B A N K R U P T C Y

AND

THE WINDING UP OF COMPANIES

IN

PRIVATE INTERNATIONAL LAW.

[1937]

S Y N O P S I S.

		Page
I.	INTRODUCTION..	1.
II.	JURISDICTION OF LOCAL COURTS.	19.
	(1) Jurisdiction of Australian Courts in Bankruptcy...	19.
	(2) Jurisdiction of South Australian Courts to wind up a company.	47.
III.	EXTRA-TERRITORIAL EFFECT OF LOCAL BANKRUPTCY OR WINDING UP.	58.
	(1) Of an Australian bankruptcy	58.
	(2) Of a South Australian winding up ..	65.
IV.	JURISDICTION OF FOREIGN COURTS AND EXTRA-TERRITORIAL EFFECT OF FOREIGN BANKRUPTCY AND WINDING UP	68.
	(1) Bankruptcy	68.
	(a) Bankruptcy taking place under an Act of the Imperial Legislature	68.
	(b) Any other bankruptcy..	74.
	(i) Movables	74.
	(ii) Immovables	120.
	(c) Concurrent bankruptcies	122.
	(2) Winding up	127.
V.	ADMINISTRATION IN LOCAL BANKRUPTCY OR WINDING UP.	135.
	(1) Effect on antecedent transactions..	135.
	(2) Power of local Courts to protect foreign property of bankrupt or company	145.
	(3) Proof and effect of proof	167.
	(4) Liability of Contributories	179.
	(5) Priority of debts and administration generally.	188.
	(6) Principal and ancillary windings up.	205.
	(7) Administration of local assets of dissolved foreign company	221.
VI.	EFFECT OF BANKRUPTCY AND WINDING UP AS A DISCHARGE.	255.
	(1) Bankruptcy.	255.
	(a) local bankruptcy	255.

SYNOPSIS (continued).

Page.

(b) bankruptcy taking place under an Act of the Imperial legislature .. .. 257.

(c) any other bankruptcy .. .. 262.

(2) Winding up .. .. 276.

APPENDIX A.
Domicil and personal law of corporations and theoretical reasons for recognition of foreign corporations .. .. .. 278.

APPENDIX B.
The Statute of Westminster .. .. .. 302.

APPENDIX C.
The effect of the Constitution on the principles of private international law as between the States .. .. 305.

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CHAPTER I.

I N T R O D U C T I O N.

There are occasions in which a person's property has to be administered as a whole for the purpose of satisfying all just claims upon it. The property must be collected and administered by some person having authority to do so and he must satisfy all claims upon it to the extent and in the order prescribed by law. Some such process is known to all systems of law, for justice, both to the person concerned and to the persons having claims against him, demands on occasions when it is obvious or likely that not all those claims can be satisfied in full, that his estate shall be so administered, that they shall be dealt with equally and rateably and in some settled order, rather than that it should be left to each claimant to establish his right separately by the ordinary process of law, and to satisfy it by execution, thus leaving it to chance, caprice or oppression to decide who shall be paid in full and who not paid at all. And the usual, though not inevitable, corollorary of such a process is that when the property of the person concerned has been so taken and administered he shall be discharged from his former liabilities. This process is generally brought about by operation of law but a similar result can be obtained by voluntary agreement between such a person and his creditors, whereby he either hands over his property to a representative appointed by them to be administered as described above, or agrees to pay them a rateable proportion of their claims receiving in return a discharge from his liabilities, or, under some systems, personal immunity only. It is the concursus of claimants against the property whereby their claims are dealt with and adjusted as a whole that

forms the essence of the processes with which I propose to deal. These processes, in countries whose systems of law are founded on English law, are bankruptcy - including in that term the various voluntary processes not involving sequestration described in the Bankruptcy Act - in the case of a natural human being, and winding-up in the case of a company.

In many cases, our propositus the man or company concerned has property situated in more than one country, or the rights of the claimants upon his or its property may arise under different systems of law. In such instances, many questions of private international law may arise for solution. Thus, what persons are to be subjected to this process in the Courts of any given country? Are the Courts of each country to administer separately the property within their respective jurisdictions, and if so what account are they to take of concurrent administrations in other countries, or are the Courts of some country, and if so, of what country, to be recognized as having the sole or at any rate the pre-eminent right to administer the estate of our propositus as a whole? If a person is appointed by the Courts or under the law of one country to administer the estate of our propositus, will the Courts of other countries recognize his title to property situated in such other countries? Or, if there are persons having claims upon the property arising under different systems of law, by what law are the validity of such claims and their priorities inter se to be decided? Will the Courts of one country allow claimants from all over the world to share in the property, or will the administration in each country be only for the benefit of claimants belonging in some way to the particular country concerned? Or, if our propositus is discharged from his liabilities as a result of some bankruptcy or liquidation proceedings in one country, in what cases, if at

all, will that discharge be a good answer to an action brought against him by one of his former creditors in the Courts of another country? It is the object of this thesis to endeavour to discover the principles which guide the solution of these and similar questions.

There are two methods of considering any question of private international law. (See Dicey - Conflict of Laws 4th Ed. p.15-19). One is to extract from the writings of jurists and other sources and from the application of logic and deduction a code of rules which should decide what jurisdiction is to belong to each State in any matter, or what law is to be applied to the solution of any question. Those writers who adopt this method are in effect attempting to propound a common private international law for the world, regardless of the fact that the actual rules of private international law adopted and enforced by the Courts of various States profoundly differ from each other. Such writers, while they do not pretend that their principles are those which are necessarily applied in the Courts of any particular State, rather hold those principles up as a test of the expediency or justice of the rules actually adopted. They are expounding law as it ought to be, not as it is. The second method is to endeavour to ascertain the actual rules in relation to the particular topic adopted by the law of some particular State. The first method is philosophical and ideal and has the advantage of logic and consistency. The second is more practical and less subjective, and only attempts to discover part of the actual law of some State. In accordance with the traditional methods of English law, I have adopted the second method and all that this thesis attempts to do is to discover the rules relating to the topic under discussion which are or would be applied in the

Courts of South Australia. This path can only be followed at the cost of a certain sacrifice of logic and consistency. The decisions are not all reconciliable and the principles underlying them are still less so. Nevertheless, I have endeavoured to adhere to principle a s much as possible, and to this end, I have ventured to question several of the decisions, not considering the law to be finally settled in the absence of a statute or of a decision of the House of Lords or of the Privy Council.

Though, therefore, my purpose is to discuss part of the law of South Australia, yet I do not propose to enter into a detailed discussion of the provisions of Federal or State Statutes, where no question of principle is involved. For where the legislature lays down a particular rule, provided that it is within its legislative competence, the Courts subject to that legislature have no option but to obey it. It may or it may not conform to the Court's idea in abstract of the proper limits of its own jurisdiction, or of the proper system of law to be applied to the particular case. It may be in flagrant contradiction of some generally accepted principle of international law. But these considerations become irrelevant. For example, the Federal Bankruptcy Act lays down certain rules as to the persons against whom and the conditions in which a sequestration order may be made. These rules are purely arbitrary, and no principle of private international law can be deduced therefrom. They, indeed, answer the question: What is the jurisdiction of an Australian Court to make a sequestration order? And they are, therefore, in outline necessary to be understood for the purposes of our subject. But, if we desire to know what, according to the principles of private international law in force in South Australia, is the proper Court to exercise this jurisdiction, we must look at the cases

in which the effect of foreign bankruptcies is discussed. It is certain that an Australian Bankruptcy Court would not concede to a foreign Court a jurisdiction co-extensive with its own.

The principles of private international law applied in Australia are mainly those which have been developed in the English Courts, except in so far as these have been varied by statute. Private international law, however, is still, to a very large extent, case law. It is, moreover, case law for the most part of recent development. It has been said that it is the last province still remaining for the Courts to develop and settle. It is here, more than in most branches of law, that the opinions of text writers of foreign jurists and the influence of legal theory can still play a large part in the guidance of the Courts. I have, therefore, frequently referred to the opinions of text writers, particularly to those of Dicey (Conflict of Laws 4th Ed.) and Westlake (Private International Law 7th Ed.) and any expression of disagreement with their conclusions is given with diffidence and hesitation.

