The Conflict of Laws Sections in the New N. B. Wills Act

1. LORD KINGSDOWN'S ACT.

In 1857, the Judicial Committee of the Privy Council, in the leading case of Bremer v. Freeman (1), affirmed the exclusive authority of the law of a testator's domicile at death to prescribe the forms in accordance with which a will of movables should be made. The following is Lord Wensleydale's proposition:

> That the law of the Testator's domicile at the time of making the Will and of the death of the Testator, when there is no intermediate change of domicile, must govern the form and solemnities of the instrument, can no longer be questioned.

In that case the testatrix, an Englishwoman, was living in France. But she had not obtained the authorization of the French government to establish a domicile in France and, while there, she made a will in English form. It was held that, under English conflict rules, whatever may have been her status under French domestic law, she was domiciled in France when she made her will and that, since she had not satisfied the formalities of the French law in making it, it was invalid.

Cheshire (2) says that "this (decision) caused so much alarm among British subjects resident in Paris that they pressed the Legislature to provide a remedy for the future", and that "stimulated by this agitation, Lord Kingsdown introduced his bill to alter the law . . . " The Parliament of the United Kingdom approved the bill and, in 1861, enacted "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects" (3). This act is usually referred to as Lord Kingsdown's Act. It is reproduced, mutatis mutandis, in the New Brunswick Wills Act contained in the Revised Statutes of 1927 (4).

The dominant sections of Lord Kingsdown's Act are sections 1 and 2:

> 1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin.

(1) 14 E. R. 508.
(2) Private International Law, 3rd. Ed. p. 691.
(3) Cited as the Wills Act, 1861, 24 & 25 Vic. c. 114.
(4) R.S.N.B. 1927, c. 173, ss. 29 to 33.

2 Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Certain differences in language may be observed in these two sections. To indicate only one, section 1 refers to "a British subject" while section 2 speaks of "any British subject".. In the case of In re Grassi (5), Buckley J. reviews these verbal differences and says that "they must have arisen from a want of scanning the language, and not from the existence of any purpose of producing different results". He later adds that the variance between the two sections is "one of words only, and not of meaning". The actual difference between them is that section 1 applies to wills made "out of the United Kingdom" while section 2 refers to wills made "within the United Kingdom". And, whereas section 1 provides three alternatives to the form prescribed by the law of the domicile of the testator at the time of death, section 2 only permits one such alternative, namely, the lex loci actus. Both sections are restricted to wills of "British subjects" and, most important of all, both are limited to wills of "personal estate".

Varied theories have been advanced to explain why this Act adopted the classification of "personal estate" rather than that of "movables". What appears to be the most plausible explanation is that, in using the expression "personal estate", the British Parliament was using the inaccurate language of older judgments and older text writers and that it used the term "personal estate" to signify the concept "movables". But the Act has nevertheless been construed literally by the courts wherever it has been adopted and, as a result, an illogical situation has arisen in English Conflict of Laws.

Before Lord Kingsdown's Act, in order to arrive at a common basis with other systems for determining questions involving foreign elements, English conflict rules had classified the subject matter of ownership into "movables" and "immovables". It is not necessary here to review the reasons underlying the maxim "mobilia sequuntur personam". But, in view of the exceptions brought into English conflict law by Lord Kingsdown's Act in regard to chattel interests in land, a class of immovables which English law classifies as personal property, it might be well to touch on some of the reasons for recognizing that all immovables should be governed by the lex rei sitae.

This rule is supported by Cook (6) on principles of social convenience:

(5) (1905) 1 Ch. 584 at 591.
(6) 'Immovables' and the 'Law' of the 'Situs' (1939) 52 Harvard Law Review, 1246 at 1247.

> Clearly the physical object in question can not as 'land' be removed outside the borders of the state or country in which it is physically situated. One can, of course, 'sever' a portion of the 'land' and thereby convert it into a 'chattel' or 'movable', and then transport it elsewhere. So long, however, as it remains 'land' it must remain within the borders of a given state; consequently under the territorial organization of modern society, only the appropriate officers of the government of the state in question may lawfully deal physically with it. This being so, if the question as to who owns or is entitled to the possession of a piece of 'land' in one state is raised in the courts of another state, it seems obvious that it is desirable or convenient for the court in this other state to inquire what the courts of the state where the 'land' is would say about the matter, and thereby bring about uniformity of decision.

In Freke v. Lord Carbery (7), Lord Selborne supports the same rule by reference to the law of nature and of nations and he speaks along similar lines, not only of land but also of chattel interests in land:

> "The territory and soil of England, by the law of nature and of nations, which is recognized also as part of the law of England, is governed by all statutes which are in force in England. This leasehold property in Belgrave Square is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so."

