What is needed is a permanent and effective system whereby the law may be kept under constant review; a body to study aspects of the law and make recommendations when changes are considered necessary; and most important of all, a system which will ensure prompt and effective machinery for translating such recommendations into law.

New Brunswick has in the past shown a commendable willingness to implement reforms in the law when such are brought to attention. An example is the manner in which the legislature became the first in Canada to adopt the new Wills Act proposed by the Conference of Commissioners on Uniformity of Legislation in Canada. It is to be hoped that this progressive spirit will continue and that the legislature in future will take advantage of the work of such bodies as the Law Reform Committee. In particular, it should repeal s. 1 (a), (b), (c), (e) and s. 2 of the Statute of Frauds and s. 5 of the Sale of Goods Act.

—T. B. Drummie,
Lord Beaverbrook Overseas Scholar,
London School of Economcs.

IVEAGH V. INLAND REVENUE COMMISSIONERS *

Conflict of Laws — Voluntary Settlement of Intagible Movables — Proper Law of the Settlement — Imputed Intention of the Parties — Relevant Considerations

By a voluntary settlement dated July 1, 1907, when the territory of the Republic of Ireland formed part of the United Kingdom, certain shares, bearer bonds and other securities were settled on E.G. for life with a power of appointment in favour of his wife and children. The settlement contained a very wide investment clause, including expressly investment in land in England, but there was no express power to invest in freehold land in Ireland. The settlement was drafted and prepared by solicitors in England and at all material times the shares and other indicia of title were kept in a bank in England, although there was power under the settlement to keep the securities in Ireland. At the date of the settlement the domicile of all the parties to it was Ireland. It was executed in England. The tenant for life had married in 1903, and by appointments made in 1946 and 1948 he surrendered his life interest in part of the settled property in favour of his daughters. On a question as to whether estate duty was exigible on £75,000 ordinary shares in an English company, Arthur Guinness, Son & Co. Ltd., registered on the register kept in Dublin by the company and locally situate there,[1] on the death of the tenant for life in 1949, it was held,

* [1954] Ch. 364.

1. Shares in a company are situate at the place where they can be transferred, which is normally the registered office. See **Dicey's Conflict of Laws**, 6th Ed., 1949, p. 306. **Land, Trusts in the Conflict of Laws**, 1940, holds the view that "for purposes of determining the law governing trusts of intangible personal property the element of location of the trust property should be used in the sense of the place where the securities are physicaily kept." (p. 21). He states that this is the view the American courts have taken. (p. 88). Cf. **Treasurer of Ontario v. Blonde et al.** [1946] 4 D.L.R. 785; [1947] A.C. 24 (J.C.P.C.) Falconbridge, **Conflict of Law**, 2nd. Ed., 1954, at p. 500 says in reference to the **situs** of shares: ". . . it is not certain to what extent the tests adopted for the purposes of taxation are identical with the tests that should be adopted for the purpose of the conflict of laws . . ."

by Upjohn J., that for the purposes of estate duty the settlement was governed by its proper law which was the law of the Republic of Ireland.[2]

In determining the proper law, the learned judge considered the domicile of the settlor, the beneficiaries and the trustees, the form and contents of the settlement, the place where the settlement was drafted and executed, in what country the trust was managed, the nature and **situs** of the trust property and the physical location of the share certificates and other indicia of title, and the scope of the investment clause.[3]

One of the significant features of this judgment is the holding by the court that the law which governs the "rights and liabilities" under a voluntary settlement is the law by reference to which the settlement was made: the proper law. This conclusion was reached by encompassing the voluntary settlement within the principle applied to a marriage settlement in **Duke of Marlborough v. A.-G. (No. 1)**,[4] and applying the theory of the intention of the parties—prevalent in the field of pure contractual obligations—to the determination of the proper law of a trust **inter vivos** of intangible movables where foreign elements are involved, for estate duty purposes. In his discussion of the development of the intent theory in arriving at the law governing a contract, Prof. Nussbaum makes this observation:

> Recently the theory which makes the applicable law dependent upon the intent of the parties — we shall briefly term it the 'intent theory' — has even been carried over to trusts.[5]

The view of this eminent jurist is indicative of the trend of the courts in some American states. We shall seek to determine here if **Re Iveagh** represents the first application of the doctrine of the proper law to **inter vivos** trusts of intangible movables by an English court.

