[HIGH COURT OF AUSTRALIA.]

LEWIS . . . . . APPELLANT;
DEFENDANT,

AND

BALSHAW . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *Oct.* 15, 16; *Dec.* 18.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Validity—Jurisdiction of New South Wales Court—Foreign domicil—Grant of probate by Court of domicil—Movable and immovable property in New South Wales—Application in New South Wales for administration with will annexed—Caveat—Wills, Probate and Administration Act 1898-1932 (*N.S.W.*) (*No.* 13 *of* 1898—*No.* 49 *of* 1932), *secs.* 44, 46, 47, 72.

A testatrix, who was domiciled in England, died possessed of movable and immovable property in New South Wales. The executor named in the will obtained a grant of probate in common form in England, and, as a person entitled to probate who was out of the jurisdiction, brought a suit in the Supreme Court of New South Wales for the grant to his attorney of administration with the will annexed. The suit was contested by a caveator who claimed that the will was invalid.

Held that the validity of the will as a disposition of immovables and as a title to administer them must be determined independently of the English grant, and that the caveator's objections should therefore be heard and determined upon the merits.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

On 22nd March 1933 probate of the will of Sophia Morwitch was granted by the High Court of Justice in England to William Balshaw, the executor named in the will. At the time of her death in 1933

the testatrix was domiciled in England and owned considerable real and personal property in New South Wales. A suit was brought in the probate jurisdiction of the Supreme Court of New South Wales by Balshaw praying the grant of administration, with an exemplified copy of the will annexed, to Perpetual Trustee Co. (Ltd.) of Sydney, New South Wales, Balshaw's attorney, for his use and benefit until he himself applied to become the representative of the testatrix in New South Wales. It was a contested suit, in which the defendant, Henry William Lewis, a caveator, claimed (*a*) that the will was not properly executed, (*b*) that the testatrix was not mentally capable of making a will, (*c*) that she did not know and approve the contents of the will, and (*d*) that the execution of the will was obtained by the undue influence of certain persons, one of whom was named. None of these issues was raised in England. In the course of his judgment *Nicholas* J. said that the grant made by the Court of the domicil should be followed in New South Wales in the circumstances of the present case, notwithstanding the existence of immovable as well as movable property among the assets of the testatrix in that State. It had been proved that the formalities of a will of immovables were the same in New South Wales as in the jurisdiction of the principal grant; therefore that grant should be followed although the issues now raised had not been investigated. His Honor held that he should not allow the issues raised to be tried.

An application upon motion by the defendant for leave to appeal from that decision to the High Court was granted by *Nicholas* J.

The appeal now came on for hearing.

Mason K.C. (with him *Holmes*), for the appellant. A grant of probate made by the Court of the domicil, although a foreign Court, will be accepted so far as it relates to movables, but it will not be accepted as regards immovables within the jurisdiction; in the latter case the *lex situs* prevails. The rules as regards movables and immovables are set forth in *Dicey's Conflict of Laws*, 5th ed. (1932), pp. 510 and 583. If in this case the grant of probate by the English Court were followed it would, in effect, mean that that Court, a foreign Court, has jurisdiction to decide the title to land in New South Wales. It has no such jurisdiction. The question of

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resealing was dealt with in *In re Heathcote* (1); however, that decision was not followed by *Harvey* J. in *Public Trustee of New Zealand* v. *Smith* (2). The application here is for an original grant. The decision in *In the Will of Ronaldson* (3), in which the question of a grant involving real estate was dealt with, is bad law. The power and authority of a probate Court as regards real estate does not extend beyond the real estate within the jurisdiction (*Re Howard* (4); *Boyse* v. *Colclough* (5); *Foster* v. *Foster's Trustees* (6)). The attorney here would be an original grantee (*In re Rendell*; *Wood* v. *Rendell* (7); *Re Dewell*; *Edgar* v. *Reynolds* (8)).

[EVATT J. referred to *Blackwood* v. *The Queen* (9).]