I might add that I have not thought it necessary to define the fundamental conceptions of private international law, such as the nature of the subject itself or the meaning of the term "domicil", or the difference between movable and immovable property. I have used the word "country" to mean what Dicey (p.57) defines it to mean, namely, the whole of a territory subject under one sovereign to one system of law. This presents some complication in a Federal system of Government, but this is avoided if we bear in mind the relation of the term to the particular subject matter under discussion. When considering a subject matter regulated by Federal law, Australia is one country for the purposes of

private international law; when considering one regulated by State law, the various States are separate countries for that purpose. The terms "local" and "foreign" are used in a similar way. Thus, since the Constitution gives the Commonwealth Parliament power to make laws with regard to bankruptcy, and that power has been used, for the purposes of bankruptcy Australia is one country (for the purposes of an Australian bankruptcy at least; the effect of a bankruptcy occurring in a country outside Australia might conceivably be different in the various States); whether or not the Commonwealth Parliament has power to make laws with regard to the winding up of companies, that power has not been used, and the matter is in fact regulated by the different States, so that in that regard South Australia and Victoria are separate countries for our purpose. The application of the ordinary principles of private international law as between the States of the Commonwealth, however, is, to some extent, affected by the Constitution. I have discussed this subject briefly, and with hesitation, in an Appendix. For the purposes of the body of the thesis, I assume, unless otherwise stated, that with respect to any matter the subject of State legislative power, the States are separate countries from the standpoint of private international law.

Before I discuss the questions which I raised at the beginning of this Chapter, it might be as well to take a general view.

In the first place, in English law, both bankruptcy and winding-up are entirely the creatures of statute. They are unknown to the common law. I will explain the history of the two proceedings in more detail at a later stage. Their development has been very largely the work of the

Courts of Equity in comparatively recent times, mostly during the last two centuries in the case of bankruptcy, the last century in the case of winding-up, work upon which the legislature has from time to time set the seal of its approval. Their roots are not embedded in the common law: they make their appearance in the English legal system at a comparatively late stage. Here, they differ from the other great example of the administration of a person's property as a whole, and the satisfaction of claims upon it, namely the administration of a deceased person's estate. In this case, too, the property of the deceased has to be collected and administered by some person having authority to do so, and all just claims upon it satisfied before the question of the right to the clear surplus is considered. Questions very like the ones set out at the beginning of this chapter have to be answered in this case also. But we will derive no satisfactory assistance in our efforts to discover the answers to most of the questions there set out from a study of the cases dealing with executors and administrators. The reasons for this are historical. From a very early date, the right to decide who was to represent the estate of a deceased person, the right to appoint the executor or administrator, became the sole prerogative of the ecclesiastical Courts. The rights and liabilities of the executor or administrator as the representative of the deceased when so appointed, on the other hand, fell within the province of the common law, and formed a large part of the learning of the common lawyers in the Middle Ages. Into this field of law, Courts of equity came late, and when they did come, they could only appropriate what was left or what they were obviously fitter to undertake than their rivals. The superiority of their machinery gave them an advantage over the ecclesiastical Courts; and it also enabled them to view the estate

as a whole, whereas the common law Courts could only consider individual claims by or against the estate. The administration action enabled the Court of Chancery to take over the administration of the estate itself, to settle and adjust the claims of creditors upon it and the order in which those claims were to rank, besides distributing the surplus if there was any, an event of some improbability in the later stages of the Court's career. The Court's jurisdiction in this respect bears an obvious analogy to the cases of bankruptcy and winding-up; hence, we shall derive assistance from some of the cases on the administration of a deceased person's estate, and I have used some of these as authorities, although it must be remembered that the Court of Chancery in administering this branch of the law, was administering something which bore the marks of two other systems of law. These historical factors make it impossible to form a coherent and homogeneous set of principles with regard to the administration of assets; and this is one of the penalties which must be paid by a legal system which derives its contents from the principles enunciated by three different and hotly competing sets of Courts administering three different systems of law.

Secondly, our topic shares a difficulty with all the other branches of private international law. The subject was originally developed on the Continent by countries which derived most of their fundamental principles of jurisprudence from a common source - the Roman law. As questions of private international law were raised in England, the Judges, in view of the silence of English law, were forced to borrow the theories and maxims of the Continental jurists, and to attempt to apply principles derived from an alien system of jurisprudence to the legal conceptions of their own law.

It is obvious that this is likely to cause confusion and in no case more than in the present one. The Continental countries inherited a system of bankruptcy of a sort from Roman law, the procedures of cessio bonorum and venditio bonorum. I do not profess to be able to describe accurately the nature of the bankruptcy law of any Continental country, but it appears that in general the same principles guide the bankruptcy of a natural and of an artificial person and that the adjudication of bankruptcy acts as a judgment in favor of the creditors, giving the curator or syndic, the representative of the creditors, the administration of the bankrupt's property for their benefit and preventing executions or attachments by individual creditors, but not always operating as a transfer of property from the debtor to the curator. It is, viewed in one way, simply a method of execution. (See Savigny Private International Law (translated by Guthrie) p. 209).(I)

Two views have been taken by foreign jurists as to the proper rule of private international law to be applied to bankruptcy. According to one which upholds what is called "the unity of bankruptcy", there should be only one bankruptcy in the country of the bankrupt's domicil, or perhaps the country of his principal trading establishment.

(I) See for example Goirand French Code of Commerce p.353: "The effect of an adjudication of bankruptcy is to deprive the bankrupt of the right to administer his property from the day on which the bankruptcy is therein declared to have commenced.

This measure does not divest the bankrupt of the ownership of his property but it deprives him of all power to manage sell or transfer it and thus renders it impossible for him to deal in any way with his estate.

The right to administer the estate having passed from the bankrupt to the syndic, it follows that the syndic is the proper party to appear, whether as plaintiff or defendant, in all cases which involve the bankrupt's interests."

The syndic is the representative of the bankrupt as well as of the general body of creditors. See at p.377.

No Court of any other country should entertain any bankruptcy proceedings against him and the curator appointed by the Court of the domicil should be assisted by being allowed to obtain possession of all the bankrupt's property in other countries. Separate executions against that property should be prevented and all the creditors referred to the Court of the domicil to have their claims ranked according to that law, with the exception of rights in rem against the bankrupt's property which must be governed by the lex situs and satisfied either in the country of the situs, the surplus then being remitted to the Court of the bankruptcy, or in the court of the bankruptcy itself, the whole proceeds of the foreign property being remitted there. (See for an exposition of this view Savigny, Private International Law above referred to, p.209). According to the other view, separate bankruptcies should be instituted in each country where the debtor has property and each bankruptcy should proceed entirely separately according to its own law, some authorities apparently going so far as to advocate distribution in each country only among creditors subjects of or domiciled in such country or at least the giving of a preference to such creditors. These views are both extreme and probably the law of no country would go so far as to adopt either of them in its entirety. (See Westlake Chap. VI. for a discussion of these matters. See also Aghion French Law as applied to British subjects. Chap. VIII

Attempts have been made by writers to discover whether English law adopts or rejects the unity of bankruptcy. In my opinion, it cannot be said in strictness to do either, because its fundamental conceptions in these matters are utterly different. I will explain my opinions of what these principles are and my reasons for that opinion

in due course. I am assuming here the theories which I shall endeavour to prove elsewhere. In the first place, the principles which govern the bankruptcy of a human being and the winding-up of a company are not the same. There is no logical reason why this should be so: but the law with regard to winding up has always been a part of the company legislation in force at any particular time and no attempt has been made in England or Australia to include the matter in a bankruptcy statute. Now bankruptcy effects an assignment of property from the bankrupt to the trustee in bankruptcy. (Sec. 60 of the Federal Bankruptcy Act 1924-1933). On the other hand, the winding up of a company does not effect an assignment of property from the company to the liquidator, but merely gives him the custody, control and administration of the company's property. (Sec. 211 of the Companies Act 1934.) (See also Primary Producers Bank v. Hughes 32 S.R. (N.S.W.) 14.) The liquidator then is more nearly analogous to the Roman law curator than a trustee in bankruptcy.