A preliminary point peculiar to this case should at the outset be made. When parties contract with a definite proper law in view, even though that law must be discovered for and attributed to them by the court, it is the law of that country at the time a feature of the contract calls for adjudication, e.g., when a breach occurs, and not the law at the time the contract is entered into that must be applied.[6] However, it is when the contract is made that the selection of the proper law takes place, or is deemed to take place. When the settlement in the instant case was executed in 1907, England and Ireland were under one system of law—that of the United Kingdom. Now, since the parties made no express choice of law to govern the trust on the execution of it, one cannot ascribe to them a choice of English

2. [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E. R. 609.
3. In the United States, where there has been a steadier development of this aspect of the conflict of laws, additional elements have been the forum of the action and the implied intention of the settlor. See Swabenland, **"The Conflict of Laws in the Administration of Express Trusts of Personal Property"**, [1936], 45 Yale L.J. 438 at pp. 442-3.
4. [1945] Ch. 78; [1945] 1 All E. R. 165 (C.A.), which, in turn, derived its rule from conflictual rules respecting contracts.
5. Nussbaum, **Principles of Private International Law**, 1943, p. 159. In a footnote to this statement the author states that there was not, as of then, any discussion of this topic, although there had been decided cases in the U. S.
6. We are not here concerned with the situation where the parties incorporate into a contract particular provisions of a given system of law which remains unaffected by any relevant change in that law once the contract has been entered into. See Cheshire, **Private International Law**, 4th Ed., 1952, pp. 209-10.

or Irish law at that time. Indeed, the question would have no significance.[7] As Upjohn J. remarked:

> It is in a sense a hypothetical question because in 1907 . . . it was all one country, and the question whether the law of Ireland or the law of England governed was not a real question.[8]

But, with the political separation of the two countries the possibility of the present conflict arose and crystallized in the instant case. Thus, the intention of the parties, if one was to be ascertained, must be entirely artificial, and the selection of the proper law totally dependent on other considerations albeit cloaked in the terms of the parties' intention.[9]

A discussion of this topic is hampered because authorities on private international law (and judges, too) do not seem to have separated it from marriage settlements or the sale of chattels or the assignment of choses in action. As one writer said:

> Yet for the purposes of the conflict of laws one can not comfortably identify the typical *inter vivos* trust transaction either with the transmission of an estate upon death or marriage or with the sale or incumbrance of chattels.[10]

Within the framework of the trust concept itself clarity will be encouraged by adopting the following classification, gathered from writers on this matter:[11]

Between (1) a) the **creation** of the trust:

(i) capacity of the parties to the trust.
(ii) formal validity of the trust.
(iii) essential validity of the trust.

b) the **administration** of the trust.
c) **construction** of the trust instrument.
d) **jurisdiction** of the court to determine the above matters.

7. Moreover, the parties could not be heard to say in court (as they did in **The Assunzione** [1954] 2 W.L.R. 234; [1954] 1 All E.R. 278, C.A.) that they held diametrically opposed views as to which law they intended to govern their contract, although, as Singleton L.J. pointed out, nothing could be gained by demonstrating this fact since "that would have meant that there would have been no contract."

8. **Iveagh v. Inland Revenue Commissioners** [1954] 1 All E.R. 609 at p. 614.

9. Had the settlement contained a clause stating that the law of the United Kingdom should govern the validity and administration of the settlement, even more formidable difficulties would have arisen. How could that intention **per se** be effectuated? Moreover, would the express use of the phrase "English law" have necessarily meant the law of England as distinguished from the law of the U.K.?

10. Cavers, "Trusts Inter Vivos and Conflict of Laws", [1930], 44 Harv. L. Rev. 161 at p. 188. This article investigated the problem of the law which determined the validity of an **inter vivos** trust of movables and set aside that of administration. Lathem in "The Creation and Administration of a Trust in the Conflict of Laws," [1953], 6 Current Legal Problems, p. 176, says: "But although books on the Conflict of Laws devote a chapter to contract, and one to tort, I know of none with a systematic chapter on trusts."
Halsbury, 3rd Ed., vol. 7, p. 76 discusses **Re Iveagh** under the heading Settlements and Assignments, making no distinction between an ordinary trust and a marriage settlement.

