on a delict, instead of a contract, the prescriptions of the lex loci delicti were, by parity of reasoning, applied. Rae - v - Wright 1717 Mor. 4506 the law of the debtor's domicile supplied the rule (Robertson -Marquis of Annandale 1749. 1. Pat. 293: But the proper law of the contract did not reign unchallenged, , and in at least one case in this period the law of the debtor's domicile supplied the rule. Robertson - v Marquis of Annandale 1749. 1 Pat. 293

Between 1768 and 1772 there are cases where the <u>lex</u> fori governed. <u>Taylor - v - Inne's Exors. 1768 Mor. 4520; Kerr - v - Earl</u> of Home, 1771 Mor. 4522; <u>Barret - v - Earl of Home</u> 1772 Mor. 4524] Then the law of debtor's domicile came into favour <u>York Buildings Co. - v -</u> <u>Chesswell</u> 1792 Mor. 4528; <u>Assignees of Ross & Ogilvy - v - Hoss's Trs</u> 1811; Hume 473; <u>Campbell - v - Stein</u> 1818 6 Dow. 116, Affg 23 Nov. 1813; F. C.; <u>Thomson - v - Lord Duncan</u> 1808 Hume 466; <u>Fraser's Trs</u> - v - Fraser 1830 9 S. 174; <u>Gibson - v - Stewart</u> 1831 9; S. 525; also <u>Rohertson - v - Marquis of Annandale</u> 1749 1 Pat. 293. - In the penultimate case Lord Gillies chose the law of the domicile of the debtor because that must be considered the <u>lex loci solutionis</u>, so this case may be an authority for the proper law of the contract instead of the 'law of the debtor's domicile.

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In Don - v - Lippmann, in the House of Lords in 1837, [1837 2 S and MoL 682, revg. 14 S. 241] Lord Brougham, after a review of the authorities, made a clear and reasoned election of the lex fori. as the rule. He considered both " that the lex fori is the rule where the question arises upon the remedy, and that limitation of actions belongs to the head of remedy" [at. p. 724] This may have been thought sufficient to settle the matter, but in 1839 in Farrar - v - Leith Banking Co. [1839 1 D. 936] the whole Court was still debating the matter. They chose the law of the forum, but not because it was the forum of the cause, but because it was the forum of the <u>debtor</u>, i. e. the ratio of their decisionw/as the law of the debtor's domicile.

Farrar - v - Leith Banking Co. This is an action for repetition of the price of goods surrendered in England by an English Debtor to the Agent of a Scots Bank. The ground of the action is that the pransaction is illegal by English Law, which gave the right of repetition, although The English Statute of Limitations is it is not illegal by Scots law. pleaded in defence, and it is argued inter alia, that English Law should apply as the proper law of the transaction: Also that the agent of the Bank in England is a partner of the bank, that the bank could have been sued in England during the whole of the period of the English prescription, but had not been sued, and so the right of action are prescribed. The Court however considered that the agent is purely acting as an agent for the Scotch bank, the site of whose business and whose domicile all Scotland is the bank's principal forum, and along is in Scotland. because the right of action existed in a subsidiary forum, that did not mean the prescription of the subsidiary forum is to be looked to. Scots Law is applied because it is both the lex fori and the law of the domicile of the debtor. The law of the domicile of the debtor is still regarded as an important factor. Lord MacKenzie went as far as to

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express himself in these words: "If effect on prescription is to be given to the domicilium debitoris, which seems to be the rule, at least where that is also the forum of action, it is the more necessary to require a proper and complete domicile of the debtor for this purpose" If the rule was clearly held at that time that the limitation p. 955 of actions ruled by the lex forig as such, that is the ratio of Don - v -Lippmann, then there would have been no argument for the defender, which would have required the consideration of the whole Court. Farrar - v - Leith Banking Co. therefore seems to raise doubt as to the clearness of the principle that the lex fori governs prescription of actions as it does other questions relating to the remedy. It is consistent with the view, that if the action has been raised in England, Scots law as to prescription should still have been applied, which is not possible in Don - v - Lippmann Considering the whole course of the Scottish decisions in fact, the position is far from satisfactory. There can be no such doubt however, that the lex fori governs the limitation of actions, that Don - v - Lippmann is the authoritative case, and that Farrar - v - Leith Banking Co. while correctly decided, is based on a most doubtful ratio. It is to be remarked that the very judges who, in the latter case, paid attention to the domicile or forum of the debtor, in a later case seem to assume that it is the lex fori as such, that governs all matters relating to the remedy.  $\int$  -- <u>Alexander</u> - v - Badenach 18435 6. D. 3225. See also Fergusson - v - Fyffe 165 S. 1038, (1841) E. 2 Robin. 267; Wemyss - v - Australian Co. of Edinburgh 1856, 19; D. 122; Banner - v - Gibson. 1830, 9; S. 61; Ersk. Inst. 3,7, 48; Kames, Equity, 3,8, 6; Diskson i§ 532, in favour of the lex fori. In England, Huber - v - Steiner 1835, 2. Bing. (N.C.) 202