When the Courts begin to consider the effect of foreign bankruptcies, they, assuming that in these cases too there was an assignment of property, placed an assignment on bankruptcy in the same category as an assignment on death (i.e. of the beneficial surplus after payment of debts not of the legal title to the property as a whole) or on marriage, and therefore to be regulated on the maxim which we shall frequently meet hereafter, mobilia sequuntur personam. Since, in English law, the law of the person is the law of the domicil, this means that a bankruptcy occurring under the law of the bankrupt's domicil would act as an assignment of the bankrupt's movables all over the world and at any rate in England to the representative of his creditors appointed under the foreign

bankruptcy law. (See for an example of this mode of reasoning Sill v. Worswick 1 H. Bl. 665). But bankruptcy not occurring under the law of the domicil would have no such effect and therefore could not affect the English movables. The result of this would be that the trustee (to use a convenient term) of the country of domicil would be able to take the English movables: they would be his property, not the property of the bankrupt and therefore no separate execution could be had against them in England. But the trustee in a country not the country of domicil could not take the English movables for they would not be his property, but the property of the bankrupt still, and therefore they could be attached in England. It is possible that under certain conditions such a bankruptcy might be enforced in England as a judgment in personam against the debtor, not as an assignment: in this case, the foreign trustee could sue in England on the judgment and possibly recover property there, but the property would not until then be protected against execution. The English immovables would not be affected by the assignment as they would be governed by the lex situs, not by the lex domicilii but they might be recovered as a result of an action in England on the foreign bankruptcy as a foreign judgment: in the latter event, they would not be protected against individual creditors until the order of the English Court. On the other hand, the existence of a foreign bankruptcy was never a bar to bankruptcy proceedings in England though it might be a matter to be considered in the exercise of the Court's discretion, and it might well be that there would be no property in England for the English bankruptcy to operate upon except assets which had not passed to or been recovered by the foreign trustee.

Then, when the Courts came to consider the effect of a foreign winding up, they, assuming this time that there was no assignment from the company to the foreign liquidator,

decided that the bankruptcy rules were therefore not applicable and that the property within their jurisdiction did not vest in the foreign liquidator. Here again, in certain cases, the liquidator would be acknowledged as the agent of the company and that would give him a right to sue on the company's behalf and to get in its local property, but there would be no protection of that local property, against local executions. Thus, it would be necessary to have a separate winding up in each forum, just as a separate administration in each forum is necessary in the case of death, as a result, historically, of the technical rules about the necessity for a grant of probate or letters of administration from the proper ecclesiastical court before the goods of the deceased within the particular diocese or province could be collected.

In all cases, the English courts have treated foreign and domestic creditors of the same class on an equality, except that they have reserved to themselves the right to take measures of retorsion against creditors coming from a country which refuses to grant equality to English creditors.

The rules on this topic are sometimes stated as if the distinction was between bankruptcy and winding up. The true distinction, in my opinion, is between proceedings which involve assignment and those which do not. It is because bankruptcy under British systems of law involves assignment and winding up does not that the distinction is wrongly taken. But obviously, this need not be a rule of universal validity and there may be cases of bankruptcy which do not effect an assignment to the trustee and cases of winding up which do effect one to the liquidator. This warning must constantly be given whenever rules are laid down as to the effect of bankruptcy and winding up.

I have stated here baldly and roughly propositions which I shall endeavour later at length to discuss and explain

and, if possible, to justify by authority, in order to be able to answer the first question which the theoretical writers would put on this topic to the expounder of any system of law, namely: "Do you adopt or reject the unity of bankruptcy?"

The answer is that the law of South Australia does neither. It holds that in cases involving assignments of property to the representative of the creditors of the bankrupt or the company by the law of the domicil of the bankrupt or company, movable property situated here will ~~have~~ passed to that representative. To that extent, of course, the local creditors are deprived of their remedy against the local property and our law acknowledges the unity of bankruptcy. But that will not prevent a separate bankruptcy or winding up here and a separate administration here of what remains, the immovable property, and any species of movable property which does not pass under the foreign law. In other cases, the representative of the creditors under the foreign law may be assisted here to recover local property of the bankrupt or of the company, but since no assignment to him has been effected the property is still the property of the bankrupt or of the company, and is, therefore, not protected against local executions, and for this purpose a local bankruptcy or winding up is necessary. We therefore never carry the theory of the unity of bankruptcy so far as to allow the jurisdiction of our Courts necessarily to be ousted by the occurrence of a foreign bankruptcy. We so far adopt it, however, as to consider that in all bankruptcies or windings up, foreign and domestic creditors should be treated equally: on the other hand, in any bankruptcy or winding up here we will generally apply the local law of administration. It might be added that in the case of a competition between two systems of law which are founded upon English law, the theory of the unity of bankruptcy will be applied, so far as we ever apply it, to the case of the bankruptcy

of a natural person, but separate administrations will be necessary in the case of the winding up of a company, and it is necessary to remember that the rules applied in cases of competition between two such systems may have to be materially altered when one of the competing systems is not of such a nature.

I propose to deal with the topic in the following way:

Firstly, I will deal with the jurisdiction of the local courts in bankruptcy and winding up. That is to say, I will endeavour to answer the questions - what persons, for what reasons, and subject to what conditions, are liable to have a sequestration order made against them by an Australian Court, and what companies can be wound up by a South Australian Court? Of course, I am only concerned with these questions from the point of view of private international law, with cases which involve some foreign element. I only deal with the question of jurisdiction as looked at territorially or in other words, in order to discover for example what connection with Australia is necessary to subject a man to the Australian bankruptcy law, either in relation to himself, his nationality, domicil, residence or mere presence in Australia or in relation to any acts he may commit.

Secondly, having ascertained when the Australian or South Australian Court can make an order for sequestration or winding up I next consider what the effect of that order is outside Australia so far as the question can arise for consideration in our Courts. I only consider what its effect is according to Australian or South Australian law: what effect the Courts of any other country will give to it is not, of course, a part of our law, but a part of the law of such other country.

Thirdly, having observed the jurisdiction of our Courts and the effect of their orders, I will next consider the jurisdiction that our law considers should be allowed to foreign Courts in matters of bankruptcy and winding up and the effect in Australia or South Australia of foreign bankruptcies and windings up. This effect will be different upon movable and immovable property here. Logically, the jurisdiction and the extra-territorial effect should, perhaps, be considered separately, but the first can generally only be discussed in our Courts when the second is under consideration.

Fourthly, I come to the actual administration during the bankruptcy or winding up. In this connection only an administration in our Courts concerns us: the rules adopted by foreign Courts during the course of a bankruptcy or winding up in foreign countries form no part of our topic except in so far as they affect the conduct of our own administration. Thus, we shall have to consider how far the provisions of our bankruptcy and winding up law affecting antecedent transactions relate to foreign persons property or transactions; how far the Court can prevent the diminution of the funds available for creditors by executions and attachments against the foreign property of the bankrupt or the company; what creditors will be allowed to prove their debts here and upon what terms; how far the Court can take into account payments received abroad in deciding what to pay here; by what law the Court is to decide whether a creditor is secured or unsecured; by what law the foreign property of the bankrupt or company in the hands of the local trustee or liquidator is to be administered, and by what law the priority of creditors inter se is to be decided.

There are some questions which fall to be answered in

the case of a company only. These arise mainly from the differences between the bankruptcy of a human being, and the winding up of a company. Thus, it is not only insolvent companies which may be wound up and therefore it is possible that there may be a surplus. This is possible in the case of bankruptcy also; but in that case, the surplus can only be restored to the bankrupt. But the winding up provisions of the Companies Act contemplate the dissolution of the company and the division of the surplus in a certain way. (See Sec. 232 and 264 of the Companies Act,); so that we have to ask - what law has power to dissolve the company? what is the effect of the dissolution of the company in a foreign country upon its existence and assets in South Australia? by what law is the title to the surplus left in the winding up after the debts are paid to be decided? The rights and liabilities of the members also have to be considered, so we must ask - what persons can be placed upon the list of contributories? on what persons can calls be made? by what law are the rights and liabilities of the members to be decided? Moreover, since, under British systems of law it is necessary for a separate winding up to take place in each forum, we have to ask what account is to be taken here, of a winding up elsewhere. This raises the question of principal and ancillary windings up. Many of these matters have not been as yet thoroughly investigated, and owing, no doubt, to the existence of separate company laws and winding up provisions in the six Australian States the Australian Courts have taken a leading part in exploring this legal terra incognita. Matters like this often occur in Australia and the subject is of much practical importance.

Fifthly, I will deal with the question of discharge and endeavour to answer the question: By a discharge arising under what bankruptcy law will what obligations be regarded as discharged in Australia?

Finally, I have relegated to an appendix certain subjects which incidentally arise to be considered and which cannot be conveniently dealt with elsewhere.

CHAPTER II.

JURISDICTION OF LOCAL COURTS.

(1) Jurisdiction of Australian Courts in Bankruptcy.

I will now deal with the cases in which the Bankruptcy Courts in Australia have jurisdiction to adjudicate a man bankrupt, i.e., to make a sequestration order against him.