11. Land, **op. cit.**, pp. 1-2; Beale, "Living Trusts of Movables in the Conflict of Laws", [1932], 45 Harv. L. Rev. 969; Cavers, **loc. cit.**, **passim**; Swabenland, **loc cit.**; Hoar, "Some Aspects of Trusts in the Conflict of Laws", [1948], 26 Can. Bar Rev. 1415.

Between (2) taxation of trust property, including inheritance, property, gift and income tax.
Between (3) a) testamentary trusts and
b) **inter vivos** trusts.
Between (4) a) trusts of immovables and
b) trusts of tangible movables and intangibles.

Since the distinctions in these various groups are of different orders, it is evident that there are numerous potential combinations of them; e.g., the court might be concerned with the administration of a trust **inter vivos** of intangible movables or a problem of taxation respecting a testamentary trust of movables. Unfortunately, the above classification has not been recognized by English courts. However, it would appear that matters of succession duty[12] have been treated under administration.[13] Lord Greene M.R. in **Duke of Marlborough v. A.-G. (No. 1)** said:

> The next case is *Attorney-General v. Jewish Colonization Association*.[14] There a domiciled Austrian assigned property to an English company by deed under which the settlor was to receive the income during his life and after his death the company was to apply the property for the benefit of Russian Jews. The settlement was written in the English language and was in English form. The company was one which apart from formal matters conducted its business from its principal office in Paris. At the death of the donor when duty was claimed the greater part of the investments were foreign investments and only a small proportion were British. Speaking of this case in *Attorney-General v. Belilios*[15] Sargant L.J. points out that it would not have been necessary for the court 'to apply foreign law *for the purposes of administration* . . .[16]

English decisions are scanty and relate in the main to marriage settlements,[17] and "they strongly point to the conclusion that the courts are inclined to emphasize the contractual aspect of trust transfers in preference to assimilating them to property transfers."[18] An early case considering an **inter vivos** trust of intangible movables, which was not cited in **Re Iveagh**, is **A.-G. v. Felce** [19] where a Frenchman created a trust in 1880. The trust **res** — various foreign stocks and

12. Succession duty was abolished in England by the Finance Act, 1949, s. 27 (1) and (2).
13. Croucher, "Trusts of Moveables in Private International Law", [1940], 4 Modern L. Rev. 111 and cases therein discussed. Upjohn J. in **Re Iveagh** considers the question as one affecting the "rights and liabilities of the parties", a phrase which could embrace validity as well as administration. Cf. Schmitthoff, **English Conflict of Laws**, 3rd Ed., 1954, p. 218, where the author cites **Re Iveagh** in support of the statement that "as far as the creation [i.e., the validity] of the trust is concerned, there can be little doubt that that act is governed by the law intended by the settlor and the other parties to the trust."
14. [1900] 2 QB 556 [Ridley & Darling JJ.]; [1901] 1 K.B. 123 (C.A.)
15. [1928] 1 K.B. 798 at p. 820 (C.A.)
16. [1945] Ch. 78 at p. 86 (C.A.) This case **itself** involved a determination whether succession duty was exigible on certain trust funds settled under a marriage settlement. Cf. Lathem, **Op cit.**, p. 183, where the view is taken that these succession duty cases purported to find the law governing the **creation** of the trust.
17. Croucher, **loc. cit.**, emphasizes that the English cases he examines relate to marriage settlements, and that the principles of them might not necessarily apply to ordinary trusts.
18. [1950], 3 International L. Q. at p. 89. The writer of this note states that the only relevant English decision is **Re Pilkington's Will Trusts** [1937] 3 All E. R. 213 [Farwell J.]. He discusses an Australian case which considered the law applying to the validity of an **inter vivos trust.**
19. [1894], 10 T.L.R. 337 (Q.B. Div., Mathew & Cave JJ. Westlake, **Private International Law**, 7th Ed., 1925, appears to be the only recent conflicts text to cite this case.

securities—was placed in the hands of an English trustee domiciled in England. All the stocks and securities, which were payable to bearer, were deposited by the trustee in an English bank (and thus situate in England) and the trustee made a declaration of trust in accordance with the settlor's direction, for the benefit of certain persons, who were all Frenchmen domiciled in France, but were not his lineal issue. On the death of the trustee, the defendant and another were his executors. The settlor died in 1891 and the Commissioner of Inland Revenue claimed stamp and estate duty (which was paid) and also succession duty on the capital value of the trust funds (less the account duty) passing on the settlor's death and derived from him as predecessor, under the declaration of trust, to the persons mentioned as beneficiaries. The executors refused to pay the succession duty.