Maughan K.C. (with him *Stuckey*), for the respondent. This suit was not instituted to determine the title to real estate; it was instituted to determine the issue as to who shall be the representative of the estate in New South Wales. The law as regards the capacity of a testator to make modes of distribution of real estate is the same in New South Wales as in England. The estate includes a large amount of personalty; therefore the rule of private international law should prevail, that in this jurisdiction the grant should follow the grant of the domicil (*Miller* v. *James* (10)). There is not any rule that the existence of realty in an estate is the predominating element. The question of the representation of a deceased person granted by a Court of probate is not in any way influenced by the existence of realty. The decision appealed from was given, not as a matter of jurisdiction but as a matter of convenience, which is a fundamental feature of most of the rules of private international law. When *Boyse* v. *Colclough* (5) and *Foster* v. *Foster's Trustees* (6) were decided, real and personal estate did not, under the law then in force in the respective jurisdictions, pass to the personal representative. The history and development of English law relating to grant of probate is stated in *Mortimer* on *Probate Law and Practice*, 2nd ed. (1927), at pp. 13-24. Even prior to the *Court*

(1) (1903) Q.S.R. 57.
(2) (1924) 42 W.N. (N.S.W.) 30.
(3) (1891) 10 N.Z.L.R. 228.
(4) (1924) 1 D.L.R. 1062, at p. 1069.
(5) (1854) 1 K. & J. 124, 502; 69 E.R. 396, 557.
(6) (1923) Sc. L.T. 59.
(7) (1901) 1 Ch. 230.
(8) (1858) 4 Drew. 269, at p. 272; 62 E.R. 104, at p. 105.
(9) (1882) 8 App. Cas. 82.
(10) (1872) L.R. 3 P. & D. 4.

of Probate Act 1857, the ecclesiastical Court granted probate of a mixed will (*Partridge's Case* (1)). Having regard to the absurdity of having the same will litigated in two or more jurisdictions, and the inextricable confusion that would arise if there were a different personal representative in the different countries concerned, as a matter of comity of nations the Judge of first instance was right in saying that where there is such administration of real and personal estate the proper formula is the formula of the domicil of the testator (*Enohin* v. *Wylie* (2)). Upon finding a grant by the Court of the foreign domicil it becomes the duty of the Judge in the probate jurisdiction to follow that grant and make a similar grant in New South Wales. It is immaterial whether that is done by reseal or on original application. When making ancillary grants on the basis of a grant in the country of the domicil, a Court may impose conditions (*Dicey's Conflict of Laws*, 5th ed. (1932), pp. 510 et seq.). *Dicey's* rule 150 (5th ed., p. 583) only shows by what law rights to immovables are governed ; it has no bearing on the question, who is to be entitled to administer ? (See also *Westlake's Private International Law*, 6th ed. (1922), p. 117.) Both the law of England and the law of New South Wales put the administration of real and personal property in the same persons, the personal representative. According to the law of New South Wales the legal personal representative depends upon the law of the domicil. If probate of a will has been granted by the Court of the domicil, a foreign Court will not allow the validity of that will to be litigated before it (*Miller* v. *James* (3)), and, so far as the English Courts are concerned, will grant probate to the person to whom the grant has been made by the Court of the domicil (*In the Goods of Earl* (4)). The only exception from that rule is in the case of the incapacity of the person to whom probate has been granted, e.g., a minor (*In the Goods of the Duchess D'Orleans* (5)).

[RICH J. referred to *In the Estate of Humphries* (6).

(1) (1702) 2 Salk. 552 ; 91 E.R. 468.
(2) (1862) 10 H.L.C. 1, at pp. 13, 15 ; 11 E.R. 924, at pp. 929, 930.
(3) (1872) L.R. 3 P. & D. 4.
(4) (1867) L.R. 1 P. & D. 450, at p. 453.
(5) (1859) 1 Sw. & Tr. 253 ; 164 E.R. 716.
(6) (1934) P. 78.

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[McTIERNAN J. referred to *Larpent* v. *Sindry* (1) and *Walker and Elgood's Law of Executors and Administrators*, 3rd ed. (1897), p. 100.]

As to whether the fact that the will was not duly executed is material, see *In the Goods of Smith* (2) and *Freke* v. *Lord Carbery* (3). No question of representation arose in *Foster* v. *Foster's Trustees* (4) or *Boyse* v. *Colclough* (5); the only matter before the Court in those cases was a claim to real and/or personal estate; the question of domicil was not raised. As to whether the Court may determine ownership of real estate as distinct from right to succession, see *In re Nicholls*; *Hunter* v. *Nicholls* (6). There is not any clash as to the law to be applied to administration. The law which operates upon grant of probate is well settled: as regards movables it is the *lex domicilii*; as regards immovables it is the *lex loci rei sitæ*. In view of the ample personalty in this estate *Nicholas* J. had no alternative but to follow the English grant.

[DIXON J. referred to *In the Goods of Meatyard* (7).]