As I have already mentioned, bankruptcy law in England and in those countries which have adopted the English Common Law is entirely the creature of statute. The common law knew nothing of the Roman procedure of venditio bonorum and cessio bonorum. Execution might be levied either against the property or the person of the debtor by each creditor and there was no way of regulating or equalizing the claims of the individual creditors in the interests of the whole. Similarly, there was no means of enabling an honest but unfortunate debtor to escape from his liabilities and begin again. This state of things was unjust, both to the creditors as a whole and to the debtor, for the astute or the oppressive creditor might obtain payment in full, leaving the slower or more compassionate without anything to meet his claim, while the debtor might be harrassed and imprisoned all his life and finally die of starvation, unless he was dishonest and fortunate enough to be able to smuggle the fruits of his bad faith into the prison and there live in comparative comfort.

It was obvious by the sixteenth century that this position was wholly unsuitable to the needs of a new age and a growing mercantile community and the first of the Bankrupt Acts was passed in 1542-3, followed by more comprehensive enactments in 1571, 1604 and 1623.

Other Acts were passed during the following centuries,

enlarging, consolidating and amending the law as contained in these statutes and the judicial interpretation thereof, and the colonial legislatures in Australia passed Bankruptcy Acts from time to time. The Act at present in force in England is the Imperial Bankruptcy Act of 1914 (4 & 5 Geo.V. C . 59), and the Federal Bankruptcy Act 1924-1933 is largely modelled on this enactment, although not without important variations. Nevertheless, the history of these statutes has been one of gradual development, not of sudden changes, and the present Bankruptcy Act must be read in the light of its forerunners and of the judgments of the Courts in construing their provisions.

One of the questions which frequently came before the Courts was this: What persons has the Court power to adjudicate bankrupt? The earlier statutes were confined to traders, and it was not until the nineteenth century that other persons were delivered from the tender mercies of their creditors and made subject to the bankrupt laws. The Statute of 1623 provided that aliens as well as British subjects could be made bankrupt, but in general, the Bankruptcy Acts left the word "debtor" very much at large, and the Courts had to endeavour to decide for themselves what debtors could properly be regarded as coming within the scope of the Acts. But, before a debtor could be adjudicated bankrupt it had to be proved that he had committed an act of bankruptcy and though the various acts of bankruptcy were defined, it was obvious that the statutes could not intend to refer to acts of the nature specified committed anywhere in the world by anyone, and here again, the task of limitation was no easy one.

The main principle by which the Courts were guided in this endeavour was that all legislation is prima facie territorial. See Ex parte Blain 12 Ch. D. 522 and Cooke v.

Charles A. Vogeler Co. 1901 A.C. 102. The word "debtor", it was agreed, must mean "debtor properly subject to the law of England" (per Mellish L.J. in In re Crispin L.R. 8 Ch.App. 374 at p. 379) and this again must mean a British subject and any foreigner who committed an act of bankruptcy in England, and probably any foreigner domiciled in England. (See ex parte Blain above at pps. 529-30 and In re Crispin). Decisions along the same lines were given by Australian Courts. (See In re Adcock 22 S.A.L.R. 122 per Way C.J. at p. 128; re Whitelaw 1906 V.L.R. 265). At any rate, it was clear from the decisions culminating in the decision of the House of Lords in Cooke v. Charles A. Vogeler Co. above that a foreigner who had never been in England and had himself personally done no act within the jurisdiction of the English Bankruptcy Court could not be made bankrupt in England, even although he had traded through agents in England. (Cooke v. Charles A. Vogeler Co.), and even though he was a member of an English firm which had traded and contracted debts in England and against which an execution had been levied for a judgment debt above £50, which might otherwise have been an act of bankruptcy, for an act of bankruptcy must be a personal act or default and cannot be committed through an agent or by a firm as such. (Ex parte Blain above). Nor was this position altered if the foreigner had committed in his own country an act which would undoubtedly have been an act of bankruptcy if he had done it in England. (Cooke v. Charles A. Vogeler Co. above).(I)

Thus, the Courts were formulating on logical principles the answers to the question - what persons from the point of view of private international law has the English Court the power to adjudicate bankrupt, and what acts from the same point of view are acts of bankruptcy on which the English Court will make the adjudication? It is obvious, however,

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(I) though as to the particular act of bankruptcy dealt with in this case, see later.

that many persons who would escape adjudication on these principles might have contracted heavy debts in England and might, moreover, have property in England within the reach of the English Bankruptcy Court. The English Bankruptcy Act of 1914, therefore, contains an express definition of "debtor" which to a certain extent obviates these difficulties.

In this respect it has been followed by the Federal Bankruptcy Act: Section 4, the definition clause, contains a statutory definition of debtor, as follows:-

> "Debtor" includes any person whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him -
>
> (a) was personally present in Australia: or
>
> (b) ordinarily resided or had a place of business in Australia: or
>
> (c) was carrying on business in Australia personally or by means of an agent or manager:
>
> or (d) was a member of a firm or partnership which carried on business in Australia.

This definition is clear, and according to Dicey (Conflict of Laws 4th Ed. p.316 n.) exhaustive. But the word "includes" seems to indicate that there may be other debtors subject to the bankruptcy law of Australia besides the classes enumerated in the definition. Moreover, there is nothing in the Act ro remove any class of debtors formerly held to be subject to the bankruptcy law under the various State statutes from the reach of that law, although the classes of persons subject to it are considerably increased. While there is no direct English decision under the old law to show that foreigners domiciled in England who had not committed an act of bankruptcy in England were subject to the bankruptcy law of England, the learned Judges were careful when defining who were not subject to that law, to

refer only to foreigners not domiciled or present in England at the time of the alleged act of bankruptcy. (See Ex parte Blain above per Brett L.J. at ps. 529-30. Ex parte Crispin above per Mellish L.J. at ps. 379-80). Moreover, when we remember that, as we shall see, there is authority for saying that foreign bankruptcies should only be given full effect in England when they occur in the domicil of the bankrupt it would surely have been anomalous to hold that debtors domiciled in England were not debtors subject to the bankruptcy law of England. Dicey in the second edition of his Conflict of Laws at p.282 held that all debtors domiciled in England were subject to the bankruptcy law of England. Further, as we shall see, an Imperial statute can bind British subjects wherever they happen to be which a colonial statute cannot do, so that while the English Courts could hold that "debtor" in the previous English Bankruptcy Acts included any British subject, it was impossible for a State Court to hold that "debtor" in the various State Acts where no express definition appeared could be construed to mean any British subject nor for such purposes as these can a person be a subject of a particular colony, so as to found the jurisdiction of its Courts. (See Gibson & Co. v. Gibson 1913 3 K.B. 379). We find, therefore that "debtor" in the various State Acts was construed to mean any person domiciled in the particular State or any person who committed an act of bankruptcy therein. (See re Kerle 19 N.S.W. L.R. (B & P.Cases) p. 26 per Simpson J. at p.28). I do not think that the definition in Section 4 is exhaustive, and I therefore think that the word "debtor" in the present Act by analogy to the previous State Acts should be construed to mean any person domiciled in Australia or any other person as set out in the definition clause above. This opinion is supported by Mr. Baldwin (Bankruptcy 11th Ed. p.63 note (p)).

Now, it is clear that this definition is entirely arbitrary. We cannot deduce therefrom any principle of private international law: it is not to be expected that foreign Courts would recognize the extra-territorial effect of a sequestration order made by an Australian Court against any person falling within that definition, nor, on the other hand, will an Australian Court recognize the extra-territorial effect of an adjudication by a foreign Court in every instance when it itself would have power to make a sequestration order against such a person.

Section 5 of the Act further provides that the Act shall apply to "all debtors including foreigners" but it would not appear that this adds anything to the definition in Section 4. It is not my intention to enlarge on this definition: it is clear that any discussion, for example, as to when a man is "ordinarily resident" in Australia would not throw any light on any problem of private international law, but would merely be an enquiry into the interpretation of the words of a statute.

The Court has jurisdiction to make a sequestration order against a debtor as defined, even though he is not amenable to bankruptcy proceedings by the law of his domicil. This has been so from the earliest times. (See ex parte Williamson 2 Ves Sen 249 where a domiciled Irishman who committed an act of bankruptcy in England was made bankrupt there, even though there were no bankruptcy laws at all in force in Ireland at that time).