The Crown argued that the declaration of trust was executed in England, that the trustee was and continued to be domiciled in England and the executors were domiciled in England, and that the securities were situate in England. The Crown stressed the point that the trust was created in order to obtain the protection and benefit of English law and was thus an "English trust". Dicey Q.C. (for the executors), contended that the court must consider whether under all the circumstances the fund and the objects of the trust were foreign or English. The court held that the trust was English and consequently succession duty was payable. In so doing, it followed **Wallace v. A.-G.**,[20] **A.-G. v. Campbell** [21] and **In re Cigala's Trusts.**[22] Mr. Justice Cave said:

> The disposer of the funds in the present case has expressly created an English trust to secure it according to English law, on account of the apprehensions he entertained as to the state of affairs in France.[23]

The court used no phraseology reminiscent of "proper law" but instead spoke of an "English trust". Nevertheless, although the report of this case is short and the judgments evidently oral, it is submitted that the leading factor which brought the court to an application of English law as governing the trust was the intention of the settlor as expressed in his desire to obtain the protection of English law. It will be observed that the court rejected the very element which weighed most heavily with Upjohn J. in **Re Iveagh,** namely, the domicile of the settlor and the beneficiaries. In both cases the law applied was that of the **situs** of the trust property, but in the **Felce** case, whether the court regarded the various other factors which established a connection with England as relevant considerations does not appear from the judgments.

In the **Re Iveagh** situation the subjective theory of intention breaks down, whether it is attempted to imply or to impute that intention. It was impossible for the parties on making the settlement to choose between English and Irish law since they formed one system. The theory might be supported by adopting Schmitthoff's view that:

20. [1865], L.R. 1 Ch. Ap. 1.
21. [1872], L.R. 5 H.L. 524.
22. [1878], 7 ch. D. 351 (Jessel M.R.)
23. [1894], 10 T.L.R. 337 at p. 338.

> . . . the search for the presumed intention of the parties becomes, in fact, the attribution of a fictitious intention to them and the courts insert in the contract a provision which the parties, 'as just and reasonable people' would probably have inserted if their attention had been directed to contigencies which escaped their notice.[24]

In the present case this would involve inserting in the settlement by the court a provision that if at any time after it was executed, the law of England and Ireland were to differ, then Irish law would govern the trust. Certainly, in **Re Iveagh** there was no real basis for the discussion of intention, be it that of the parties or that of the settlor only. This is not to say that intention should never be the means of ascertaining the law governing an **inter vivos** trust; but, it is submitted, the intention should be limited to that of the settlor, although one of the matters in discerning this intention could be the domicile of the beneficiaries.[25] In this respect there would be a departure from the intention theory in contract.

If this case is looked upon as supporting the objective theory of intention—the law of that country governs with which the contract has the most real or substantial connection—it must be remembered that this connection is not a matter of quantity, for in **Re Iveagh**, a majority of factors connected the settlement with England.[26]

Succession duty was attracted in England[27] if the successor becomes entitled to the property by English law, and that is so when "the property is found to be legally vested in a person subject to the jurisdiction of the British courts, and the title to the beneficial interest in the property is regulated and capable of being enforced by the laws of this country . . ."[28] In Canada, payment of succession duty on a movable depends on its **situs**, since under the B.N.A. Act, provincial authority to levy tax is confined to taxation "within the province".[29] **Situs**, then, is all-important, possibly to the exclusion of all other elements, even where the movable is held in trust. An instructive case is **Attorney-General for Ontario v. Fasken et al.**[30] where F set up a trust of a chose in action in these circumstances: while domiciled and resident in Ontario, he advanced money to a Texas company

24. Schmitthoff, **Op cit.**, p. 105. See also **The Assunzione** [1954] 1 All E. R. 278; [1954] 2 W.L.R. 234 (C.A.) and note in 1954, 17 Modern L. Rev. at p. 255. It seems obvious that it is reasonability in the judge's conception. The learned judge in **Re Iveagh** [1954] 1 All E. R at p 616) said: "the decisive matter here, **in my judgment**, is that this is a settlement to benefit a family in Ireland . . ." See in this regard **George C. Anspach Co. Ltd. v. C.N.R.** [1950] 3 D.L.R. 26 (Ont. H. C. Wilson J.).