Thus, if the action is being brought in a Scottish Court, the triennial, quinquennial, sexennial, and vicennial limitations can be applied, no matter what is the <u>lex causee</u>, and no foreign limitations

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of this nature can be applied. Even when an action has been berred by a limitation of actions in the Courts of the country where the contract was entered into, and with which it had the nearest connection, and has been held barred by a limitation of action, (if it is not barred by our rules of limitation of actions, it will be maintainable here. [ Harris - V - Quine 1869 IV, Q.B. 653] Where Scotland is the lex fori, and Scots law is being applied, there is no rule of Scots law that the debtor must have resided within Scotland during the period of the prescription [ Dickson i \$ 535; contra Boag - v - Watt's Creditors 11thg Dec, 1800 . F.C.; Ersk Inst. 3,7,48. These contary authorities date from a time when the lex foriums not clearly acknowledged as the rule. Perhaps it was not seen that the issue was: Bo out own internal rules of law demand that the debtor should be resident in Scotland throughout the period of the prescription? In England it has been the rule of the internal law since 4 Ann c.16. that the debtor must be resident in England for prescription to run against the debtor But although a foreign limitation of action is not regarded in our Courts, if the debtor has been resident within the which are the Courts of jurisdiction of the foreign Courts, that is, the proper law of the contract, for the whole of the period of the foreign prescription, This may raise a presumption of payment, which can be rebutted by cont**zery** proof or inferences from the circumstances. |Kames, Equity, 3, 8, 6; Ersk Inst. 3, 7, 48; Dickson i \$ 536. If the prescription extinguishes the right or obligation itself (2)through an ex post facto operation, and not through the medium of an implied condition limiting its duration, it is applied if it is a of contract, and the lex bei delict i prescription of the proper law of the contract and the obligant has deliet resided within the jurisdiction of that law during the course of the prescription, and otherwise is ignored. [Don - v - Lippmann, supra, per Lord Brougham at p. 730; Richardson - v - Lady Hadinton March, 6th. 1821 F. C., 2 Sh. App. 406; Huber - v - Steiner 1835 2 Bing. (N.C.) Higgins V. Ewing's Tro. 1925 S. C. 440; 202 per Tindal C.J. at p. 211; Dickson is 537; Story 2, 487.

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Cheshire criticizes the proviso that the obligant must have resided within the jurisdiction of the prescription during its course before itss applicable. p. 642 saying that it is sufficient that the prescription belongs to the proper law of the contract. It is sufficient in the third type of negative prescription that the prescription should belong to the proper law, irrespective of the residence of the obligant, but there is a great difference between the 3rd and 2nd types of negative prescriptions, between, e. g., the septennial limitation of cautionary obligations, and the long megative prescription. In Cautionary obligations the parties know, if Scots law is the proper law, the obligation cannot last for more than 7 years, no matter what they do by way of deligence or acknowledgment (short or renewing the obligation), and the 7 years limitation enters into the contract from the beginning and is a term of it throughout just as if it had been expressed in a clause. But in regard to other contracts, it cannot be said to be an implied term where Scotland is the proper law, that the contract is limited to 20 years, for it may last for 200 years if kept alive by diligence or payment of interest. The long negative prescription extinguishes the obligation vi juris by an expost facto operation, and the obligant must have resided within Scotland so that the law actually operated in the case.

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(3) If the prescription is a limitation of the duration of the right or obligation entered into it <u>ab initio</u>, it is applied if it forms part of the <u>lex Gansae</u>, i. e. the proper law of the contract in a case of contract, <u>Alexander - v - Badenach</u> 1843, 6 D. 322 ; Dickson &; 5540and the <u>lex loci delicti</u> in the case of delict; <u>Goodman - v - L.N.W.R.</u> (0.H.) 1877, 14 S.L.R. 499] and otherwise is ignored. There is no need for the obligant to have resided within the territory of the <u>lex causae</u> during the running of the prescription. [Dickson, ibid].

