ceeded with, and that for that purpose the time for notifying to the Registrar his desire to be heard upon the matter of the Registrar's notice of 30th July 1907 may be extended.

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THE KING v. THE REGISTRAR OF TRADE MARKS.

Solicitors, for the prosecutor, *Waters & Crespin.*

Solicitor, for defendant, *Charles Powers*, Commonwealth Crown Solicitor.

B. L.

Appl *Doyle (decd), Re; Ex parte Bnen v Doyle* (1993) 117 ALR 653

Appl *Davis v Turning Properties* (2005) 222 ALR 676

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY AND OTHERS . . . DEFENDANTS, } APPELLANTS;

AND

ARTHUR JAMES GREGORY AND OTHERS . PLAINTIFFS AND DEFENDANTS, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 19, 20, 21.

MELBOURNE, *March* 23.

Griffith C.J., Barton and Isaacs JJ.

Private international law—Distinction between immoveables and moveables—Incorporeal right with respect to immoveable—Interest in trust estate—Trust to sell—Insolvency—Notice to trustees—Effect of foreign insolvency—Subsequent assignment—Priorities—Bankruptcy Act 1870 (*Tas.*) (34 *Vict. No.* 32), *sec.* 16 —*Law No.* 47 *of* 1887 (*Natal*), *secs.* 51, 52, 53.

A right enforceable with respect to an immoveable is, for the purposes of private international law, an immoveable.

A person claiming in Tasmania under an assignment of an equitable chose in action executed by a bankrupt after sequestration, who took his assignment without notice of the bankruptcy and has given notice of his assignment to the trustee of the property to which the chose in action attached, is entitled to priority over the trustee in bankruptcy who has not given notice.

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The recognition offered by the rules of private international law to an assignment to creditors of the moveables of a debtor under the law of a foreign country extends only to recognizing it as having the same validity as an assignment made in accordance with the laws of the situs of the moveables.

A testator by his will devised land in Tasmania to trustees to pay his widow out of the income a certain annuity, and to pay the residue of the income to his sons in equal shares, and he directed that upon the death of his widow the trustees should sell the land (with a discretionary power to postpone the sale for seven years) and divide the proceeds equally among the sons. One of the sons having gone to the Colony of Natal, in South Africa, before the death of his mother, became insolvent there, and according to the law of Natal his trustee in insolvency would have priority over subsequent incumbrancers of the insolvent's choses in action without the necessity of giving notice. The insolvent, having returned to Tasmania, executed an assignment of his interest in his father's estate to an assignee who had no notice of the insolvency and who gave notice to the trustee of the property.

Held, that from the date of the testator's death until the date of the sale of the land the interest of each son was an immoveable within the principle of private international law, and therefore that the insolvency in Natal did not operate in Tasmania as an assignment of the insolvent's interest in his father's estate.

Held, further, that even if the insolvent's interest were a moveable, the assignee in Tasmania had priority over the Natal trustee in insolvency.

Decision of the Supreme Court reversed.

APPEAL from the Supreme Court of Tasmania.

By his will, dated 23rd July 1900, and two codicils dated respectively 19th November 1903 and 31st December 1903, James Gregory of Queenborough in Tasmania, who died on 7th January 1904, gave, devised and bequeathed all his property real and personal to his trustees, his two sons Arthur James Gregory and Frank Gregory, upon trust to pay to his wife an annuity of £200, the payment of which he charged upon all his real estate, except a certain property at Parattah, with a direction not to sell such real estate during the life of his wife. Subject to the payment of such annuity he directed the trustees to pay and divide the net rents and profits of such real estate equally amongst his eight named children, including George William Gregory, described in the will as " of South Africa," and the widow of a deceased son, for their own several and respective use and benefit. The second

codicil contained the following clause :—" And I declare that my trustees shall upon the decease of my said wife sell all my real estate (excepting my said property at Parattah) by public auction or private contract and with power to postpone the sale for not exceeding seven years after my wife's decease and to sell at their discretion And after payment of all expenses to stand possessed of the net proceeds upon trust to pay and divide the same equally between and amongst my said eight children and my said daughter-in-law Harriet Gregory for their own absolute use as tenants in common." Probate was granted on 23rd January 1904 to Arthur James Gregory, reserving the right of Frank Gregory to come in and prove.

The testator's son George William Gregory was on 21st June 1904 adjudicated insolvent by the Supreme Court of the Colony of Natal, in South Africa, and Thomas Herbert Green of Durban in South Africa was duly appointed trustee of the insolvent estate. Shortly afterwards George William Gregory returned to Tasmania, and on 17th February 1905 he assigned his interest under his father's will to the Australian Mutual Provident Society to secure the payment of certain advances, and on the same day notice of the assignment was given to the trustees of the will. Other assignments of his interest were made to other persons, among them to Frederick Henry Crisp and Frederick Rolfe Stops, to secure advances by them, and notice of all of the assignments were given to the trustees. All the notices except one were given before the death of the testator's widow, that one being given on 4th November 1905. Mary Ann Gregory, widow of the testator, died on 16th October 1905. On 6th November 1905 the trustees of the will received notice of the insolvency in Natal of George William Gregory.

On the 10th March 1906 an originating summons was taken out on behalf of the trustees of the will to obtain the opinion of the Supreme Court of Tasmania on the following questions (*inter alia*) :—

1. Is the trustee of the insolvent estate of George William Gregory, one of the beneficiaries of the will of the said James Gregory, entitled to the one-ninth share of the said George William Gregory or any portion thereof and, if so, what portion ?

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2. Will the claim of the trustee in insolvency be postponed to *bonâ fide* mortgagees of the share of the said George William Gregory, notices of which mortgages were given to the trustees prior to notices of insolvency having reached them?

5. To whom and in what proportions will the trustees of the will of the said James Gregory deceased be justified in handing over an equal one-ninth part of a certain sum of £2,860 12s. 3d. representing the net proceeds of a sale of portion of the real estate of the said James Gregory deceased and also all future net proceeds arising from the sale of the real estate of the said James Gregory deceased? How the costs of and incidental to this application are to be provided for?

The matter having been referred to the Full Court, that Court held that the title of the Natal trustee in insolvency prevailed over the titles of the several mortgagees, and ordered that the share of George William Gregory in the capital moneys and annual income should be paid to T. H. Green, and that the costs of all parties other than T. H. Green should be paid out of that share.

From this judgment the Australian Mutual Provident Society, Frederick Henry Crisp and Frederick Rolfe Stops appealed to the High Court.

Bavin, for the appellants the Australian Mutual Provident Society. In the case of a person made bankrupt under the Tasmanian *Bankruptcy Act* 1870, which in this respect follows the English *Bankruptcy Act* 1869, it is necessary for the trustee in bankruptcy to give notice of the bankruptcy to a trustee who holds a fund in trust for the insolvent in order to perfect his title and give him priority over a subsequent encumbrancer who has given notice: *Palmer* v. *Locke* (1); *In re Barr's Trusts* (2); *In re Atkinson* (3); *In re Jakeman's Trusts* (4); *Mercer* v. *Vans Colina* (5); *In re Stone's Will* (6); *Lloyd* v. *Banks* (7); *In re London and Provincial Telegraph Co.* (8); *In re Beall*; *Ex parte*

(1) 18 Ch. D., 381.
(2) 4 K. & J., 219.
(3) 2 D.M. & G., 140.
(4) 23 Ch. D., 344.
(5) (1900) 1 Q.B., 130 (*n*).
(6) (1893) W.N., 50.
(7) L.R. 3 Ch., 488.
(8) L.R. 9 Eq., 653.

Official Receiver (1); *Wace on Bankruptcy*, p. 260; *Ryall* v. *Rowles* (2); *Dearle* v. *Hall* (3).