The illogical exception to which Lord Kingsdown's Act has subjected this rule springs from the fact that, under English domestic law, a number of interests in land are classified as personal property, for example, leasehold interests, a mortgagee's interest, or the interest of a beneficiary in real property held upon trust for conversion into money. In their character as interests in land, these interests are immovables and, as such, succession to them should be governed by the lex rei sitae. But, by reason of Lord Kingsdown's Act, in their character as personal estate, these interests may, as regards formal validity, be disposed of by will in any of the alternative forms which that act permits. In other words, whereas previously English Conflict of Laws was only concerned with the distinction between movables and immovables in selecting the proper law for purposes of probate and succession, it had now to consider the common law distinction between realty and personalty as well.

In Canada, the situation has been made even more complicated by the fact that the various provinces have not uniformly adopted Lord Kingsdown's Act. New Brunswick has incorporated the whole act into its 1927 Wills Act; Ontario and Alberta adopted sections 1, 2 and 3; British Columbia only adopted section 1; Nova Scotia adopted section 1 with two modifications; Prince Edward Island, on the other hand, does not appear to have adopted any of the sections.

2. PART II OF THE N.B. WILLS ACT (1950) AS AMENDED

It was with a view to eliminating the complications discussed above that, in 1929, the Conference of Commissioners on Uniformity of Legislation in Canada adopted a revised version of Lord Kingsdown's

(7) 1873 L. R. Eq. 461.

Act as Part II of the draft Uniform Wills Act. Part II of that draft act is reproduced in sections 33 to 35 inclusive of the 1950 New Brunswick Wills Act (9). The benefits of this Act are extended to all persons and are not limited to British subjects; the Act rectifies the error of the British Parliament in using the term "personal estate", substituting the concept "movables"; it extends the scope of the original Act; and it includes a statement of the general conflict rules relating to the formal and intrinsic validity of wills.

(a) Change in Terminology

After the Uniform Wills Act was adopted by the Conference in 1929, Dr. Falconbridge, who had contributed to that revision, submitted a further redraft. This appeared first in a note published in the Law Quarterly Review (10) and is reproduced in Dr. Falconbridge's Essays on the Conflict of Laws (11). In 1951, Dr. Falconbridge brought the subject matter of this note to the attention of the Ontario Commissioners who embodied the note verbatim in their report which was submitted to the 1951 Conference.

The Conference referred the report and the Uniform Wills Act to the Nova Scotia Commissioners to act in consultation with Dr. Falconbridge for the purpose of incorporating into the Act a new Part II, giving effect to Dr. Falconbridge's recommendations. The Nova Scotia Commissioners were to report at the next meeting of the Conference.

In the meantime, the New Brunswick Legislature, by section 25 of the Statute Law Amendment Act, 1952 (12), repealed Part II of the 1950 New Brunswick Wills Act substituted a new Part II which enacts Dr. Falconbridge's latest redraft.

The only explanation of the reasons for the redraft which appears in Dr. Falconbridge's note is contained in the following paragraph:

> **The terms "movable property" and "immovable property" which** occur in the Conference version are inconsistent with the distinction between things on the one hand and the property or an interest in things on the other hand . . . Things may be movable or immovable, but the property or an interest in a thing is an intangible concept that cannot itself be described as movable or immovable. If the thing itself in which a person has the property or an interest is intangible, neither thing nor property or interest can be accurately described as movable or immovable, but conventionally an intangible thing is classified as movable in the conflict of laws and therefore in the new version the definition of "interest in movables" includes an interest in an intangible thing.

On reading the various chapters of his Essays on the Conflict of Laws, however, particularly chapters 20, 21 and 32, one gets a clearer understanding of the defects in the 1929 draft which he is seeking to remedy.

(9) 14 Geo. VI, c. 172.
(10) (1946) 62 Law Quarterly Review, p. 323
(11) Pages 474 to 476.
(12) 1 Eliz. II, c. 22.

First it should be kept in mind that this redraft is not meant to alter the substantive law of the 1929 draft in any way. It is merely designed to restate the contents of the original draft in more accurate terms. An examination of the previous artificial use of the terms "movables" and "immovables" shows that there was need for a revision of these terms along the lines adopted in the new Part II.

It is often said that "immovables are governed by the lex situs". But a court never has to decide on an immovable. The word "immovable" is a term which refers to the physical nature of a thing; it distinguishes land, and things physically attached to it, from other things. What courts decide in actual cases are questions involving legal rights. They may be proprietary rights, possessory rights or any other rights relating to particular pieces of land. These rights are themselves intangible legal concepts and to refer to them, or to any particular one of them, as, for example, to a leasehold, as an "immovable" is an artificial use of that term. So, in the new Part II, the word "immovable" has been discarded and all the rights and interests previously known as "immovables" are now grouped together under the more accurate classification of "interests in land."