Where debts of different ginds, at different times, the lex fori and not the proper law of the debts will determine into which category a debt comes. Thus in The Alliance Bank of Simla - v - Carey [1880 5 C.P.D. The that India specialty debts have no higher legal value

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# Please regard the material within the square brackets as footnotes.

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## PENAL LAWS AND PUBLIC POLICY

A foreign penal [ Cheshire pp. 133-135; Dicey Rule 54; Wolff \$163; Goodrich \$9] revenue [ Cheshire pp. 135, 136; Dicey Rule 54; Wolff \$144\_7 or political [ Dicey Rule 54; In re Amand 1941 2 K.B. 239 per Viscount Caldecote C.J. at p. 254; In re Amand (No. 2) 1942 1 K.B. 445 per Croom-Johnson J. at p. 451\_7 law is effective only within the territory of the foreign country.

Penal Laws

(i) Punishment

"The penal laws of one country cannot be taken notice of in another". <u>Ogden v. Folliott</u> 1790 3 T.R. 726 per Buller J. at p. 733\_7 Penal laws may be either punishment for crimes or confiscatory laws.

The first class of penal laws includes "all branches of public law punishable by pecuniary mulet or otherwise, at the instance of the State Government, or of some one representing the public." "... no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches .... ought to be admitted in the Courts of any other country."

<u>/ Huntingdon v. Attrill</u> 1893 A.C. 150 per curiam at p.156 Monetary penalties however are only "penal" where they are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or a member of the public in the character of a common informer, <u>/ Tbid p. 158</u> and not where a right of action is given to the party agrieved. <u>/ p. 161</u> If a foreign judgment includes both penal and remedial elements, as where a fine is payable to the state and damages to the party agrieved, these elements are separable and the party agrieved may enforce in this country the first of the judgment which awards him damages. <u>/ Raulin v. Fischer</u> 1911 2 K.B. 95] The first class also includes a penal status such as outlawry/ outlawry, infamy, civil death, and that resulting from attainder. Such a status is only effective within the country which created it. Z See "Status" Z Also included are prohibitions which are imposed for purposes of punishment, such as a prohibition against adulterers marrying. Z See 'Marriage ..... Essential Validity' Z

As explained elsewhere [See 'Assignation of Moveables'] the confiscation of property by a <u>de facto</u> government is effective and recognised by our Courts as regards property of its own subjects within its jurisidiction, but the requisition or "nationalisation" with payment of compensation of property would be effective and recognised as regards the property of foreigners within its jurisdiction, and as regards the property of its own subjects both within and outwith its jurisdiction.

Kevenue Laws

The revenue laws of a foreign state can not be enforced in our Courts. So there can be no action in our Courts to recover taxes imposed by a foreign state, <u>The Eva 1921 P. 454; In re Visser 1928 1 Ch. 877;</u> Cotton v. Rex 1914 A.C. 176 per curiam at p. 195; Indian & General Investment Trust v. Borax Consolidated Ltd. 1920 1 K.B. per Sankey J. at p. 550 7 or a foreign municipal authority, / Municipal Council of Sydney v. Bull 1909 1 K.B. 7 7 or even the expenses awarded against a party in a foreign revenue suit. / Attorney-General for Canada v. Schulze 1901 9 S.L.T. 4 7 The Dominions are just as much foreign governments for the purposes of this rule as countries which are not under the Crown. /Attorney-General for Canada v. Schulze, Municipal Council of Sydney v. Bull, supra 7 Another application of this principle is the rule that there can be no objection to a deed on the ground that it has not been properly stamped according to a foreign law, even although that law is the lex loci contractus. / See 'Contract ... Stamping of Deeds.