[ISAACS J. referred to *Jameson & Co.* v. *Brick and Stone Co.* (4); *In re Lake*; *Ex parte Cavendish* (5); *Montefiore* v. *Guedalla* (6).]

Under Law No. 47 of 1887 (Natal), secs. 51, 52, 53, which is similar in this respect to the English *Bankruptcy Act* 1849, sec. 141, no such notice is necessary: *In re Bright's Settlement* (7). But a foreign trustee in insolvency has no higher right in Tasmania than a trustee under a Tasmanian bankruptcy, and, whether the interest of this insolvent under the will is a moveable or an immoveable, the Natal trustee must perfect his title according to the law of Tasmania, and priorities will be adjusted according to that law. In *Ex parte Rogers*; *In re Boustead* (8) it was said that the Imperial *Bankruptcy Act* 1869 only passed immoveables in a Colony according to the law of the Colony. See also *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos* (9); *Dicey's Conflict of Laws*, p. 334; *Westlake's Private International Law*, 4th ed., p. 165. There is no reason for any distinction in this respect between moveables and immoveables: *Story's Conflict of Laws*, 8th ed., p. 766. The law of the State where moveables are as to perfecting title must be observed: *Dulaney* v. *Merry & Son* (10); *In re Queensland Mercantile and Agency Co.*; *Ex parte Australasian Investment Co.*; *Ex parte Union Bank of Australia* (11); *Kelly* v. *Selwyn* (12); *Foote's Private International Jurisprudence*, 3rd ed., p. 327; *Westlake's Private International Law*, 4th ed., p. 404; *Jeffery* v. *M'Taggart* (13).

[Counsel also referred to *Story's Conflict of Laws*, 8th ed., p. 456; *Harrison* v. *Sterry* (14); *Sill* v. *Worswick* (15); *Westlake's Private International Law*, 4th ed., p. 173.]

Nicholls, for the appellants F. H. Crisp and F. R. Stops. The interest of the insolvent in his father's estate is an immoveable,

(1) (1899) 1 Q.B., 688.
(2) 2 Wh. & T. L.C., 6th ed., 799, at p. 853.
(3) 3 Russ., 1.
(4) 4 Q.B.D., 208.
(5) (1903) 1 K.B., 151.
(6) (1903) 2 Ch., 26.
(7) 13 Ch. D., 413.
(8) 16 Ch. D., 665.
(9) (1891) A.C., 460.
(10) (1901) 1 K.B., 536.
(11) (1891) 1 Ch., 536; (1892) 1 Ch., 219.
(12) (1905) 2 Ch., 117.
(13) 6 M. & S., 126.
(14) 5 Cranch., 289.
(15) 1 H. Bl., 665, at p. 691.

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and, if so, there is no doubt that the Tasmanian law applies. That interest, although it may not be an estate in land, is an interest in land. It arises out of the land and carries with it the right of the insolvent to have the land sold, and may be lost if the land is lost. The fact that the land is for certain purposes, *e.g.*, succession and taxation, deemed to have been converted does not change the interest of the insolvent from an immoveable into a moveable. The doctrine of notional conversion does not apply to private international law: *Westlake's Private International Law*, 4th ed., p. 203; *Dicey's Conflict of Laws*, pp. 312, 72, 73. Until the land is actually sold the interest remains an immoveable: *In re Piercy*; *Whitwham* v. *Piercy* (1). The insolvent's interest is a chattel real, just as is a leasehold interest in land, and is governed by the *lex loci*: *Freke* v. *Lord Carbery* (2); *Duncan* v. *Lawson* (3); *Foote's International Jurisprudence*, 3rd ed., pp. 202, 213, 308. See also *Pepin* v. *Bruyère* (4); *In the Goods of Gentili* (5); *de Fogassieras* v. *Duport* (6).

There was no privity between Green and the trustees of the testator's estate so as to give a Court of Equity jurisdiction.

[ISAACS J. referred to *British South Africa Co.* v. *Companhia de Moçambique* (7); *Lewin on Trusts*, 11th ed., p. 48.]

Butler, for the respondents the trustees of the estate of James Gregory.

Lodge, for the respondent T. H. Green. The interest of the insolvent is a moveable. It is in its essence money and nothing else in the eye of the law of Tasmania, according to which the nature of the interest must be decided: *Viner* v. *Vaughan* (8); *Foote's Private International Jurisprudence*, 3rd ed., p. 238. The interest was intended to be divorced from the land. All that the insolvent has is a right to a definite share of the proceeds of the sale of the land. The only class of property included in personalty which is not included in moveables is chattels real. The doctrine of equitable or notional conversion applies. That is a

(1) (1895) 1 Ch., 83.
(2) L.R. 16 Eq., 461.
(3) 41 Ch. D., 394.
(4) (1900) 2 Ch., 504; (1902) 1 Ch., 24.
(5) Ir. R., 9 Eq., 541.
(6) 11 L.R. Ir., 123.
(7) (1893) A.C., 602, at p. 626.
(8) 2 Beav., 466.

doctrine which is known to other countries than the British Dominions and is a fit doctrine to be applied in international law: *Buchanan* v. *Angus* (1).

[Griffith C.J.—Before the *Judicature Act* it was held that the doctrine of equitable conversion would not give the Court jurisdiction over a will limited to real property: *In the Goods of Barden* (2).]

So far as the trustees of the estate are concerned the land remains realty, but the insolvent's interest in it is for the purposes of succession and assignment personalty. If the insolvent were domiciled abroad the interest would pass according to the law of his domicil. The appellants themselves treat it as personalty for the purpose of their title to it. The equitable conversion operates from the death of the testator: *Clarke* v. *Franklin* (3), but only as to so much of the land as is afterwards sold: *Fitzgerald* v. *Jervoise* (4); *Stead* v. *Newdigate* (5). The only kind of personalty which is immoveable is chattels real, and the insolvent's interest in this estate is not a chattel real. See *Dicey's Conflict of Laws*, pp. 73, 514.

[Isaacs J.—A partner's interest in land of the partnership appears to be personalty: *Attorney-General* v. *Hubbuck* (6); *Attorney-General* v. *Marquis of Ailesbury* (7).

Griffith C.J. referred to *Chatfield* v. *Berchtoldt* (8).]

The passage in *Dicey's Conflict of Laws*, p. 312, only means that in the hands of the trustee the interest is an immoveable. If it means more, the authorities there cited do not support it. See *Forbes* v. *Steven* (9); *In the Goods of Gunn* (10).

[Griffith C.J.—Apart from municipal law, is not this interest an incumbrance upon the land just as a real charge is?]

No. The trustee could give a good legal and beneficial title to the land without the intervention of the beneficiaries. What the insolvent is entitled to is a debt: *Lord Sudeley* v. *Attorney-General* (11). The equitabe conversion enured to the benefit of

(1) 4 MacQ. H.L. Cas., 374.
(2) L.R. 1 P. & M., 325.
(3) 4 Kay & J., 257.
(4) 5 Madd., 25.
(5) 2 Mer., 521.
(6) 13 Q.B.D., 275.
(7) 16 Q.B.D., 408.
(8) L.R. 7 Ch., 192.
(9) L.R. 10 Eq., 178.
(10) 9 P.D., 242.
(11) (1897) A.C., 11.

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the insolvent while he was in South Africa. Why should it not enure to the benefit of his trustee in insolvency there?

[GRIFFITH C.J.—Can a trust of land be administered anywhere else than in the country where the land is?]

The answer to that question does not affect the nature of the beneficiaries' interests in the land.

[ISAACS J. referred to *In re De Nicols*; *De Nicols* v. *Curlier* (1); *Gray* v. *Smith* (2).]

Assuming this interest to be a moveable, then on the authority of *Palmer* v. *Locke* (3), the necessity under the Tasmanian law for notice to the trustee of the estate by a Tasmanian trustee in insolvency is not disputed.