As stated by *Harvey* J. in *Public Trustee of New Zealand* v. *Smith* (8), the decision in *In re Heathcote* (9) is inconsistent with the decision in *Hood* v. *Lord Barrington* (10). There is not any jurisdiction to "split" the probate. There is a vital distinction between succession and representation (*Pepin* v. *Bruyère* (11); *Dicey's Conflict of Laws*, 5th ed. (1932), pp. 589, 590, *tit.* "devolution").

[DIXON J. referred to *De Fogassieras* v. *Duport* (12).]

The appointment of the executor is essentially a matter for the Court of the domicil; it does not depend upon title, the nature of the assets, or how they are disposed of by the will. It is a question for the probate Court as distinct from a Court of administration. The rule relating to movables, by legislation, has been made to apply to immovables (*Maddock* v. *Registrar of Titles* (*Vict.*) (13)). Where there is only real estate in England a foreign grant may be resealed in England (*Tristram and Coote's Probate Practice*, 15th ed. (1915), p. 252: *Mortimer* on *Probate Law and Practice*, 2nd ed.

(1) (1828) 1 Hagg. Ecc. 382; 162 E.R. 620.
(2) (1850) 2 Rob. Ecc. 332; 163 E.R. 1336.
(3) (1873) L.R. 16 Eq. 461.
(4) (1923) Sc. L.T. 59.
(5) (1854) 1 K. & J. 124, 502; 69 E.R. 396, 557.
(6) (1921) 2 Ch. 11.
(7) (1903) P. 125.
(8) (1924) 42 W.N. (N.S.W.) 30.
(9) (1903) Q.S.R. 57.
(10) (1868) L.R. 6 Eq. 218.
(11) (1902) 1 Ch. 24.
(12) (1881) 11 L.R. Ir. 123.
(13) (1915) 19 C.L.R. 681, at p. 693.

(1927), p. 480). The question of limited grants is dealt with by *Mortimer*, 2nd ed., pp. 357 et seq.

[DIXON J. referred to *Walker and Elgood's Law of Executors and Administrators*, 3rd ed. (1897), p. 39, and *In the Estate of Von Brentano* (1).]

The remarks by the Vice-Chancellor in *Twyford* v. *Trail* (2) to the effect that a foreign grant of probate is not conclusive are inconsistent with the decisions in *Enohin* v. *Wylie* (3) and *Miller* v. *James* (4).

Mason K.C., in reply.

Cur. adv. vult.

Dec. 18.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. Succession to movables upon death is governed by the law of the deceased's domicil. Succession to immovables upon death is governed by the law of the place where they are situated and is not affected by the law of the domicil. The formal and intrinsic validity of a will of land depends upon the *lex loci rei sitæ*. That of a will of movables depends, apart from Lord Kingsdown's Act, upon the *lex domicilii* of the testator. In granting probate or letters of administration when the property within the jurisdiction is movable, effect is given to the law of the domicil and the grant is made to the person entitled under that law. If the *forum domicilii* has already constituted an administrator of the movable assets, whether he be an executor, administrator, or bear some other name, a grant is made to him without further investigation of his title, unless he is disqualified under our law, or there is some other special reason against the recognition. But a title to administer immovables situated here must exist under our municipal law.

In New South Wales, upon the grant of probate of the will or of administration of the estate of any deceased person, all real and personal estate of or to which he died seised, possessed or entitled

(1) (1911) P. 172.
(2) (1834) 7 Sim. 92, at p. 102 ; 58 E.R. 771, at p. 775.
(3) (1862) 10 H.L.C. 1 ; 11 E.R. 924.
(4) (1872) L.R. 3 P. & D. 4.

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in the State as from his death passes to and becomes vested in the executor or administrator obtaining the grant. In the case of probate or administration with the will annexed he holds that estate according to the trusts and dispositions of the will (secs. 44 and 47 of the *Wills, Probate and Administration Act* 1898).

In the present case the testatrix, who was domiciled in England, died possessed of movable and immovable property in New South Wales. The executor named in the will obtained a grant of probate in common form in England, and now, as a person entitled to probate who is out of the jurisdiction, he has appointed to act for him a company within the jurisdiction, which seeks administration with the will annexed (see sec. 72 as amended by sec. 43 (*c*) of Act No. 44 of 1930). A caveat has been lodged and the validity of the will is contested.