This term is defined in section 33 (a) as follows:

> (a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;

But there is a class of things, usually classed as immovables, which it is even less reasonable to bring within the scope of that term. That class is referred to by Lord Selborne in Freke v. Lord Carbery (supra):

> So strong is the force of the immovable character where it is found, that it will attract to itself prima facie things which are ambiguous, at least to the extent of obliging other nations to recognize the law of the place where the immovable property is situate, as entitled to lay down the rule with regard to these ambiguous things connected with it.

These ambiguous things include ordinary chattels like keys to a house, title deeds of land and stones of a dry wall. It is usually said of them that they "partake" or "savour" of the nature of immovables and as such, Lord Selborne says that "it belongs to the law of the country in which that property is situate to determine whether they shall be deemed movable or immovable." And so, a thing may be deemed an "immovable", which is neither an immovable in fact, nor an interest in an immovable, but which is an interest in a physically movable object. Such a use of the term "immovable" is unreal; the new Part II therefore provides expressly for this class of interests:

> 40. Nothing herein contained shall be construed so as to preclude the application of the law of the place where land is situated, instead of the law of the domicile of the deceased owner, as regards succession or intestacy or under a will to a thing which in itself is movable because it is not physically attached to or incorporated in the land, but which is so closely connected with the use of the land that succession to it should be governed by the same law as governs succession to the land.

The term "movables" also refers to the physical nature of movable things and, like the term "immovables", is inaccurate when used to designate rights or interests in things. It has therefore been replaced by "interests in movables". But, before the 1952 amendments, "movables" was also used to designate interests in things which are themselves intangible legal concepts, as, for example, interests in shares. This artificial classification of intangibles as movables has been avoided in the 1952 Part II by expressly including this class of interests in the definition of "interests in movables" set out in section 33 (b) as follows:

> (b) an interest in movables includes an interest in any tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

Thus, Dr. Falconbridge has abandoned the classical distinction between movables and immovables and substituted two distinctions: first, the distinction between things and interests in things, and, second, the distinction between tangible things, which may be either movable or immovable, and intangible things. In the words of Dr. Falconbridge, (13), this latter classification "is unreal in the sense that the description of an intangible legal concept (such as a chose in action or the goodwill of a business) as a "thing" involves the reification or "thingifying" of what does not exist in the same way as a tangible thing exists, but merely exists in the eye of the law". But the necessity for this usage arises from the common practice of speaking of the situs of an intangible thing and also of expressing conflict rules, with regard to intangibles, in terms of situs.

The merit of Dr. Falconbridge's classifications lies in the fact that they are universal and natural. In his own words (14):

> If regard is had to the purpose to be served by conflict rules, it is obvious that those rules should be based on distinctions and classifications which are, so far as practicable, universal and natural, and therefore susceptible of application to the different systems of law between which a choice must be made, (as, for example, the distinction between immovable things (land) and movable things), and not upon distinctions and classifications which are technical and complex in that they involve legal concepts which may be peculiar to a particular system of law, and are therefore unsuitable as a basis of selection between different systems of law, (as, for example, the distinction between different kinds of interests in land and other things). It is important therefore that things and interests in things be not confused.

(b) Extension of Scope of Lord Kingsdown's Act

The new New Brunswick Act extends the scope of the conflict sections of the old Wills Act in two ways: the new conflicts part applies to all persons, not merely to British subjects; its available alternatives for valid formal execution of a will are extended. On the other hand it restricts the scope of the sections by excluding chattels real. The relevant sections are 36 and 37 which read as follows:

(13) Essays on the Conflict of Laws, p. 417.
(14) Essays on the Conflict of Laws, pages 435 and 436.

36. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made within the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof.

(a) of the province under Part I;
(b) of the place where the testator was domiciled when the will was made; or
(c) of the place where the testator had his domicile of origin.

37. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made outside the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof,

(a) of the place where the will was made;
(b) of the place where the testator was domiciled when the will was made; or
(c) of the place where the testator had his domicile of origin.

It will be noted that these two sections reproduce sections 1 and 2 of Lord Kingsdown's Act with four important changes: (1) They are not confined to wills of British subjects. (2) They do not apply to chattel interests in land which had been illogically included in Lord Kingsdown's Act by the use of the words "personal estate", here replaced by "interest in movables". (3) The same alternatives are permitted for a will made within the province as for a will made outside the province; it is thus not clear why two sections are necessary. (4) The clause "(whatever may be the domicile of such person at the time of making the same, or at the time of his or her death)" has been omitted.