[ISAACS J. referred to *In re Brown's Trust* (4); *Ex parte Agra Bank*; *In re Worcester* (5); *Sturt* v. *Cockerell* (6).]

But the question of assignability must in this case be determined according to the law of Natal. This was a moveable in Natal which passed to the trustee by virtue of the Natal law, and, if it so passed, the Tasmanian Courts will recognize the assignment with all the incidents of the law of Natal, and if it appears that something happened in Natal which destroyed for ever the right of the insolvent to deal with this property, the Tasmanian Courts will recognize that provision of the Natal law. See *Selkrig* v. *Davis* (7); *McEntire* v. *Potter & Co.* (8); *In re Coombe* (9); *Thompson* v. *Bell* (10).

Nicholls, in reply, referred to *Foote's Private International Jurisprudence*, 3rd ed., p. 298; *Dicey's Conflict of Laws*, pp. 781, 789 (*n*1); *In re Stokes*; *Stokes* v. *Ducroz* (11); *In re Davidson's Settlement Trusts* (12).

Cur. adv. vult.

The following judgments were read:—

March 23.

GRIFFITH C.J. James Gregory by his will and codicil devised land in Tasmania to trustees to pay to his widow out of the income an annuity of £200, and to pay the residue of the income

(1) (1900) 2 Ch., 410.
(2) 43 Ch. D., 208.
(3) 18 Ch. D., 381.
(4) L.R., 5 Eq., 88.
(5) L.R., 3 Ch., 555.
(6) L.R. 8 Eq., 607.
(7) 2 Rose, 291, at p. 315.
(8) 22 Q.B.D., 438.
(9) 1 Giff., 91.
(10) 23 L.J.Q.B., 159.
(11) 62 L.T., 176.
(12) L.R., 15 Eq., 383.

to his eight sons and the widow of a son in equal shares. The testator directed that upon the death of his widow the trustees should sell the land (with a discretionary power to postpone the sale for seven years), and divide the proceeds equally among the same nine persons, of whom G. W. Gregory was one.

The testator died on 7th January 1904. It is not in controversy that G. W. Gregory's interest in the proceeds of the land so directed to be sold became a vested interest at the testator's death, or that by the municipal law of Tasmania that interest was for the purpose of succession to be regarded as personalty. It was further contended that the notional conversion took effect from the testator's death.

On 21st June 1904 G. W. Gregory's estate was placed under sequestration by the Supreme Court of the British Colony of Natal upon his own petition, and the respondent Green was appointed trustee of his estate. The insolvent subsequently returned to Tasmania, and executed successive assignments of his interest under the testator's will to the appellants and other persons for valuable consideration, the first being dated 17th February 1905, and the others being all antecedent in date to the death of the widow, which occurred on 16th October 1905. Notice of all these assignments was duly given to the trustees of the will before that date. On 6th November 1905 Green gave them notice that he claimed the interest by virtue of the sequestration. The jurisdiction of the Supreme Court of Natal to make the order of sequestration was not disputed.

Both parties appealed to the recognized rule of private international law that the assignment of a bankrupt's property to the representatives of his creditors under the law of a foreign country which has jurisdiction over the bankrupt's person operates as an assignment of the moveables of the bankrupt wherever locally situated, but not of his immoveables: *Dicey*, Rules 107, 108; *Westlake*, secs. 134-140.

The rules of what is called international law are, after all, only general principles which, by the comity of nations, are adopted by civilized States as part of their own municipal law, and effect is given to them, not as laws paramount, but as part

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of the municipal law. The rule just stated is accepted as part of the law of England and of Tasmania.

The appellants contend that G. W. Gregory's interest was an immoveable, the respondents that it was a moveable, within the meaning of this rule. The appellants further contend that, even if it was a moveable, notice to the trustees of the will was necessary to complete the respondent Green's title as against the other assignees. The Supreme Court decided in favour of that respondent on both points.

The distinction between moveables and immovables is primarily, as the words themselves denote, a distinction of fact.

It is generally possible by the use of the senses to say whether *in rerum naturâ* an object is moveable or immoveable. This question of fact is not affected by the municipal laws of the place where the object is situated. With advancing civilization there come into existence incorporeal rights of property with respect to both moveables and immoveables. No one doubts that incorporeal rights with respect to moveables are themselves regarded as moveables. And I am unable to see any reason why in the case of immoveables also the incorporeal right should not follow the character of the thing to which it is an accessory. The circumstance that the municipal law of a country thinks fit to treat some kinds of immoveable property as having for certain purposes some of the qualities or incidents of personal property seems to be quite irrelevant to this question of fact. Thus, a leasehold estate in land is an immoveable, because the land is in fact immoveable, and the circumstance that English law regards such an estate as what it calls "personal property" does not alter the fact. For the purposes of international law the fact, and not the epithet, is regarded: *Freke* v. *Lord Carbery* (1). So a rent-charge, which is an incorporeal right accessory to land, is an immoveable, although some rent-charges are by the *Wills Act* treated for certain purposes as personal property: *Chatfield* v. *Berchtoldt* (2). Some confusion has been caused in discussion on this point by reference to the analogous division of property into realty and personalty under English law. The analogy no doubt exists, and, but for some positive rules of that law, might be

(1) L.R., 16 Eq., 461.

(2) L.R., 7 Ch., 192.

complete. But it is a mistake to argue that, because the English technical distinctions between real and personal estate no longer depend entirely upon physical facts, the distinction between immoveables and moveables in the application of the rule of international law has been equally qualified. So far as I am aware, such a doctrine has never been suggested by any English judicial authority.

Law, as has often been pointed out, deals with rights and not with things. But, so far as regards property, the rights with which it deals are rights with respect to things, that is, physical objects capable of being apprehended by the senses. International law deals with things as they are, and not with words as they may chance to be defined in dictionaries of municipal law.

In my opinion the question whether a particular right is to be regarded as a moveable or an immoveable for the purposes of international law depends upon the nature of the thing with respect to which the right is asserted, and not upon the municipal law of the country in which it is locally situate.

No doubt the law may treat as an immoveable a thing which in its apparent form is moveable, if it is so closely connected with an immoveable as to be a mere accessory to it, as, for instance, in the case of title deeds. But this is not a real exception, for the deed, except so far as the material on which it is written is concerned, is a mere record of a right to a physical object.

What, then, was the subject matter of G. W. Gregory's interest at the date of sequestration? Plainly the subject matter was land in Tasmania. Gregory's interest was a right (which could not be enforced for seven years) to have the trusts of the will administered and, for that purpose, to have the land sold. If authority were needed to support the proposition that this right could only be enforced in the country of the situs of the land, it is afforded by the cases of *Whitaker* v. *Forbes* (1), and *British South Africa Company* v. *Companhia de Moçambique* (2). In my judgment, this right followed the nature of the land to which it related, and was in law as well as in fact an interest in land (see per Lord *Cairns* L.C. in *Brook* v. *Badley* (3)), although

(1) 1 C.P.D., 51.

(2) (1893) A.C., 602.

(3) L.R., 3 Ch., 672, at p 674.

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for some municipal purposes treated as if it were personal property. It was therefore an immoveable. No authority, nor even an expression of opinion, was cited to us to the contrary effect. Mr. *Dicey*, indeed, treats this view as so obvious as not to require elucidation. Dealing with the term "personal property" as used in English municipal law, he says (page 312):—"Personal property includes land (immoveables) of two different descriptions. In the first place, it includes . . . chattel real. It includes, in the second place, land which, though not a chattel real, is by any rule of law treated as personalty, or, in other words, made subject to the incidents of personal property. Such, for example, is land which under a rule of equity is, as the expression goes, 'converted into personalty.'" In other words, land which under a rule of equity is deemed to be converted into money is, although included in the term personalty, an immoveable. No doubt, he says (page 72) that "'immoveables' are equivalent to realty, with the addition of chattels real or leaseholds; 'moveables' are equivalent to personalty, with the omission of chattels real." But that this general statement was not intended to contradict the other is shown by the passage on page 73:—"Immoveable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests."