If the will related only to movables, the fact that the forum of the domicil had granted probate which remained unrevoked would lead the Supreme Court of New South Wales to refuse to entertain the issue of the validity of the will or of the executor's title to a grant of probate thereof. But, if the will related only to immovables, the grant of probate in England would be treated as entirely irrelevant and the validity of the will and the executor's right to a grant would be determined upon the hearing of a contested suit. The question is: What is to be done when the will relates both to movables and immovables within the jurisdiction?

Nicholas J. has adopted the solution which gives predominance to the grant of the Court of domicil. In his opinion the grant made by that Court should be followed, notwithstanding the existence within New South Wales of immovables as well as movable property. His Honor considered that general considerations of convenience and international comity contribute to the practice under which ancillary grants follow the grant of the Court of the domicil in the case of movables, and that it does not altogether depend on the rule that the law of the domicil governs succession to movables. Realty did not pass to the executor or administrator at the time when the necessity was recognized of having a single administrator for movables except when the formalities prescribed by the *lex situs* had not been complied with, a case which might be met by a limited grant.

His Honor thought that the advantages of having the same person to administer the one estate wherever the assets were found were no less important because some of those assets were immovable and descended according to the *lex situs*, a law by which the administrator would be bound and under which he must obtain authority to administer.

In our opinion the force of this reasoning, which we have done no more than summarize, is insufficient to overcome the objection that by admitting the will to probate the Court of New South Wales does much more than constitute an administrator of assets. It establishes the will as a dispositive instrument. Except for matters appearing on the face of the will, such as the illegality of its provisions, there are few, if any, grounds left open for questioning the efficacy of the will as a disposition of property.

A general grant of probate means that the immovables vest in the executor and must be administered according to the disposition of the will (cp. *In re Howden and Hyslop's Contract* (1)). Thus, to follow the grant of the Court of the domicil makes the title to immovables, both beneficial and legal, depend upon a determination of that Court founded on its own law. Yet no forum but the *forum situs* and no law but the *lex situs* can govern the title to land. Considerations of convenience and of comity could not, and have not, overcome this rule.

In our opinion the validity of the will as a disposition of immovables and as a title to administer them must be determined independently of the English grant. It follows that the caveator's objections to the grant of probate should be heard and determined upon the merits.

If, in the event, the Court pronounces against the validity of the will, a difficulty may arise, unless proceedings are taken in England to revoke probate. If all attempts fail to obtain consistent determinations upon the question, it may be that the New South Wales Court should grant administration with the will annexed, limited to movables, and by that means give effect to the dispositions governed by the law of the domicil as administered by the Court of the domicil. But that question has not yet arisen.

(1) (1928) Ch. 479, at pp. 482, 483.

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The appeal should be allowed, the order appealed from set aside and the cause should be remitted to the Supreme Court for hearing.

STARKE J. Sophia Morwitch died in 1933, domiciled in England. Probate of her will was granted by the High Court of Justice in England to Balshaw, the executor named therein. She owned at the time of her death considerable movable and immovable property in New South Wales. The *Wills, Probate and Administration Act* 1898-1932 of New South Wales enacts that upon the grant of probate of the will or administration of the estate of any person all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales shall, as from the death of such person, pass to and become vested in the executor to whom probate has been granted or administrator for all his estate and interest therein, and that the real as well as the personal estate of every such person shall be assets in the hands of his executor or administrator for the payment of all duties and fees and for the payment of his debts in the ordinary course of administration (secs. 44, 46). It is conceded that the law in New South Wales is the same as in England as regards the capacity of the testator to make, and the modes of execution of, a will of real estate. A suit has been brought in New South Wales praying the grant of administration, with an exemplified copy of the will of the deceased annexed, to the attorney of the executor for his use and benefit until he shall himself apply to become the representative of the deceased in New South Wales. It is a contested suit, in which the defendant sets up that the deceased, Sophia Morwitch, was not of capacity to make a will, that she did not know and approve of the contents of the will propounded, that it was not properly executed, and that its execution was procured by undue influence. The English grant was apparently in common form, for none of these matters was raised in England. It is not disputed that the English grant has no direct operation in New South Wales. But it is insisted that the Supreme Court of New South Wales should follow the English grant without investigating the issues raised by the defence because it was made by the competent Court of the domicil of the deceased.