The Court may make a sequestration order against a debtor who has committed an act of bankruptcy, either on the petition of a creditor or of the debtor himself. (See Section 54 of the Bankruptcy Act.) There is no definition of creditor in the Act but it is clear that a creditor means any creditor

of a "debtor" as defined above, and it is immaterial where he is domiciled or resides or trades, or what his nationality is, or where his debt was contracted. (See Ex parte Pascal 1 Ch.D.509). This is so on general principles of law, whereby, except in special cases, as for example an equalizing measure to remedy injustice done to Australian creditors by a foreign Court in preferring foreign creditors of the same class, all creditors of the same class whether foreign or local are treated equally. (See In re Kloebe 28 Ch. D. 175).

The conditions on which a creditor may present a petition are dealt with in Section 55 (1) of the Bankruptcy Act as follows:-

> "A creditor shall not be entitled to present a petition "against a debtor unless -
>
> "(a) the debt owing by the debtor to him, or, if two "or more creditors join in the petition, the aggregate "of the debts owing to the several petitioning "creditors amounts to Fifty pounds: and
>
> "(b) the debt is a liquidated sum, whether due at "law or in equity or partly at law and partly in "equity and payable either immediately or at some "certain future time: and
>
> "(c) the act of bankruptcy on which the petition is "grounded has occurred within six months before the "presentation of the petition: and
>
> "(d) the debtor is domiciled in Australia, or within "a year before the date of the presentation of the "petition has ordinarily resided or had a dwelling-"house or place of business in Australia, or has "carried on business in Australia, personally or by "means of an agent or manager, or is or within the "said period has been a member of a firm or partner-"ship which has carried on business in Australia by "means of a partner or partners, or an agent or "manager",
>
> "and where a deed of arrangement or a deed of assign-"ment has been executed, a creditor shall not be "entitled to present a bankruptcy petition founded on "the execution of the deed, or on any other act "committed by the debtor in the course or for the "purpose of the proceedings preliminary to the executior "of the deed, in cases where he is prohibited from so "doing by the provisions of Part XI or Part XII of this' "Act."

I will deal with the question of an act of bankruptcy later. Thus, even in the case of a debtor as defined by me above, there is no jurisdiction to make a sequestration order against him on the petition of a creditor unless the provisions of Section 55 (1) are also complied with. The practical effect of this is that a sequestration order may be made against any debtor on a creditor's petition, if the debtor is domiciled in Australia and the conditions of Section 55 (1) (a) - (c) are complied with.(I) If the debtor is not domiciled in Australia, then unless he has fulfilled one of the conditions in (b) - (d) of the definition clause in Section 4 within a year from the date of the presentation of the petition he cannot be adjudicated bankrupt on a creditor's petition.(II) Therefore, if a debtor is not domiciled in Australia a sequestration order cannot be made against him on a creditor's petition merely because he was personally present in Australia when he committed or suffered an act of bankruptcy. A debtor, on the other hand, is under no such restrictions. Any debtor as defined by me above can present a petition alleging that he is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy, and the Court may thereupon make a sequestration order. (See Section 57 of the Bankruptcy Act.) It has been held, under previous Acts, that the Court cannot make a sequestration order on a debtor's petition unless the debtor

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(I) If the creditor alleges that the debtor is domiciled in Australia the onus is on him to prove this. (Re Duleep Singh 7 Mor. 228. Re Speering 2 A.B.C. 12).

(II) It is submitted that there can be no distinction between the words "place of residence" in the definition clause and "dwelling house" in section 55 (1) (d): the cases have given a wide meaning to "dwelling house". See In re Hecquard 24 Q.B.D. 71 and compare Re Nordenfeldt 1895 1 Q.B. 151. At any rate, I assume, following Dicey p. 322-3 that they mean the same thing.

is either domiciled or resident within the jurisdiction at the time the petition is presented, (In re Waters 22 N.S.W. S.R. p. 269 re Klatte 6 Q.L.J. p. 275) unless perhaps he had assets within the jurisdiction (re Ashton 1909 Q.W.N. 17) though this is in conflict with In re Waters above). It is submitted, however, that these cases depend upon the principle that "debtor" means "debtor properly subject to the law of England (or New South Wales or Queensland) as enunciated in the cases I have mentioned above, and that their ratio decidendi disappeared when the statutory definition of "debtor" in the Federal Bankruptcy Act became law. It is, therefore, my opinion that any debtor as defined above may present a petition and a sequestration order may be made even though he is at the time of presentation of the petition outside Australia and neither domiciled nor resident there.

Some difficulty may be presented by Part X of the Act relating to the estates of persons dying insolvent. Section 155 gives power to the creditors of a "deceased debtor" to present a petition for the administration in bankruptcy of the latter's estate. No similar restriction to that imposed by Section 55 (1) (d) on the right of a creditor to present a petition against a living person apparently exists, or at least, there is nothing in the section to indicate its existence, though curiously enough the prescribed form (form 176) makes provision for compliance with that section. It is also doubtful whether the commission of an act of bankruptcy is necessary to ground the petition or whether the order will be made unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient to pay the debts of the deceased.

It has been held however that no act of bankruptcy on the part of the deceased - and one cannot be committed after death - is necessary. (See In re Fergie 24 V.L.R. 416 Re Paravicini 3 A.B.C. 15). This in its turn raises a doubt as to the application of the definition of "debtor" in Section 4 to Section 155 for as we have seen, the date of the act of bankruptcy forms part of this definition. And finally, Section 156 dealing with the right of the personal representative to present a petition on behalf of the estate refers to "deceased person" and not to "deceased debtor". Assuming that the definition clause cannot in strictness apply the Sections still cannot relate to any deceased debtor or deceased person dying anywhere in the world but only to deceased debtors or persons whose estates are in some way subject to the bankruptcy law of Australia. Like the English Courts, when interpreting the previous bankruptcy statutes, we must find some method of limitation. Now the Legislature has already given some indication as to what debtors are subject to the bankruptcy law of Australia in the definition clause and I suggest that that test should be applied by way of analogy to discover what estates of deceased debtors or deceased persons are subject to that law, substituting the date of death for the date of the act of bankruptcy. On the other hand, the meaning of the words might be limited in some other way so as to include the estates of all persons dying in Australia only, or of all persons dying domiciled in Australia only, or of all persons dying with assets in Australia. This last suggestion, however, seems hardly likely, for as we have seen in construing the previous Acts the Courts held that the mere presence of assets within the jurisdiction was not enough to make a living debtor subject to the bankruptcylaw. I think that in construing

Sections 155 and 156 the courts should apply the analogy of the decisions on the previous Acts and of the other sections of the Bankruptcy Act itself. McDonald Henry & Meek (Australian Bankruptcy Law p. 367) apparently apply the definition clause to Section 155 and I think that this is the correct view. I think that "deceased debtor" in Section 155 would be construed to mean any debtor who died domiciled in Australia or who comes within the words of the definition in Section 4 substituting the date of death for the date of the act of bankruptcy. I think that this test should be applied to discover the meaning of "deceased person" , in Section 156 also, because, again applying the analogy of living debtors, it cannot be contended that the right of the administrator to obtain the administration of the estate in bankruptcy is less than the right of a creditor to do so.

The Bankruptcy Act also contains provisions regarding composition and assignments without sequestration and deeds of arrangement. (Parts XI and XII). These are provisions designed to enable a bankrupt to come to an amicable arrangement with his creditors, and to enforce the same. Such schemes must be registered in the Bankruptcy Court. Here again, it is submitted, that these provisions relate to debtors as defined above, and only to such debtors. The execution of a deed which comes within the provisions of Part XII (see sec.190 (3)) would probably be an act of bankruptcy within sec. 52 (a) so that its date would probably be taken in applying the definition clause, that is, if a domiciled foreigner can come within the provisions of Part XII (as to which see later). In applying the definition clause to Part XI the date of the meeting of creditors would probably be taken (see sec. 168 : this relates only to deeds of assignment but the same test would probably be applied in deciding to what debtors the provisions relating to compositions apply.) No composition or deed of assignment or arrangement made with any debtor other than such a debtor could, in my opinion, be registered nor would the other provisions of the Bankruptcy Act apply to such a case.

It has been pointed out that before the latest bankruptcy legislation, two questions were exercising the

mind of the courts with regard to their jurisdiction in bankruptcy, from the standpoint of private international law. One of these questions - What debtors are subject to the bankruptcy law of Australia? - has been answered by legislative enactment. The other - What acts of bankruptcy committed where and by whom will give the Courts jurisdiction? - still remains in some doubt. We have also seen that the act of bankruptcy must be committed before the Court can make a sequestration order. (Section 54 of the Bankruptcy Act). The question now to be considered is: What is an act of bankruptcy from the standpoint of private international law?