In my opinion, therefore, the respondent Green never acquired any right to Gregory's interest by virtue of the sequestration. I will, however, proceed to deal with the second point, on the assumption that that interest was a moveable and not an immoveable. It appears to be accepted as the law of England that under the *Bankruptcy Act* of 1869, as well as the Act of 1883, the rule in *Dearle* v. *Hall* (1) applies to assignees in bankruptcy as well as to assignees under assignments by act of parties, so that a person claiming under an assignment of an equitable chose in action executed by a bankrupt after sequestration, who took his assignment without notice of the bankruptcy, and has given notice of it to the trustee of the property, is entitled to priority over the trustee in bankruptcy who has not given notice. The doubt suggested by Lord *Selborne* L.C. in *Palmer* v. *Locke* (2) seems not to have been regarded as

(1) 3 Russ., 1.

(2) 18 Ch D., 381.

diminishing the authority of the cases of *In re Barr's Trust* (1); and *In re Atkinson* (2): See *In re Stone's Will* (3). The law of Tasmania is in this respect the same as the law of England. It is said, however, that by the law of Natal the rule is otherwise, and I will assume this to be so. It was then contended that the law of Natal governs the case. But I think it is clear in principle that the recognition afforded by the rules of private international law to an assignment to creditors under the law of a foreign country extends only to recognizing it as having the same validity as an assignment made in accordance with the laws of the situs of the moveable. The law of one country can never have effect *per se* as law in another country. Whatever effect it has is given it by the law of the country whose jurisdiction is invoked. If that country for reasons of international comity gives effect to such a law, it is because it adopts the rule of the foreign law as part of its own law *quoad illud*. No authority was cited to us to show that the provisions of a foreign law as to the perfecting of a title to local property have ever been so adopted. The authorities, such as these are, all point the other way. *Dicey* (page 334) says:—"When, further, a bankruptcy in one country is an assignment of property situate in another, it passes the property subject, speaking generally, to any charge acquired thereon prior to the bankruptcy under the laws of the country where the property is situate, and subject also to the requirements, if any, of the local law as to the conditions necessary to effect a transfer of such property"; citing, amongst other authorities, the dictum of *Jessel* M.R. in *Ex parte Rogers* (4), and adding that this dictum applies apparently to moveable property as well as to immoveables.

Story (*Conflict of Laws*, sec. 550) says:—"Although moveables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and

(1) 4 K. & J., 219.
(2) 2 D.M. & G., 140.
(3) (1893) W.N., 50.
(4) 16 Ch. D., 665, at p. 666.

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jurisdiction, as it has over immoveable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immoveable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents, is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty. Hence it is that, whenever personal property is taken by arrest, attachment, or execution within a State, the title so acquired under the laws of the State is held valid in every other State; and the same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of a State."

The recent case of *Kelly* v. *Selwyn* (1) before *Warrington* J. is to the same effect. The Supreme Court thought that the law of Natal governed the case on this point. For the reasons I have given I am unable to agree with them. I think, therefore, that in either view of the nature of Gregory's interest the respondent Green has failed to establish any title to it, and that the appellants are entitled to succeed.

BARTON J. It is not disputed that if the interest which is the subject of the assignments to the several appellants is an immoveable that conclusion is fatal to the claim of Mr Green, the respondent trustee of the estate of G. W. Gregory under *The Insolvency Act* of 1867, a law of Natal. See *Dicey's Conflict of Laws*, Rules 107, 108.

In the exercise of international comity the Courts will apply the maxim "*mobilia sequuntur personam*," in favour of the trustee or assignee under a foreign bankruptcy or insolvency. But nations in self-protection refrain from allowing foreign laws either to accomplish or to regulate the transfer of land and other immoveables within the domestic bounds. The Natal insolvency is a foreign one in respect of its relation to the laws and the Courts of Tasmania. For the purposes of the argument the direction to the trustees of James Gregory, by his will, to sell the realty within 7 years of the death of the widow, which happened

(1) (1905) 2 Ch., 117.

in October 1905, was taken to have operated as a conversion on and from the testator's death in January 1904, a few months before the adjudication in Natal and the appointment of the respondent Green as trustee thereunder, and for the same purposes G. W. Gregory was taken to have acquired domicil in Natal before his insolvency. Was then G. W. Gregory's interest under the will, the land having been, in equity, converted into personalty in January 1904, from that time a moveable or an immoveable?

Under the head of "Interpretation of Terms," Mr. *Dicey*, in his book already referred to, says, at p. 72:—"The division of the subjects of property into immoveables and moveables does not square with the distinction known to English lawyers between *things real*, or real property, and *things personal*, or personal property. For though all things real are, with certain exceptions, included under immoveables, yet some immoveables are not included under things real; since chattels 'real,' or, speaking generally, leaseholds, are included under immoveables, whilst they do not, for most purposes, come within the class of realty, or things real. On the other hand, while all moveables are with certain exceptions included under things personal, or personalty, there are things personal, viz., chattels real, or, speaking generally, leaseholds, which are immoveables, and are in no way affected by the rules hereafter laid down as to moveables. To put the same thing in other words, 'immoveables' are equivalent to realty, with the addition of chattels real or leaseholds; 'moveables' are equivalent to personalty, with the omission of chattels real."

But this eminent jurist, later in the same book, expands his view of the subjects of personal property included among immoveables. At p. 312 he says:—"Personal property includes land (immoveables) of two different descriptions. In the first place, it includes land in which a person has less than a freehold interest, e.g., a leasehold. . . . . It includes, in the second place, land which, though not a chattel real, is by any rule of law treated as personalty, or, in other words, made subject to the incidents of personal property. Such, for example, is land which under a rule of equity is, as the expression goes, 'converted into personalty,' as where freehold property is under a settlement conveyed to trustees in trust to sell the same, and after the death

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of A to stand possessed of the proceeds of the sale for the purposes of the trust."

If this is correct, the interest of G. W. Gregory under his father's will, which for the purpose of succession has become personal property, is nevertheless an immoveable. And it must be remembered that the author is speaking of immoveables in the character which, in the view of English jurists, they maintain as subjects of private international law. If that interest is an immoveable then the assignment of G. W. Gregory's property to the respondent Green, under the *Insolvency Act* of Natal, does not pass the interest to him, as that law does not affect an immoveable of the insolvent situate in Tasmania.

Then is the view taken by Mr. *Dicey* justified in law?