(C) The Effect of Section 38

Section 38 of the new Act corresponds to section 3 of Lord Kingsdown's Act with one important difference. The word "only" has been added in "by reason ONLY of any change of domicile". The section now reads as follows:

38. A will shall not be revoked or become invalid and its construction shall not be altered by reason only of any change of domicile of the testator after the making of the will.

In Lord Kingsdown's Act itself this section had, unfortunately been drafted in very wide terms as compared to the other sections of that Act. As a result difficult questions were raised and opinions differed as to its scope and meaning. The most useful classification of the points of disagreement may be found in Dicey on Conflict of Laws (15). They are: (1) whether the section was limited by implication to wills of British subjects; (2) whether it applied to cases where the domicil is changed, but no further act is done, or also to cases where a further act or acts are done; and (3) whether it was limited in its effect to formal validity or extended also to material validity. In view of the changes effected by the 1952 amendments, it would seem to be the best course to examine the section in its context in the amended Act in regard to these three issues.

(15) 6th Ed. 1949, pages 839 to 842.

(1) Is the section limited to the wills of British subjects? Obviously, since none of the sections of the 1952 Act is limited to wills of British subjects, this issue is now disposed of. However, there may still be a question whether section 38 is of universal application or whether its effect is limited to wills made in one of the alternative forms permitted by sections 36 and 37. If the view is correct that section 3 of Lord Kingsdown's Act was limited to British subjects, it could well be held, after a review of the history of the statute, that the legislature did not intend to extend the application of section 38 beyond the scope necessary to give effect to the broader sweep of the new section.

The issue under Lord Kingsdown's Act was never finally decided and no doubt convincing arguments could be made for either view.

In the Estate of Groos (16) is the only case which seems to have decided that the section was of universal application. But that case is not conclusive on the point, as the same result could have been reached without any reference to section 3 of Lord Kingsdown's Act. Sir Gorell Barnes himself pointed this out (17).

There are no doubt good reasons why the section should be made generally applicable, just as there are reasons for limiting its application to wills made under sections 36 and 37. It is not the intention to debate the issue here; it is submitted, however, that the question is still open and that doubts should be resolved by a clarifying amendment.

(2) Before the 1952 amendments, it was not clear whether the section only operated to save a will where there had been a change of domicil and nothing more, or whether it also extended to cases where some other act had been performed as, for example, where a revocation of the will had been executed in a form recognized by the law of the new domicil but not by the law of the domocil where the will was made. The 1952 amendments have determined this issue by the insertion of the word "only".

(3) Is the section limited to formal validity and construction or does it extend to material validity? On the question of construction, even under ordinary conflict principles, unless a testator expresses a contrary intention, construction depends prima facie on the law of his domicil at the date of the will, both as regards wills of interests in land and wills of interests in movables. So this reference to construction in the section is unnecessary, unless it is looked upon as a statement of the common law rule. But even on this view, such reference is hardly necessary because section 39 permits the application of the general conflict rule in this respect.

(16) (1904) P. 269.
(17) (1904) P. 269 at 272.

> 39. Nothing herein contained shall be construed so as to preclude resort to the law of the place where the testator was domiciled at the time of the making of a will in aid of the construction of a will relating to either an interest in land or an interest in movables.

On the question of formal validity, however, the usefulness of section 38 cannot be doubted since sections 36 and 37 no longer provide that a will made in accordance with their permissive provisions will be formally valid whatever may have been the domicil of the testator at the time of making the will or at the time of his death.

But it is also necessary to consider whether the section extends to material validity. The dominant sections of Lord Kingsdown's Act referred to matters of form. It would have been natural, therefore, under that Act, to restrict section 3 to formal validity also. Material validity of a will of movables at common law was governed by the law of a testator's domicil at the time of his death and it did not seem likely that the legislature intended to alter that rule in a statute dealing mainly with matters of form. When applied with reference to the 1952 amendments, that argument has an even greater force as the legislature has expressed its intention not to alter the general rule by stating the rule in section 35. But, on the other hand, a scrupulous application of the literal rule of interpretation might lead to an opposite conclusion and, therefore, it might be advisable to amend this section so as to limit it to formal validity.

(d) Sections Restating General Conflict Rules

In conclusion it may just be noted that the new Act restates the the general conflict rules governing the formalities of making, the intrinsic validity and effect of wills. Subject to the other provisions of Part II of the Act, these rules will continue to operate, but now as statutory mandates. For sake of completeness these rules are reproduced here:

> 34. Subject to the other provisions of this Part, the manner and formalities of making a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in land, shall be governed by the law of the place where the land is situated.
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> 35. Subject to the other provisions of this Part, the manner and formalities of making a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in movables shall be governed by the law of the place where the testator was domiciled at the time of his death.

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