Acts of Bankruptcy are defined by Section 52 of the Bankruptcy Act as follows:-

"A debtor commits an act of bankruptcy in each of the "following cases:-

"(a) If in Australia or elsewhere he makes a conveyance "or assignment of his property to trustees for the "benefit of his creditors generally.

"(b) If in Australia or elsewhere he makes a fraudulent "conveyance gift delivery or transfer of his property "or of any part thereof.

"(c) If in Australia or elsewhere he makes any convey- "ance or transfer of his property or any part thereof "or creates any charge thereon which would under this "or any other Act be void as a preference or a fraudu- "lent preference if he became bankrupt.

"(d) If with intent to defeat or delay his creditors "he departs or remains out of Australia or out of a "State or departs from his dwelling house or usual "place of business or otherwise absents himself, or "begins to keep house:

"(e) If execution against him has been levied by seizure "of his goods under process in an action in any Court "or in any civil proceeding in any Court, and the goods "have been either sold or held by the sheriff for seven "days or if any such execution has been issued against "him and has been returned unsatisfied; Provided that, "where an interpleader summons has been taken out in "regard to the goods the time elapsing between the "date on which the summons is taken out and the date "on which the proceedings on such summons are finally "disposed of, settled or abandoned, shall not be taken "into account in calculating the period of seven days:

"(f) If he has been adjudged or declared bankrupt or "insolvent by any Court in the King's Dominions out of "the Commonwealth having jurisdiction in bankruptcy or "insolvency in which case it shall not be necessary "to produce any other evidence of the act of bankruptcy

"than a duly certified copy, under the seal of the "Court, of the order of adjudication by which the "debtor was declared or adjudged bankrupt or "insolvent;

"(g) If, at any meeting of creditors, he consents "to present a petition under this Part of this Act "for the sequestration of his estate, and he does "not, within forty eight hours from the date of his "consent, present the petition;

"(h) If, at any meeting of creditors, he admits "that he is in insolvent circumstances and is "requested by a resolution of a majority of the "creditors present at the meeting to surrender his "estate for administration in accordance with this "Act and he refuses so to surrender his estate:

"(i) If he files in the Court a declaration of "his inability to pay his debts or presents a " bankruptcy petition against himself;

"(j) If a creditor has obtained a final judgment "or final order against him for any amount and "execution thereof not having been stayed, has "served on him in Australia or, by leave of the Court, elsewhere, a bankruptcy notice under this "Act, and the debtor does not, within seven days "or such time as is prescribed after service of "the notice in Australia, or within the time "limited in that behalf by the order giving leave "to effect the service elsewhere, either comply "with the requirements of the notice or satisfy "the Court that he has a counterclaim, set-off, "or cross demand which equals or exceeds the "amount of the judgment debt and which he could not "set up in the action or proceeding in which the "judgment or order was obtained:
"Any person who is for the time being entitled to "enforce a final judgment or final order for the "payment of money shall be deemed a creditor who "has obtained a final judgment within the meaning "of this paragraph: and a final judgment or order "against a married woman shall be deemed to be a "final judgment or order within the meaning of this "paragraph, notwithstanding the fact that no "execution can issue at law on the judgment or "order.

"(k) If he gives notice to any of his creditors "that he has suspended, or that he is about to suspend payments of his debts.

"(l) If, at a meeting of creditors under Part XI of "this Act or some adjournment thereof, a resolution "accepting a proposal for a composition or scheme, "or for the execution by the debtor of a deed of "assignment or a resolution by a majority in value "of the creditors present personally, by attorney, "or by proxy that the meeting shall not be deemed "an act of bankruptcy be not duly passed, or if the "debtor does not execute a deed of assignment "pursuant to a resolution therefor within seven "days after the passing of the resolution, or if a

"resolution accepting a proposal for a composition or
"scheme be not duly confirmed in accordance with
"section one hundred and sixty one of this Act, or
"if the composition or scheme be rejected or
"annulled in pursuance of that Section or annulled
"in pursuance of section one hundred and sixty one A
"or if a deed of assignment is declared void in
"pursuance of section one hundred and seventy six
"of this Act.
"An Act of bankruptcy mentioned in this paragraph
"shall be deemed to have been committed by the debtor
"on the day of the first meeting of creditors and
"also, where the composition or scheme has been
"rejected, or annulled or the deed has been declared
"void on the date of the making of the order of
"rejection or annulment, or the declaration, as the
"case may be, provided:

"(i) that, except where the composition or
"scheme has been rejected or annulled or the
"deed has been declared void, a petition for
"sequestration is presented against the debtor
"within two months after the date of the first
"meeting of creditors: and

"(ii) that, where the composition or scheme
"has been rejected or annulled, a sequestration
"order is made against the debtor within seven
"days after the date of the order of rejection
"or annulment: and

"(iii) that, where the deed has been declared
"void a sequestration order is made against
"the debtor within fourteen days after the date
"of the declaration.

There has been no statutory alteration of the law on this subject comparable with that effected by the definition of debtor: therefore the old cases are presumably still good law and every transaction to be an act of bankruptcy within the meaning of the Act must have been done or suffered in Australia unless the contrary clearly appears from the terms of this section. (See Baldwin on Bankruptcy 11th Ed. p. 97. Norden v. James Dick 533. Ingliss v. Grant 5 T.R. 530 and In re Crispin L.R. 8 Ch. App. 374). This does not necessarily mean that the debtor must be physically present in Australia at the time when the act of bankruptcy was committed.

According to Dicey p. 318 the rule in Ex parte Blain 12 Ch. D. 522 that an act of bankruptcy must be a personal act or default and cannot be committed by a firm as such is still good law. In that case a domiciled Chilian

subject who had never been in England was a member of an English firm which had traded and contracted debts in England and against which an execution had been levied, under which the goods of the firm had been seized and sold. It was held that he was not a debtor within the meaning of the bankruptcy law and that he had not committed an act of bankruptcy. The statutory definition of debtor in the Federal Bankruptcy Act disposes of the first ground and Westlake (p. 170) suggests that Section 4 (1) (d) of the English Act (corresponding to our Section 55 (1)- (d) renders the second ground inapplicable to the present law also. I respectfully agree with Dicey (p. 318) that this section has nothing to do with acts of bankruptcy. A person in the position of the Chilian trader in Ex parte Blain (mutatis mutandis) would now be a debtor subject to our bankruptcy law because he would be a member of a firm which carried on business in Australia. Apparently, however, the seizure and sale of the firm's goods under execution in Australia in the circumstances of that case would not be an act of bankruptcy committed by such a debtor, because an act of bankruptcy must still be a personal act or default and cannot be committed by a firm as such. This does not appear to be entirely satisfactory.

I will now deal seratim with such of the acts of bankruptcy enumerated in Section 52 as concern our subject.

It will be noted that sections 52 (a) (b) and (c) all refer to acts taking place in Australia or elsewhere. This wording appeared in some of the earlier acts and was the subject of discussion by Mellish L.J. in the case of In re Crispin L.R. 8 Ch. App. 374 at p.380, (approved in Cooke v. Charles A. Vogeler Co. 1901 A.C. 102 per Lord Halsbury L.C. at p. 108). That learned Judge says:

"We think that the Legislature cannot have intended to "enact that if a foreigner who is not subject to the law "of England does something in his own country which may be "perfectly lawful and innocent by the laws of that country "the effect should be that his property should be vested "in a trustee in England for the benefit of his creditors. "Then we think that a consideration of the particular acts "which are made acts of bankruptcy when committed out of "England will confirm this conclusion . The first is "that "the debtor has in England or elsewhere made a conveyance "or assignment of his property to a trustee for the benefit "of his creditors generally". This seems clearly intended "to relate to a conveyance which is to operate according to "English law which a conveyance executed by a domiciled "Englishman although out of England, may do: but a convey- "ance executed by a domiciled foreigner in his own country "must necessarily operate according to the foreign law and "we think that it was never intended that such a conveyance "should be an act of bankruptcy. The second is "that the "debtor has in England or elsewhere made a fraudulent "conveyance etc. of his property or of any part thereof." "This clearly means and has always been interpreted as "meaning fraudulent by the law of England and therefore "cannot properly apply to a conveyance which is executed in "and is to operate according to the law of a foreign country".