Let me put the question thus. In considering the effect of a foreign bankruptcy on property physically within the domestic bounds, that is, in applying the principles of private international law, does the law of England, which for this purpose is the law of Tasmania, keep in mind the substance of the thing, or the rules and methods which dictate its treatment for certain municipal purposes? I am of opinion that it is the substance alone that is to be considered. One may leave aside mere accessories, which follow the substance of necessity. Title deeds, for instance, must go with the land because without the former the right to the latter could not be proved, and the law will not give the property in the land to the owner, say, in Tasmania, and the property in the means of proof to another person, who may take them anywhere. But take the case of chattels real, or leasehold lands. They are personal property for all purposes of devolution. The physical possession, or the right to the possession of them, must be proved in order to sustain an action for trespass upon them. And no such action can be brought except in the country which includes them. So as to lands held in trust for conversion and deemed in equity to be personalty. The trustees must still defend the possession or the title when either is assailed, and no law of a foreign country can force them to defend anywhere but in the *locus rei sitæ*. But then, it is said, these considerations do not apply to a mere reversionary interest in the trust property directed to be sold. I think they

still apply, for whatever affects the right of the testator or the trustee to the unsold land, by consequence affects the right to receive the proceeds. As to the land itself, from the inception of the trust it is in equity merely money for the limited purposes of the trust, but only so far as those purposes extend. Apart from those purposes it remains land, and as an immoveable is in relation to international law governed by the doctrines applied by the *lex situs* in administering that law. Similar considerations have prevailed in the case of a rent-charge *pur autre vie* issuing out of English land, which was held liable to legacy duty as personal estate under the English Statutes, 14 Geo. II. c. 20, and 1 Vict. c. 26: *Chatfield* v. *Berchtoldt* (1). These Statutes make estates *pur autre vie* applicable as personal estate in the hands of personal representatives. In the case just cited the testatrix was domiciled in Hungary, and it was argued that the English Statutes had so completely impressed the interest with the character of personalty, notwithstanding its original character of reality, that it was not liable to legacy duty because *mobilia sequuntur personam*. The decision (on appeal) was that it was only made personal property for the limited purpose of charging it with legacy duty, to which the Court held it liable, and that, apart from that purpose, it was English real estate, and subject to English law. Of this decision Mr. *Foote*, in his work on Private International Jurisprudence, 1st ed., p. 219, says:—"Had it been the law of the testator's domicil that assumed to declare English realty to be personal estate, the case would have been too clear for argument; but in the actual circumstances the *lex situs* was given much stronger effect, being allowed to change the nature of realty into personalty for its own purposes, without exposing it as such to the law of the foreign domicil." Here is a strong illustration of the truth that, notwithstanding any rule or method of treatment applied for limited purposes municipally, yet so far as those purposes do not extend, there is no change in the substance of the thing as between nations and their laws. This again is clearly the *ratio decidendi* of the case of *Freke* v. *Lord Carbery* (2). There the question was of leaseholds in England devised by a testator, whose domicil was Irish, on trust to sell and to accumulate the

(1) L.R., 7 Ch., 192. (2) L.R., 16 Eq., 461.

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proceeds for certain trust purposes for a period prohibited by the *Thellusson Act*. That Act has no force in Ireland. The argument rejected was that all questions as to personal property of the testator must be determined by the law of his domicil; that this was personal property, for leaseholds are such by English law; and, therefore, that the trusts were good. Lord *Selborne* L.C. on the contrary held that the trusts, though good as to certain other and purely personal estate, were void as to the leaseholds. These, he held, though for some purposes regarded by English law as chattels, were land, and land, whether held for a freehold or for a chattel interest, is *as a matter of fact*, and in the nature of things, immoveable, and therefore untouched by the rule which the Roman law expresses in the maxim *mobilia sequuntur personam*. It is the idea that "personal property" and "moveables" are co-extensive terms that causes confusion on this subject. To use Mr. *Foote's* words again, 1st ed., at p. 170, chattels real are personal property "merely in name, and only in the contemplation of the English law." That law, however, when it turns its attention to that branch of it which is called international jurisprudence, does not class these as moveables, because in the nature of things they are not such. It is not prompted to set the nature of things at nought by "the deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally" (Lord *Selborne* L.C. in *Freke* v. *Lord Carbery* (1). Now, as the interests in land known as chattels real and as estates *pur autre vie* are, as above shown, dealt with according to their substance and the nature of things, is there any reason why an interest in land subject to a trust for conversion should fare differently? I have not heard any such reason from the bar. Certainly it was urged that chattels real were the only immoveables included in personal property, but upon what reason could they be so included, and such an interest in land as we are now dealing with excluded? Though they are both personal property for some purposes, what is there to make the one *interest* a moveable when the other is an immoveable? In my opinion they stand or fall together. If it is contended that, because such an interest as that of G. W. Gregory is for

(1) L.R. 16 Eq., 461, at p. 466.

some purposes personal property, it is so for all purposes, and therefore a moveable, the cases of *Brook* v. *Badley* (1), *Ashworth* v. *Munn* (2), and *In re Watts*; *Cornford* v. *Elliott* (3), show that it is an interest in land. And in the case of *Murray* v. *Champernowne* (4), *Andrews* J. expressly held that real estate, vested in trustees upon trust to sell and to hold the proceeds upon certain trusts, was while it remained unsold an immoveable, notwithstanding the direction to sell.

For these reasons I am of opinion that G. W. Gregory's Tasmanian interest was at the time of the Natal adjudication an immoveable, and, therefore, the Natal adjudication and the appointment of Mr Green as trustee did not operate to vest the interest in that respondent.

This conclusion is sufficient to dispose of the case in favour of the appellants.

But in view of possible further proceedings it is perhaps desirable that we should give an opinion on the second question debated at the bar, which can be dealt with only on the assumption that G. W. Gregory's interest is a moveable. On that assumption the respondent Green affirms that an assignment of an insolvent's property to the representative of his creditors under the Insolvents Act of Natal is, or operates as, an assignment of the moveables of the insolvent situate in Tasmania, at least if he is domiciled in Natal. So much may be granted, but the matter does not end there. And first, it is convenient to clear the question of any contention founded on such cases as *In re Bright's Settlement* (5) and later cases on the same point. The present claim arises under an insolvency which, as I have pointed out, is a foreign one in its relation to the laws and the Courts of Tasmania. Though by the comity of nations the law of Tasmania will give effect to that as an assignment of the moveables, applying the maxim so often quoted, it will not also favour the foreign creditors by giving effect to special conditions for their protection, such as are contained in the negative words at the end of sec. 51 of the Natal Statute, to the detriment of Tasmanian claimants under Tasmanian

(1) L.R., 3 Ch., 672.
(2) 15 Ch. D., 363.
(3) 29 Ch. D., 947.
(4) (1901) 2 I.R., 233.
(5) 13 Ch. D., 413.

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transfers otherwise good. Internationally, the law of that State will recognize the universal effect of the assignment on moveables, but as an assignment only. It gives no more extensive operation to the assignment than could be claimed for it if made in Tasmania.

But, further, the assignee, appealing to the Tasmanian law to give effect to his claim on international principles, will not be allowed to dispense with the ordinary requirements of that law in respect of priorities acquired by reason of acts done for the perfection of title, where such requirements have been complied with by local assignees. The Natal assignee takes the Tasmanian moveables subject to any equities administered in the local Courts: *In re Barr's Trusts* (1).

What then are the equities in this case? The rule in *Dearle* v. *Hall* (2) is thus clearly expressed in *White and Tudor's Equity Cases*, 17th ed., p. 116, in the notes to *Ryall* v. *Rowles* (3). "If the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or incumbrancer without notice of the former assignment giving notice of his assignment will thereby acquire priority." *Sir Thos. Plumer* M.R., in deciding *Dearle* v. *Hall* (2), put it that the assignee of a thing which does not admit of actual tangible possession must do that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as the assignee's property. He said (4):—"Possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and he who does not obtain such possession must take his chance." After notice, the trustees of the fund become trustees for the assignee who has given them notice. See also *In re Atkinson* (5) as to insolvency, and *In re Barr's Trusts* (6), where Lord *Hatherley*, then *Page-Wood* V.C., held that the reasoning of the Master of the Rolls in *Dearle* v. *Hall* (2) applies as fully and as forcibly to an assignee in bankruptcy (or in insolvency) as to an assignee for valuable consideration. And on the whole I do not think that the authority of either of the

(1) 4 K & J., 219, at p. 229.
(2) 3 Russ., 1.
(3) 1 Ves., 371.
(4) 3 Russ., 1, at p. 24.
(5) 2 D.M. & G., 140.
(6) 4 K. & J., 219.