(ii) <u>Confisc</u>-:<u>atory laws</u>

Political/

Political Laws No conscription for military service by the law of a foreign power of a subject of  $_{\Lambda}^{that}$  power within the United Kingdom can be enforced against him while he is in this country, unless specially permitted by statute.  $\angle$  In re Amand 1941 2 K.B. 239; Wolff p. 175 $\angle$ 

Although a foreign law would normally be applicable under our rules for choice of law it will not be applied if an Act of our Parliament exists which was intended to have extraterritorial effect and to extend to and govern the case in question,  $\angle$  See 'Contract ... Essential Validity'; Marriage 'Essential Validity'; Dicey General Principle II (A). Cp. Mortensen v. Peters 1906 8 F. (J) 93; Peters v. Olsen 1905 7 F. (J) 867

or where application of the foreign law would be contrary to morality / Fenton v. Livingstone 1859 21 D. (H.L.) 9; Edmonstone v. Edmonstone June 1st 1816 F.C. per Lord Robertson at p. 148; Humphrey v. Humphrey's Trs. (O.H.) 1895 33 S.L.R. 99 per Lord Moncreiff at p. 100; Kaufman v. Gerson 1904 1 K.B. 591; In re Luck's Settlement Trusts 1940 1 Ch. per Scott L.J. at p. 908; Dicey, General Principle II (B); Westlake \$215; Cheshire p. 142  $\overline{7}$  or to a fundamental principle of our law founded on considerations of public policy, /Hamlyn v. Talisker Distillery 1894 21 R. (H.L.) 21 per Lord Chancellor at p. 23 and Lord Watson at p. 27; Rousillon v. Rousillon 1880 14 Ch. D. 351 per Fry J. at p. 369; In re Macartney 1921 1 Ch. 522; Dicey, General Principle II (B); Westlake § 215; Goodrich § 8\_7 or to our notions of natural justice / Administrator of Austrian Property v. Von Lorang 1927 S.C. (H.L.) 80; Gladstone v. Lindsay 1868 VI S.L.R. 71; Scott v. Scott (O.H.) 1937 S.L.T. 632; Robinson v. Fenner 1913 3 K.B. 835; Cheshire p. 142 7 or our notions of the fundamental human liberties. [Cheshire p. 144]

Under/

<u>Contrary to</u> <u>morality</u>

Under this heading would undoubtedly come the case of a contract with a courtesan for the price of her services, which however legal it might be by the proper law of the contract, the <u>lex loci</u> contractus, and the lex solutionis, would not be enforceable here. <u>Robinson</u> v. <u>Bland</u> 1760 2 Barr 1077 per Wilmot J. at p. 1084; Cheshire p. 142, Dicey p. 27 Other instances are not so certain, but a foreign divorce on the ground of the mutual consent of the parties [See 'Divorce'] might come within the principle. In Fenton v. Livingstone [1859 21 D. (H.L.) 97 the House of Lords considered that a marriage between a man and his deceased wife's sister, which was then characterized by Scots law as "vile, filthy and abominable in the presence of God" and was prohibited and punishable by death, was so contrary to religion and morality that the Scots Courts should not recognise such a marriage as valid even although it were valid by the law of the matrimonial domicile. This opinion was obiter, since the marriage was also invalid by the law of the matrimonial domicile and it is submitted that it gives too wide an application to the principle. However since such a marriage is now legal in Scotland, the decision is only of historical interest.

The confiscation without payment of compensation by a <u>de facto</u> government of property belonging to its own subjects which is within its jurisdiction is not so immoral and contrary to the principles of justice that our Courts will refuse to recognise it; <u>Kolbin & Sons</u> v. <u>Kinnear</u> 1930 S.C. 724 per L.J.C. Alness at p. 738; <u>Luther v. Sagor</u> 1921 3 K.B. 532. But such confiscation of property belonging to foreigners might be recognised. F.A. Mann 1943 LIX L.Q.R. at p. 171 nor is the lending of money for gaming which has been done in a country where/ where it is legal <u>Saxby</u> v. <u>Fulton</u> 1909 2 K.B. 208. But see 'Remedy'7

<u>Contrary to a</u> <u>fundamental</u> <u>principle of</u> <u>our law founded</u> <u>on considerations</u> of public policy

A foreigner who was a traveller in England and Scotland for a French champagne firm agreed with the firm while on a temporary visit to France that if he left the firm he would not represent any other champagne house for two years or establish himself in the champagne trade for 10 years. Even if this contract was governed by the law of France and was valid by that law our Courts would have refused to enforce it, because they "will not enforce a contract against the public policy of this country, wherever it may be made." Z Rousillon v. Rousillon 1880 14 Ch. D. 35 per Fry J. at p.  $369_{\overline{J}}$  It is part of the public policy of this country to protect freedom of trade here among both native subjects and foreigners. However if the traveller had been a Frenchman who travelled for champagne only in France, and had made such a restrictive ovenant there which was binding by the law of France our Courts would not have refused to recognise the contract, because it cannot be part of our public policy to protect freedom of trade in France, and the question always must always be whether the contract in issue is contrary to public policy and not whether a similar contract to be performed in this country would have been contrary to public policy. [Cheshire pp. 138,139] A contract which is invalid according to the lex loci contractus because contrary in its view to public policy is enforceable here if valid according to the proper law and not contrary to the public policy of the forum. <u>[In re Missouri Steamship Co. 1889 42 Ch. D. 321 7</u>