Now, this case was decided in 1873 when the Bankruptcy Act of 1869 was in force. The Court agreed that the word "debtor" in that Act must be construed to mean debtor properly subject to the law of England, but was of opinion that it was the act of bankruptcy which gave jurisdiction to the Bankruptcy Court and that if a foreigner came to England and committed an act of bankruptcy there, he gave the Court jurisdiction over him, in other words, became subject to the bankruptcy laws of England. (See per Mellish L.J. at p. 379). The answers to the two questions which we have seen that the Courts were considering under the earlier statutes had become inter-dependent - the questions as to what persons were subject to the bankruptcy laws of England and what acts would subject such persons to those laws. Now that the first question has been clearly answered by statute, it might be thought doubtful how far the answers to the second question given in decisions on the earlier statutes are still good law.

Are we then to say that the decision in this case is wholly dependent upon the older law and that the dicta cited above are wholly inapplicable to the present situation?

This argument was rejected by the Court of Appeal in In re Debtors 1936 1 Ch. 622, where In re Crispin and Cooke v. Charles A. Vogeler Co. were followed. There it was held that a debtor within the definition clause, a foreigner domiciled abroad, had not committed an act of bankruptcy by executing in the country of his domicil a deed of assignment of his property for the benefit of his creditors, generally, which was intended to operate according to the foreign law. Assuming then, as we must, that the language of Sections 52 (a) (b) and (c) does not include every transaction of the nature there mentioned entered into by a debtor within the meaning of section 4 it remains to attach some clear meaning to the proposed limitation. This is no easy task.

Firstly, what precisely is the proposed limitation? Mellish L.J. refers to a conveyance "which is to operate according to English law" (which must mean according to municipal English law, not according to some foreign law applied by the rules of private international law in force in England) or "according to the foreign law" and says that a conveyance executed by a domiciled foreigner in his own country "must necessarily operate according to the foreign law." This, then, restricts the operation of the sections to a case where according to the rules of private international law in force in Australia the law by which the validity of the conveyance etc. is to be governed is Australian law or the law of some State of the Commonwealth. Lord Wright (p. 633) and Romer L.J. (p. 636) in In re Debtors, however, following the language used by Lord Davey in Cooke v. Charles A. Vogeler Co. in summing up the effect of Crispin's case (1901 A.C. 102 at p. 112) refer to a conveyance "which is intended to operate according to the foreign law". Clearly, the tests are not the same and if the latter test is to be adopted, the conveyance executed by the domiciled foreigner in his own country may be an act of bankruptcy if he intends it to operate according to Australian law. Are the acts of bankruptcy caught by the sections in question transactions which are to operate or which are intended to operate according to Australian law?

Secondly, does the limitation only extend to conveyances executed outside Australia or does it extend to conveyances executed within Australia also if they are to operate or are intended to operate according to a foreign law?

Thirdly, does the limitation only include conveyances by a domiciled foreigner in the country of his domicil or does it extend to ones made by him outside that country?

Fourthly, does the limitation extend in any event to a conveyance by a domiciled Australian even if it is executed outside Australia or is not to operate or is not intended to operate according to Australian law?

To these questions, no certain answer, it is conceived, is possible. I can only indicate the probable consequences of following any of the courses shown by them.

First, however, let us consider by what law, according to the rules of private international law, the validity of the various transactions in question should be governed in order to determine according to which law they are to operate.

I think that it is necessary to distinguish between universal assignments, i.e. assignments of the whole or substantially the whole of a man's property and individual assignments, i.e. assignments of individual articles of property. (See for example Hockey v. Mother of Gold Consolidated Mines 9 A.L.R. 163, Westlake Chap. VII.) While it is probable that only universal assignments are caught by Section 52 (a) (See In re Spackman 21 Q.B.D. 728) the cases which may come within section 52 (b) and (c) may obviously be cases of either universal or individual assignments.

In my opinion the ancient principle mobilia sequuntur personam applies to a universal assignment of movable property: in other words, the validity of such an assignment is governed by the law which governs the person of its owner, i.e. in English law, the law of his domicil. This is certainly so if it is executed in the country of domicil: in that case, if it is valid by the law of that country it will pass the Australian movables, even though

invalid by our law (Dulaney v. Merry & Son 1901 1K.B. 536), and if it is invalid by that law it will not pass the Australian movables, even though valid by our law (Republica de Guatamala v. Nunez 1927 1 K.B. 669 In re Anziani 1930 1 Ch. 407 - these were cases of individual assignments but the authority of the lex domicilii is certainly not less strong in the case of a universal assignment). And in my opinion, the validity of a universal assignment of this nature must still be judged by the lex domicilii, even though it is executed outside the country of domicil. (See Westlake ps.193, 210). Mellish L.J. says that a conveyance executed by a domiciled Englishman outside England may nevertheless be one which is to operate according to English law: if this is so, the converse must necessarily follow that one executed by a domiciled foreigner outside the country of his domicil may nevertheless be one which is to operate according to the foreign law. The result of this is to place a universal assignment of movables of the nature we are now considering on the same level as one resulting on marriage or on death, by will, (so far as the beneficial interest in the surplus after payment of debts is concerned): in these cases, the place of the celebration of the marriage or of the execution of the will or of the situs of the movables is, apart from statute, irrelevant: the question of the effect of the marriage on the property of the spouses apart from express contract or the validity of the will depends upon the law of the matrimonial domicil or of the last domicil of the deceased respectively (see Dicey Chaps. XXVII and XXXI). Immovables situate outside the country of domicil may not pass under the assignment even if valid by the law of that country and the positive law of any country may prevent movables situated therein from passing under it also. But in all three cases referred to the learned Judges do not seem to consider the possibility of an assignment for the benefit of creditors operating according to as many different laws as there are countries in which the debtor has property. Both in Cooke v. Charles A. Vogeler Co. and in In re Debtors, the debtor had property in

England. But if there is one law by which it can be said that the assignment is to operate as a whole, that can only be the lex domicilii or the lex actus: it obviously cannot be the lex situs of any particular article of property. And I think for the reasons above given that it must be the lex domicilii.

Now, let us consider the case of a conveyance of or charge over an individual article of property.

Rights as to immovables have always been held to be governed by the lex situs. (See Dicey pps. 553, Westlake pps. 215-16). The general principle is beyond dispute. A conveyance of or a charge over immovables must be a conveyance or charge which is to operate according to the lex situs if it is to operate at all. Its validity as creating a right in rem must depend upon that law:(contrast the case of a contract or equity relating to foreign land which may be enforced here according to our law (unless of a nature forbidden by the lex situs) in personam but not in rem. (See Dicey pps. 219-222).

The position of an assignment or charge over an individual movable is more obscure. The law of the country of domicil of the transferor was formerly the deciding factor but the decisions seem to have moved in favor of the lex situs. (See Cammell v. Sewell 5 H & N. 728 City Bank v. Barrow 5 A.C.664, Alcock v. Smith 1892 1 Ch. 238, In re Queensland Mercantile Agency Co. 1891 1 Ch. p. 531 at p. 545 Embiricos v. Anglo-Austrian Bank 1905 1 K.B. 677). But in these five cases the assignment took place in the situs of the asset and it is not clear whether the lex situs or the lex actus was the deciding factor. Dicey apparently holds that an assignment valid by the lex situs or the lex domicilii or the lex actus will be regarded as valid in England even if in each case it were invalid by the other two laws,unless in case of one valid by thelex domicilii or the lex actus the positive law of the situs requires special forms or conditions which are not complied with. (pps. 574-590). But this contention cannot be upheld as regards such incorporeal movables as choses in action since the decisions in Republica de Guatamala v. Nunez

1927 1 K.B. 669 and In re Anziani 1930 1 Ch. 406 where assignments of a chose in action valid by the lex situs (England) but invalid by the law of the domicil of the transferor (and also of the transferee) which in both cases was also the lex actus, were held invalid in England. The learned Judges, however, in the first case gave different reasons for the decision and the matter was complicated by the question of capacity. It seems clear that the law by which an assignment is to operate must mean the law which governs its essential validity, not the law which governs the capacity of the transferor or of the transferee. Maugham J. in In re Anziani expressly distinguishes the case of corporeal movables which he says are governed by the lex situs in any event. (p. 420-) (But see Brookes v. Harrison 6 L.R. Ir.85 332 where it was held by an Irish Court that a bill of sale made in England between two domiciled Englishmen and valid by English law was valid over goods in Ireland against an execution creditor though invalid by Irish municipal law.) Thus, where the lex actus and the lex domicilii are the same, that law has been held to prevail over the lex situs, and where the lex actus and the lex situs are the same that law has been held to prevail over the lex domicilii: and there is no doubt that where the lex situs and the lex domicilii are the same, that law will prevail over the lex actus: but what law would be chosen if an assignment of movables situated in country A were made in country B by a man domiciled in country C has never been decided. Westlake generally refers assignments of individual movables to the lex situs (p. 202) and I agree with this except in cases where the assignment of an incorporeal movable and possibly of a corporeal one also is made in the country where both the assignor and the assignee are domiciled, when the law of that country would apparently govern if the movable in question were situated here (but quaere how far it would govern if the movable were situated abroad, and the lex situs rejected the criterion of the lex actus and the lex domicilii. (See Coote v. Jecks L.R. 13 Eq. 597,(I) North Western Bank v. Poynter 1895 A.C. 56 per Lord Watson at p.75 and