last-mentioned cases is impeached by *Palmer* v. *Locke* (1). The rule in *Dearle* v. *Hall* (2), in its application to equitable interests, was exhaustively considered by the House of Lords in *Ward* v. *Duncombe* (3), where it was stated by Lord *Macnaghten* to be:— "That an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee." In the Court of Appeal *Stirling* J. quoted these words as a final expression of the law, in *In re Dallas* (4). And to come closer to the case of a foreign assignment, *Warrington* J., in *Kelly* v. *Selwyn* (5), held that where an English Court is administering an English trust fund settled by the will of an English testator, the rights of the claimants to that fund must be regulated by English law. Accordingly he decided that the plaintiff, who held a second assignment but had given the first notice to the trustees, was entitled to priority over the defendant, who held an assignment prior in point of time, executed in the State of New York, where the assignor was at that time domiciled, although the law of that State did not exact notice to the trustees to render perfect an assignment of a chose in action or a reversionary interest in personalty. The question, in the opinion of the learned Judge, was, not whether the assignment in New York was valid, but in what order English law was to treat claimants with charges on the fund; and until notice was given to the trustees the assignee of a share in the fund was not completely constituted a *cestui que trust* by English law. This case seems to me to apply completely to the present on the assumption that the interest in dispute is a moveable. On grounds, then, both of principle and of authority, I am of opinion that, on the assumption stated, the claim of the trustee in the Natal insolvency is postponed to those of the several local assignees, for valuable consideration and without notice of the insolvency, who anticipated him by giving prior notice to the trustees under the will of James Gregory. But, apart from that assumption,

(1) 18 Ch. D., 381.
(2) 3 Russ., 1.
(3) (1893) A.C., 369, at p. 384.
(4) (1904) 2 Ch., 385, at p. 415.
(5) (1905) 2 Ch., 117.

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the claim, in my opinion, fails completely on the ground that the interest of G. W. Gregory did not pass to the claimant, because it is an immoveable.

ISAACS J. The first question is as to the nature of the property claimed by the Natal trustee in bankruptcy, that is to say, the nature of the property to which George William Gregory was entitled under his father's will.

That question must, in my opinion, be determined by the law of the situs. Before the maxim *mobilia sequuntur personam* can be applied it is obviously requisite to determine whether a given property is a moveable or an immoveable. In the absence of any specific rule by the *lex loci rei sitæ* the actual nature of the thing itself is taken as the criterion to determine the matter. But if the *lex situs* lays down any specific rule with regard to any property actually situate within its jurisdiction—whether as to mobility, immobility, assignability, mode of transfer, &c.—there is no principle, so far as I know, requiring or permitting the Courts of that jurisdiction to apply any other rule. It is really not necessary here to determine how the Courts of a foreign jurisdiction would for the purposes of their own causes regard such a rule if differing from the inherent nature of the property, but, if it were necessary, I should think the canons of international law as understood in British Courts would lead them to recognize and respect the sovereignty of the country where the thing is situate, and to accept the legal quality which the law of that country has impressed upon property under its exclusive jurisdiction.

Thus in *Ex parte Rucker* (1), reversed on another point in 2 *Mont. & Ayr.*, 398, an English Court of Bankruptcy held slaves to be realty because the *lex situs*—in that case Antigua—pronounced them so.

Dicey on the Conflict of Laws, Ch. 21, on the Nature of Property, formulates a rule in accordance with this view, though with doubt. *Story*, in sec. 447, says :—"For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it

(1) 3 Deac & Ch., 704.

any character which it shall choose; and no other nation can impugn or vary that character. So that the question, in all these cases, is not so much what are or ought to be deemed, *ex sua natura*, moveables or not, *as what are deemed so by the law of the place where they are situated.* If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immoveable or real property, or not, we must resort to the *lex loci rei sitæ.*"

In the case quoted by *Story*, *Chapman* v. *Robertson* (1), *Wallworth* C. says:—"And it has been decided that the *lex loci rei sitæ* must also be resorted to for the purpose of determining what is or is not to be considered as real or heritable property, so as to have locality within the intent and meaning of this latter principle." The principle the learned Chancellor is referring to is that the creation of a trust must be made according to the *lex situs.*

The Courts of the *lex situs* at all events must be bound by the law of that place, and though the general rule of actual nature, *primâ facie*, applies, it can be overridden by special rules of law, however arising, whether out of Statute or common law. In *Chatfield* v. *Berchtoldt* (2), a case as to a rent-charge out of English lands, the Court of Appeal decided against the respondent's contention that the property was personalty. But the ground of decision was clear. *James* L.J. said (3):—"The statutory provision is not that it shall be personal estate, but that in certain circumstances, and certain circumstances only, it shall be applicable as personal estate. *Simile non est idem.* It lay on the respondent to show that by the law of England estates *pur autre vie* in land had been converted into pure personalty or moveables; and we are of opinion that he has not discharged this burthen by showing that by some statutory provisions in some cases they are to be applied in the same manner as personal estate."

(1) 6 Paige (N.Y.), 627, at p. 630. (2) L.R. 7 Ch., 192.
(3) L.R. 7 Ch., 192, at p. 198.

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Therefore the law of Tasmania must govern the question as to the nature of the property. There is no difference in this respect between the law of Tasmania and that of England. I proceed to consider what is that law. The trustees of the will contend that the property is by that law pure personalty, and must be so regarded.

Reliance is placed upon the principle of *Fletcher* v. *Ashburner* (1) by which land, directed to be sold and the proceeds disposed of, is considered in equity as personal estate and passes to personal representatives. Undoubtedly many cases may be found lending great support to the contention. In *Buchanan* v. *Angus* (2) Lord *Westbury* L.C. said:—"If real or heritable property be vested in trustees upon an absolute and unconditional trust for sale, either declared or necessarily implied, and the proceeds of such sale are disposed of, there is (in the quaint phrase of the English law) an out and out conversion for the purposes of that disposition; and the interest of every beneficiary taking under the disposition is of the nature of personal or moveable property."

In *Bolling* v. *Hobday* (3) *Chitty* J., speaking of the interest of two beneficiaries under a will devising land in trust to sell and divide the proceeds, said :—" They were not equitable tenants in common of an estate under the will; they were only entitled to the one-fourth share each of the proceeds of the sale of the real estate, and in that sense—but in that sense only—had they any equitable interest in the land."

Perhaps the strongest case in this direction is that of *Du Hourmelin* v. *Sheldon* (4), where Lord *Langdale* M.R. was pressed with an argument very much resembling the argument of the trustees of the will in this case. Land in England was by will of a testatrix who died in 1829 appointed to trustees to sell, and after certain payments to invest the proceeds in trust for certain persons some of whom were aliens. It was contended that the aliens had an interest in the realty. The Master of the Rolls said (5):—" But it is argued, that taking the case as it stood at the death of the testatrix, and as it must remain until

(1) 1 Bro. C.C., 497.
(2) 4 Macq. H.L. Cas., 374, at p. 379.
(3) 31 W.R., 9, at p. 11.
(4) 1 Beav., 79.
(5) 1 Beav., 79, at p. 89.

the conversion shall be completely made, the land is the source, from which the money, or stock, in the shares of which the aliens are to be interested, is to be realized; and that, in that respect, the aliens have an interest in the land." His Honor proceeds to advert to the distinction between the case in which land is given to a trustee to be held by him in trust for an alien—in which case the alien takes in the land, a permanent equitable interest—and the case in which no interest in land was ever intended to vest in the alien, and his right, if right he has, is only to have the land converted into money, and is so far of a transitory nature that it endures only till the purposes of the donor can be performed by the due execution of the trusts he has created. Further on in his judgment Lord *Langdale* describes more specifically the interest which the alien has in the last mentioned case. He said (1):—"During the time which may elapse, before the conversion can be completed, the alien is, by the peculiar doctrine of this Court, considered to have an interest in the land which is to be converted: *i.e.*, an interest that the land should be sold to persons that can legally hold it, in order to raise the money, which he, the alien, can legally hold." That decision was affirmed on appeal by Lord *Cottenham* L.C. (2). I shall quote only one passage from the Lord Chancellor's judgment which sufficiently shows how he regarded the point. He said (3):—"Decisions, that aliens cannot enjoy, against the Crown, trusts of land, any more than the land itself, leave untouched the present question."