The prohibition of commercial intercourse with alien enemies rests upon public policy and so a contract which involves this will not be recognised by our Courts even although the proper law of the contract is a foreign/ foreign law and the contract is valid and enforceable by that law. / Dynamit A.G. v. Rio Tinto Ltd. 1918 A.C. 292\_7 It has been suggested that Foster v. Driscoll, [1929 1 K.B. 470] where a partnership agreement which had for its purpose the running of whisky into the United States during the Prohibition era was held not to be enforceable in an English Court, rests on the ratio that to enforce that obligation was contrary to public policy as involving a breach of international comity, ZF.A. mann, 1937 18 B.Y.I.L. at p. 109; Cheshire pp. 143, 4 7 but the decision can also be explained by the rule that a contract which is illegal by the <u>lex</u> <u>loci</u> <u>solutionis</u> will not be enforced. Z See "Contract - Illegality." This seems to be the tenor of Lord Justice Sankey's opinion at p. 521. Contrast however Lord Justice Lawrence at p. 510 7 A contract to supply funds to an insurgent government not recognised by the Crown is not enforceable in our Courts, Zones v. Garcia Del Rio 1825 T. & R. 297 per Lord Eldon: Westlake \$ 305, Cheshire pp. 143, 4 7 but here again the contract would also be void on other grounds.

In <u>Re Macartney</u> [1921 1 Ch. 522] an English Court held that it was contrary to public policy to enforce a Maltese Judgment against the deceased father's estate for the perpetual maintenance of an illegitimate child, although by Maltese law the maintenance awarded might be varied from time to time or terminated, according to the circumstances of the child. It is submitted that this pushes the principle of public policy too far. The Maltese Judgment was unenforceable in the English Courts in any event since it was not final and conclusive as to the amount payable. When it is said that a contract valid by the law of the country in which it is made cannot be enforced because it is contrary to public policy or the policy of the law of the forum, it

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it is meant that the contract conflicts with what are deemed in the forum to be essential public or moral interests - not merely that it would be invalid under English law.  $\sum In \ re \ Fitzgerald \ 1904 \ 1 \ Ch. \ 573 \ 7 \ Almost$  any rule of law could be said to rest on public policy, but to give public policy that extended meaning in this principle would result in the abolition of all Interinational Private Law.

Natural justice

A foreign judgment will not be enforced if the procedure has been contrary to Scottish notions of sub-:stantial justice, as, for example, where no notice of the foreign proceedings was given to the defender. <u>Crabtree</u> v. <u>Crabtree</u> (O.H.) 1929 S.L.T. 675; <u>Scott</u> v. Scott 1937 S.L.T. 632; Rudd v. Rudd 1924 P. 72. For the limits to this plea Gladstone v. Lindsay, supra 7 or where there was a refusal to receive evidence or to hear the parties / Det Norske Bjergnings etc. v. McLaren 1885 22 S.L.R. 861; Jacobson v. Frachon 1928 138 L.T.R. 386 7 The plea of no notice however will not avail a party who has agreed either expressly or impliedly to accept notice at some place other than where he is, or notice to some other person, as where a shareholder in a French company became bound by the articles of association that if he provoked a contest during a liquidation and failed to elect a domicile for the purpose of service, summonses might be validly served on him at the office of the imperial procurator of the civil tribunal of the department in which the office of the company is situated. Copia v. Adamson 1874 L.R. 9 Ex. 345; Cp. Gladstone v. Lindsay 1868 VI S.L.R. 71\_7

<u>idamental</u> erties Our Courts will not recognise foreign rules of law which contravene our notions of fundamental human liberties. Thus they will not enforce any prohibition of the law of the matrimonial domicile which prevents marriage/ marriage simply because one of the parties is of a certain religion or caste, or is in holy orders, or can only marry within a selected group of persons. See 'Marriage .... Essential Validity' / It is submitted that nowadays, although it was not the case formerly, no right arising out of slavery, even one arising from a transaction which occurred wholly within the territory of a law which recognised slavery as legal, would be recognised or enforceable here. See 'Status! /