25. This test would lose significance when the beneficiaries did not have a common domicile.

26. Numerical preponderance of factual connections has been suggested to be of importance in deciding the court which has **jurisdiction** to pass on questions of administration of the trust. Swabenland, **Op. cit.**, at pp. 438-9.

27. See Footnote 12, **supra.**

28. Halsbury, Laws of England, 2nd Ed , Vol. 13, p. 357 **et seq**, where an alternative test is suggested in the settlor's intention. See **Attorney-General v. Jewish Colonization Association** [1901] 1 K.B. 123 per Collins L.J. at p. 136, 137. Also, Halsbury, **Op. cit**, s. 396: "Where a person, whether domiciled in this country or abroad by an **inter vivos** disposition, creates an English or Scottish settlement of personal property, whether locally situate in this country or abroad, succession duty is chargeable upon the death of a life tenant under the settlement, even though the property may then be locally situate abroad." The question, of course, is, How is the court to determine that the settlement is English so that it is governed by English law.

29. B.N.A. Act, 1867, s. 92 (2).

30. [1935] O.R. 288, [1935] 3 D.L.R. 100 (Ont. C.A.).

with head office and only place of business in that state. Later, F procured from the company a written acknowledgement of the debt in favour of three nominees, who, by a declaration of trust prepared in Ontario, became trustees of the chose for beneficiaries outside Ontario. F died domiciled in Ontario and the Ontario government claimed payment of succession duty on the debt owing by that company. The court held that, **by the law of Texas,** the debt had a **situs** in Texas and was not subject to duty in Ontario.

Counsel for the Attorney-General stressed the presence of a trust with so many factors connecting it with Ontario and relied on many of the cases cited above. The view of the court on the importance of their being a trust is epitomized in a statement in counsel for the defendant's argument:

> As to the contention that the settlement was an Ontario settlement, the form and language and manner of execution of the declaration have nothing to do with the situs of the property.[31]

It is submitted that **Re Iveagh** lays down a rule which extends beyond the matter of estate duty and includes the administration[32] (and possibly the validity) of a trust **inter vivos** of movables. There is a Canadian case concerning the administration of a testamentary trust which, as a result, should be noted, namely, **In re Nanton Estate.**[33] In this case a Manitoba court applied the **lex situs,** which was also the **lex fori,** as the law controlling what was without a doubt a question of administration. In so doing, the court adopted a statement by Dean Falconbridge:

> It would seem that whatever be the nature of the trust *res* and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the *lex rei sitae*, including whatever effect *that law* gives to the expressed or implied intention of the testator.[34]

Since the author sets out a simple rule for the administration of an **inter vivos** trust,[35] it is quite possible that a Canadian judge might prefer this view to that in **Re Iveagh.** Perhaps the only appreciable differences between the two are that the English case speaks of "the intention of the parties" while the Canadian decision touches only that of the settlor, and secondly, (and this may be the more divergent element), the Manitoba case would have us discover the settlor's intention by the **lex rei sitae** while in **Re Iveagh** the parties' intention was ascertained by application of the **lex fori.**

—Franklin O. Leger,
Lord Beaverbrook Overseas Scholar,
London School of Economcs.

31. **Ibid., at p. 290.**
32. Or **other** matters of administration, if the exigibility of duty be looked upon as arising under the law governing the administration of the **inter vivos** trust.
33. [1948], 56 Man. R. 71; [1948] 2 W.W.R. 113 (Williams C.J.K.B.) followed in **In re Oldfield Estate (No. 2);** [1949], 57 Man. R. 193 (Williams C.J.K.B.).
34. Falconbridge, **Op cit.,** 1947, p. 560; 2nd Ed., 1954, p. 639. The validity of a testamentary trust is, in general, governed by the law of the testator's domicile at his death.
35. **Ibid.,** p. 640.