In accordance with this too is *Craig* v. *Leslie* (4), where the Supreme Court of the United States previously came to the same conclusion on the same question.

In *Tyrrell* v. *Painton* (5), a case to which we have been referred since the argument, it was held that a similar interest is personalty, and not an interest in land, that is so as to be subject to an elegit under a particular Statute.

But however general the expressions in some of the cases, they were not, in my opinion, intended to lay down a universal rule that

(1) 1 Beav., 79, at p. 91.
(2) 4 My. & C., 525.
(3) 4 My. & C., 525, at p. 533.
(4) 3 Wheat., 563.
(5) (1895) 1 Q.B., 202.

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such property was to be deemed in English law to be personalty for all purposes and under all circumstances. For purposes of succession, and certain fiscal purposes, it is so considered. Again, for determining the question as to the right of the Crown to take the interest of the alien, the law was declared to be that the alien's interest in the land was too slight and transitory—at all events until he validly elected to take the land itself—to come within the rule by which an alien's realty could be claimed by the Crown.

But, even in some of the cases already mentioned, the Court refers to the interest in the land. In *Du Hourmelin* v. *Sheldon* (1) the Master of the Rolls declares the nature of that interest to be that the beneficiary has an interest that the land should be sold in order to raise the money. But though transitory it is real, and though slight it is essential. Without that interest in the land itself, the benefit of the trust might be lost. In short, equity, while for purposes of substance it looks rather at the ultimate benefit intended to be conferred, does not obliterate the interest in the land itself, which is the link, slender but indispensable, to the attainment of the real bounty conferred.

In *Pearson* v. *Lane* (2) *Sir William Grant* M.R., said:—"Where land is given upon a trust to sell, and to pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner; and the trustee must convey, as he shall direct. If there are also other purposes, for which it is to be sold, still he is entitled to the surplus of the price as the equitable owner subject to those purposes; and, if he provides for them, he may keep the estates unsold."

It will be seen presently that the principle remains the same where there are more than one beneficiary.

A number of cases decided under the *Mortmain Act*, not cited in argument but which I have since examined, illustrate this doctrine very strongly. In *Attorney-General* v. *Harley* (3), *Sir John Leach* V.C. said:—"That money to arise from the sale of land is an interest in land, admits of no doubt."

Brook v. *Badley* (4) is most distinct. The Act enacted by the

(1) 1 Beav., 79.
(2) 17 Ves., 101, at p. 104.
(3) 5 Madd., 321, at p. 327.
(4) L.R. 3 Ch., 672.

3rd section that, *inter alia*, any gift of lands or of any estate or interest therein to a charitable use should be void. Lord *Cairns* L.C. had to determine whether the bequest by a beneficiary under a will of a legacy, payable out of personalty and the proceeds of sale of real estate, was a gift of an interest in land within the meaning of the Act. The Act itself provided no definition, and the Court was consequently thrown back on general principles. The Lord Chancellor was very decided that the interest of the legatee which she bequeathed to the charity was an interest in the land. He said (1):—"If a testator devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance that of a person who has a direct and distinct interest in land. The estate is in the hands of trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land, and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land; and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided." His Lordship then proceeds to practically overrule two cases so far as they are at variance with his own views.

Two Courts of Appeal have since approved of Lord *Cairns'* view, viz., in *Ashworth* v. *Munn* (2) and *In re Watts*; *Cornford* v. *Elliott* (3).

In the result, it cannot, as I conceive, be regarded as a principle or rule of English or Tasmanian law that property of the nature

(1) L.R. 3 Ch., 672, at pp. 674. (2) 15 Ch. D., 363.
(3) 29 Ch. D., 947.

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given to the bankrupt under his father's will is pure personalty—*i.e.*, with no element of immobility—and therefore such as would, by the law of the situs, be considered simply as *mobilia* and as passing under a universal assignment by the law of a foreign domicil. The case of the Natal trustee therefore must fail independently of any consideration of notice of assignment. But as this further and important question has been agitated, and has, indeed, formed the basis of the decision of the Full Court of Tasmania, it is desirable to deal with it. Assuming the interest of the bankrupt is pure personalty, and in the nature of a chose in action, the right of his trustee in bankruptcy is challenged on the ground that the particular assignees gave prior notice to the trustees of the will. It is admitted that in a controversy arising out of a Tasmanian bankruptcy this argument would prevail.

The contention is advanced, on the part of the trustee in bankruptcy, that the ordinary rules of equity are inapplicable to a case of international competition, and it is said that the title of the trustee under the law of Natal where the bankrupt was domiciled is complete there under the Natal Statute, and independent of any formalities or requirements which would have been necessary to give a perfect title to a Tasmanian assignment, and will therefore be respected and enforced in Tasmania. On this ground it was urged that the principle of such cases as *Palmer* v. *Locke* (1), *per Jessel* M.R. (not overruled); *Stuart* v. *Cockerell* (2); *In re Barr's Trusts* (3); and *In re Atkinson* (4) is not applicable.

The argument is presented, and the Supreme Court of Tasmania has determined that, inasmuch as sec. 51 of the Natal Statute (No. 47 of 1887), not only vests all property of every kind in the Master of the Supreme Court in the first instance and subsequently in the trustee, but goes on to say that after the order for sequestration has been made "neither the insolvent nor any person claiming through or under him shall have power to alienate, give, cede, deliver, mortgage, pledge, or recover, or to release or discharge the same or any part thereof" the ordinary

(1) 18 Ch. D., 381.
(2) L.R. 8 Eq., 607.
(3) 4 K. & J., 219.
(4) 2 D.M. & G., 140.

rule of equity as laid down in *Dearle* v. *Hall* (1) is displaced, and the bankrupt is incompetent even in Tasmania of making an assignment which can on the doctrine of that case, under any circumstances, confer a right to the property.

Reliance is placed on *In re Bright's Settlement* (2), and *In re Coombe's Trusts* (3), where similar negative words were held to protect the assignee in bankruptcy. But the point of these cases is that the Court was giving effect to an Act of Parliament in force in England, prohibiting, and therefore nullifying, any attempted subsequent assignment by the bankrupt. It is plain that these and similar cases are irrelevant to the matter in hand. That prohibition was no part of the assignment to the assignee, and no part of his title, but a separate and independent enactment of a legislature whose determinations bound the tribunals. The fallacy on this branch of the argument of the trustee in bankruptcy is in treating the prohibitory words in sec. 51 of the Natal Act as part of and completing the trustee's title. They are simply a law operating in Natal and not beyond it, and having no force or effect in Tasmania on transactions entered into in that State. Had Gregory after bankruptcy assumed while in Natal to mortgage his interest, it might be that the act, being forbidden in the place where done, would be disregarded in Tasmania. That is possible, I do not say more of it, but that is not the present case. The trustee's contention amounts to importing into Tasmania, by way of appeal to international law, and for the benefit of the foreign trustee in the bankrupt's domicil, the binding force of the Natal prohibition as such, and to say it supersedes in his favour the Tasmanian requirement of notice of assignment.

He does this directly by invoking the maxim of international law *mobilia sequuntur personam*, by which he fictionally transfers to Natal both the property and the assignment by the bankrupt to the appellants, and assumes a contest before the Natal Court and the decision of that Court that the assignment was contrary to the Statute there in force, and then contends that the Tasmanian Court is bound to give the same decision.