Undoubtedly the rule or practice of English law, in the case of movable property, is that a Court of probate should follow the grant made by the competent Court of the domicil. The rule is a rule of convenience and expediency, and not an absolute right (*Enohin* v. *Wylie* (1); *Blackwood* v. *The Queen* (2); *In the Goods of Earl* (3); *In the Goods of Hill* (4); *In the Goods of Cosnahan* (5); *In the Goods of Meatyard* (6)). The rule is based upon the doctrine of English law that the beneficial succession to a deceased person's movables is governed by the law of his domicil and that consequently the representative recognized by the Court of the domicil should be placed elsewhere in a position to represent the deceased. It is convenient and expedient that such a representative should deal with all the movable property of the deceased the beneficial succession to which is governed by the law of the domicil. Considerations of convenience and expediency which underlie the practice of following a grant made by the competent Court of the domicil have no application to immovable property: "every question with regard to the devolution of immovables in consequence of death is, subject to certain exceptions, governed by the *lex situs*." But the real property of a deceased person now passes in New South Wales, as in England, to his personal representatives for administration. Does this change in the law make it convenient or expedient for, or the duty of, the Courts of the country where immovables are situated to recognize the person whom the Court of the domicil of a deceased person authenticates as the personal representative of the deceased or appoints as such representative?

The grant of probate is conclusive evidence that the instrument proved is testamentary according to the law of the country where the grant was made. But it proves no more (*Concha* v. *Concha* (7); *Whicker* v. *Hume* (8)). It is conclusive "that there was an executor who was entitled to have probate" in the country where the grant was made, and it may be prima facie evidence of the domicil of the deceased (*Concha* v. *Concha* (7); *Bradford* v. *Young* (9)). But the rule that in the case of movable property a Court

(1) (1862) 10 H.L.C. 1; 11 E.R. 924.
(2) (1882) 8 App. Cas., at pp. 92, 93.
(3) (1867) L.R. 1 P. & D. 450.
(4) (1870) L.R. 2 P. & D. 89.
(5) (1866) L.R. 1 P. & D. 183.
(6) (1903) P. 125.
(7) (1886) 11 App. Cas. 541.
(8) (1858) 7 H.L.C. 124; 11 E.R. 50.
(9) (1884) 26 Ch. D. 656; (1885) 29 Ch. D. 617.

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of probate should follow the grant made by the competent Court of the domicil requires that the Court of probate should be satisfied that the grant is by the Court of the domicil, which depends upon the evidence adduced before it. It may be thus established that the grant of probate is in fact the grant of the Court of the domicil, and that the executor to whom such grant was made is recognized by the law of the domicil as the legal personal representative of the deceased. But the validity of the will in relation to immovables is not thereby established, for in general the formalities required for the validity of a testamentary disposition of immovables are governed by the *lex situs*. It may be, as in the present case, that the law of the domicil and the law of the *situs* require the same formalities for a testamentary disposition of immovables, but that is by no means universally true. And following the grant of the Court of the domicil would result in every case in establishing the validity of the testamentary instrument, both as to movables and as to immovables, according to the law of the domicil, and not according to the law of the *situs* of the immovables. In my opinion, such a result is contrary to principle and to well settled practice. *Dicey's Conflict of Laws*, 5th ed. (1932), p. 515, in referring to the rule that where a person dies domiciled in a foreign country leaving movables in England the Court will in general make a grant to his personal representatives under the law of such foreign country, observes that there is a possibility that the *Land Transfer Act* 1897 (now Part I. of the *Administration of Estates Act* 1925), which for the first time vests the English real estate of a deceased person in his personal representative, may afford good ground for not making a grant to the representative of a deceased person who has died domiciled in a foreign country. A Court of probate, however, might follow the grant of the Court of the domicil but limit its own grant to movable property within its jurisdiction (see *Williams* on *Executors and Administrators*, 11th ed. (1921), pp. 171, 295; *Mortimer* on *Probate Law and Practice*, 1st ed. (1911), pp. 279, 280). It would remain for the executor to establish before the Court of probate the validity of the will as to immovables according to the law of the *situs*. Where the law of the domicil and the law of the *situs* require the same

formalities for a testamentary disposition, it may be convenient to postpone any grant until the validity of the will is established both by the law of the domicil and the law of the *situs*; but this must depend upon the circumstances of the particular case and the exigency of administration.

The appeal should be allowed and the order of the Supreme Court dated 20th May 1935 set aside.

Appeal allowed. Order appealed from set aside and the cause remitted to the Supreme Court for hearing. Respondent to pay the costs of the appeal and of the hearing before Nicholas J.

Solicitors for the appellant, *McFadden & McFadden.*

Solicitors for the respondent, *Rand & Drew.*

J. B.