(1) 3 Russ., 1. (2) 13 Ch. D., 413. (3) 1 Gif., 91.

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In my opinion the fiction *mobilia sequuntur personam* cannot be pushed so far. Unless the trustee establishes one of two things he must fail. These are either that the negative words in the Statute are part of his title, and not merely a prohibition against the bankrupt doing an act which, notwithstanding the trustee's title, he might otherwise have lawfully done; or that the prohibition is in force as a law in Tasmania. But neither of these positions can be sustained.

The property in fact being in Tasmania, and the assignment to the appellants in fact taking place there, it is the law of Tasmania which must decide the matter and not the law of Natal: See *Turner* V.C. in *Caldwell* v. *Vanvlissingen* (1).

Lord *Stowell's* observations in a Scotch marriage case *Dalrymple* v. *Dalrymple* (2) before him are in point:—"Being entertained in an English Court, it (the cause) must be adjudicated according to the principles of English law, applicable to such a case." The words "applicable to such a case" are in the highest degree important. In some cases the English law enforces one set of rules as appropriate, and in others quite different rules. Thus, in determining the validity of a marriage ceremony, it depends (with certain exceptions) upon the law of the place of celebration. The law is taken as the test of validity, not because it is in force *ex proprio vigore* in England, but because English law says it is appropriate to such a case. But is it appropriate in such a case as the present that the Tasmanian rule of priority according to notice should be set aside in favour of the Natal prohibition?

There are two considerations which limit the application—*ex comitate, ob reciprocam utilitatem*—of foreign law.

They are shortly stated in *Wheaton's International Law*, 4th ed., at p. 131, as follows:—"In modern times, all States have adopted, as a principle, the application within their territories of foreign laws; subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject." See also Lord *Wensleydale's* speech in *Fenton* v. *Livingstone* (3).

(1) 9 Ha., 415, at p. 425. (2) 2 Hag. Con., 54, at p. 58.
(3) 3 Macq. H.L. Cas., 497, at p. 548.

Both these considerations, viz., that of the right of sovereignty, and that of the interests of the citizens of Tasmania, are involved in the present case. As to the first, it is a distinct part of the law of Tasmania—and it is I apprehend quite immaterial how it has become the law whether by Statute or common law—that the title of the assignee of such a right as that now in question is not perfect until notice to the trustee of the fund: *Lloyd's Bank* v. *Pearson* (1); *Foster* v. *Cockerell* (2); *In re Lake*; *Ex parte Cavendish* (3); *Ward* v. *Duncombe* (4). In *Montefiore* v. *Guedalla* (5) *Cozens-Hardy* L.J. says:—"The rule laid down in *Dearle* v. *Hall* (6) is now part of the law of the land." Starting with that position, why should it be disregarded in favour of the Natal trustee? Why should he be held to have perfected his title without complying with the special mode of transfer appropriate by Tasmanian law to the particular class of property dealt with?

In Mr. *Dicey's* work, at p. 334, it is stated that bankruptcy in one country is an assignment of property in another, but subject (*inter alia*) to the requirements, if any, of the local law as to the conditions necessary to effect a transfer of such property, and the learned author, after quoting the authority of *Ex parte Rogers* (7) for this position as to realty, adds:—"And this dictum, though confined to immoveable property and to property in the Colonies, applies apparently to moveable property and to property situate in any foreign country."

It is in accordance with Scottish law as appears from *Erskine's Institute of the Laws of Scotland*, ed. of 1871, pp. 717 and 718, where it is said:—"On a similar principle, where a foreign ground of debt, perfected *secundum legem domicilii*, is sustained by our Supreme Court, the diligence which is to proceed upon it, and the other judicial steps necessary for giving it full effect, must be governed by the law of Scotland; because these previous steps are required to deeds of the same kind, even supposing them perfected in the Scottish form; and that Judge within whose territory the debt is situated, and under whose authority it is to

(1) (1901) 1 Ch., 865.
(2) 3 Cl. & F., 456.
(3) (1903) 1 K.B., 151.
(4) (1893) A.C., 369.
(5) (1903) 2 Ch., 26, at p. 37.
(6) 3 Russ., 1.
(7) 16 Ch. D., 665.

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be recovered, must necessarily determine all questions of diligence and competition concerning it, according to the laws of his own country, and not according to those of a foreign state, which may be utterly unknown to him, and which have no authority, nor were ever designed to bind the Judges of any State which is not subject to the legislature who enacted them. Thus because no assignation is, by the law of Scotland, effectual against an arrester, if it has not been intimated previously to the arrestment; neither is a foreign assignment, not intimated, effectual against him, though the *lex loci* should not require assignations to be intimated."

The second consideration to which, as stated in the passage from *Wheaton*, the application of foreign law is subject here is the interests of Tasmanian subjects. Whatever else may have formed the ground of judgment in *Dearle* v. *Hall* (1) there was certainly involved in the decision the prevention of fraud against future assignees. The appellant society resident in Tasmania would undoubtedly have been protected if the assignor had become bankrupt in Tasmania where it might more easily have learnt the fact of bankruptcy, and why should it lose its protection when his bankruptcy occurred so far from its probable means of knowledge? On the ground also that the principle of *Dearle* v. *Hall* (1) would apply to this case if the bankrupt's interest were a moveable, notwithstanding a Natal assignment in bankruptcy, I am of the opinion the appeal should be allowed.

GRIFFITH C.J. The order of the Court will be as follows:—Appeal allowed. Order appealed from discharged. The first question will be answered—"The respondent Green is not entitled to any portion of the share." The fifth question will be answered —"The one-ninth part is payable to the other assignees thereof from G. W. Gregory who have given notice of their assignments to the trustees of the will to the extent of their respective charges thereon, and in priority according to the dates of their respective notices." Costs of the trustees of the will in the Supreme Court to be paid out of the fund. All other parties except the respondent Green to be at liberty to add their costs in the Supreme Court to their securities. The respondent Green to pay the appellants'

(1) 3 Russ., 1.

costs of the appeal. The appellants to be at liberty to add their costs to their respective securities so far as they are not recovered from the respondent Green. The appellants to pay the costs of appeal of the trustees of the will and recover them from the respondent Green, and to be at liberty to add them to their respective securities as far as they are not recovered from him. The trustees' costs to be taxed as between solicitor and client.

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Appeal allowed.

Solicitors, for appellants, *J. B. Walker, Wolfhagen & Walch*; *Nicholls & Stops.*

Solicitors for respondents, *Perkins & Dear.*

B. L.

Appl *Cook v Saroukos* 97 FLR 33

Appl *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540

Foll *Ratto v Trifid Pty Ltd* (1985) 56 LGRA 22

[HIGH COURT OF AUSTRALIA.]

BARRIER WHARFS LIMITED . . . APPELLANTS; PLAINTIFFS,

AND

W. SCOTT FELL & COMPANY LIMITED . RESPONDENTS. DEFENDANTS,

H. C. OF A. 1907.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

MELBOURNE, *August* 19, 20, 21, 22; *September* 2.

Contract—Absence of formal contract—Contract contained in letters—Subsequent correspondence, effect of.

Higgins J.

1908.

The plaintiffs, who were wharf owners, were negotiating with the defendants, who were shipowners, for the use by the defendants' ships of the plaintiffs' wharf. The plaintiffs wrote:—"I beg to state that I am prepared to find accommodation for your steamers at our wharf, you to be charged sixpence per ton on all coal and coke landed there, provided you undertake to do all your business other than that with the B. Co. with us. I understand your coal contracts provide for approximately 50,000 tons exclusive of the B. Co. Tonnage dues as per printed schedule handed you to be charged. I undertake to provide a berth for your steamers at all times on the understanding

MELBOURNE, *March* 18, 19, 20.

Griffith C.J., Barton, O'Connor and Isaacs JJ.