(I) In this case it was held that the English Bills of Sale

contrast the dictum of the same learned Lord in Inglis v. Robertson 1898 A.C. 616 at p. 626). In this last case even if the assignment valid by the lex domicilii and the lex actus were inoperative to pass the legal title owing to the absence of special forms required by the lex situs, in British Courts the equitable title will often be held to have passed. (Re Cigala's Trusts 7 Ch. D. 351 per Jessel M.R. at p. 357). The law by which the assignment is to operate if it is to operate at all must still be the law which is the lex actus and the lex domicilii: but for reasons of positive law the Courts of the situs cannot give effect to the ordinary principles of private international law. These rules are expressed with considerable hesitation and for greater detail I would refer to Dicey Chap. XXIV and Westlake Chap. VII.

If, then, we interpret "conveyance which is to operate according to Australian law" as "conveyance the validity of which should according to the rules of private international law be governed by Australian law" we get the following result:-

(1) a universal assignment will operate according to Australian law when and only when the debtor is domiciled in Australia.

(2) a conveyance etc. of an immovable will operate according to Australian law when and only when the immovable is situated in Australia.

(3) a conveyance etc. of a movable will operate according to Australian law when and only when the movable is situated in Australia except if the movable is incorporeal and possibly if it is corporeal also ., (See Brookes v. Harrison above):

(a) when it is situated in Australia and the debtor (and perhaps when the transferee also) are domiciled abroad and the conveyance is made in the country of the domicil

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Act did not apply to a bill of sale of goods in Scotland given in England by one domiciled Englishman to another. The case however is not an authority for applying the lex situs because by the law of Scotland no security was created without a delivery of the pledge. It was the English law that was applied and by that law the assignment was valid since the Bills of Sale Act did not apply.

(b) when (possibly) it is situate abroad and the debtor and the transferee are domiciled Australians and the conveyance is made here.

We are now in a position to consider the four questions posited above.

Firstly, is the proposed limitation to relate to acts which according to these rules are to operate according to a foreign law or only to ones which are intended to operate according to a foreign law? Now, with the greatest respect for the dicta in Cooke v. Charles A. Vogeler Co. and in In re Debtors, it must be remembered that this whole limitation is derived from the words of Mellish L.J. in In re Crispin. That learned Judge says that the conveyance by the domiciled foreigner in his own country "must necessarily operate according to the foreign law". Let us put that at its strongest: suppose the debtor executed in the country of his domicil a deed of assignment in the form of Part XII of the Act to an Australian trustee in bankruptcy Still it would not be an act of bankruptcy because the deed "must necessarily operate according to the foreign law". If the intention is irrelevant in that case, how can it be relevant in any other? Moreover, in my opinion it would be most dangerous to make the commission of an act of bankruptcy depend upon the intention of the debtor that the transaction in question should operate according to our law. If a foreign debtor domiciled abroad made a conveyance of his Australian land to an Australian creditor which would be void as a fraudulent preference if he were made bankrupt, could he plead his intention that it should operate according to the foreign law?

Secondly, it is true that under the old law the only persons subject to the bankruptcy law of a State were persons domiciled there or persons domiciled elsewhere who committed an act of bankruptcy there. But that is not the issue here. We now have a definition of the persons who are subject to the bankruptcy law of Australia. We are now considering the definition of a particular act of bankruptcy. If we are to hold, as it seems we must, that a conveyance etc. by a domiciled foreigner executed outside Australia who is yet a debtor within that definition will not be an act of

bankruptcy if it is to operate or is intended to operate according to a foreign law, but only if it is to operate according to Australian law, why should not the same benefit be extended to the domiciled Australian? What authority is there in the Act to distinguish a domiciled Australian debtor from a domiciled foreign debtor? The only reason that can be given for this distinction is that under the old law persons domiciled in a colony for example were properly subject to the bankruptcy law of that colony, but I have already shown that this is irrelevant for our purpose. If the conveyance under the rules that I have mentioned is to operate according to a foreign law I cannot see that it is relevant whether the debtor is a domiciled Australian or a domiciled foreigner. And so, also, with the place of the execution of the conveyance. The only reason for making that apart from the ordinary rules of private international law, a ground for distinction is that under the old law the commission of an act of bankruptcy within the jurisdiction gave the Court jurisdiction over a domiciled foreigner. That can have no application here.

My opinion, therefore, is that the only transactions within section 52 (a) (b) and (c) which are acts of bankruptcy are those the validity of which must, according to the rules of private international law, be governed by Australian law, irrespective of the intention or the domicil of the debtor or the place of the transaction apart from those rules. If these rules are as I have suggested, it is undeniable that startling consequences must follow. It will mean, for example, that no deed executed by a debtor domiciled abroad can come within the provisions of Part XII because sec. 190 defining the deeds which come within that Part must be interpreted in the same way as sec. 52 (a). (See MacDonald Henry & Meek. Bankruptcy Law in Australia p.405, Lipton Ltd. v. Bell 1924 1 K.B. 701). Such a deed apparently comes within Part XI because it must follow as a result of a meeting of creditors to be held in Australia and there is no definition of deed therein similar to the one contained in sec. 190 (3).

But I have endeavoured to discover this limitation whatever it is and to apply it logically. If we are to give the foreign debtor the benefit of the rules of private international law when the transaction occurs out of Australia, how can we logically deny him the benefit of those rules, when it occurs within Australia or how can we deny them to the domiciled Australian? There is certainly nothing in the language of section 52 that enables us to do so. The examination of this limitation shows the wisdom of Dicey's remark that "dicta based on the old Acts are not safe guides to interpret legislation not intended to consolidate merely but to amend the law".(p. 318).

It may be, however, that the Courts will follow other paths. They may hold that any transactions of the nature mentioned in section 52 (a) (b) and (c) are acts of bankruptcy if they are committed in Australia or by a domiciled Australian or are intended to operate according to Australian law. This would bring an assignment of property for the benefit of creditors executed in Australia or in Australian form to an Australian trustee within the reach of Part XII. If this course is followed the limitation should still, it is submitted, be extended to any assignment of property for the benefit of creditors by a domiciled foreigner executed outside Australia and not intended to operate according to Australian law. I see no reason for confining it to assignments executed in the country of domicil or intended to operate according to the law of the domicil. Care must still be taken in applying section 52 (b) and (c). In deciding whether the conveyance etc. is fraudulent or would be void as a preference if the debtor became bankrupt it must be remembered that that question may have to be determined by some other law. If the conveyance etc. is of property outside Australia the question of its validity may and probably will according to the rules as to assignments of property in private international law have to be determined by the lex situs. Even if in these cases it is not necessary to prove that it is fraudulent or void by the law of England (Contrast the dicta of Mellish L.J.in Crispin's case cited above) it must still be proved that it is fraudulent or void and if by the lex situs it is innocent and valid then the

provisions of the section are not complied with and no act of bankruptcy is committed. (As to Section 52 (c) especially see later on the effect of bankruptcy on antecedent transactions in private international law.)

The effect of Section 52 (d) may differ when the debtor is a domiciled Australian or when he is domiciled elsewhere. If a domiciled Australian departs or remains out of Australia, that may be strong evidence that he intends to defeat or delay his creditors. The same reasoning, however, will not apply to a man domiciled elsewhere who has to come to Australia for some temporary purposes and then returns to his own home. In such a case no adverse inference need be drawn. (See In re Crispin L.R. 8 Ch.App. 374 Ex parte Guiterrez 11 Ch. D. 298). Even a domiciled Australian with a permanent residence abroad, if he departs or remains out of Australia, will not necessarily be held to have done so with the intent to defeat or delay creditors because of that circumstance alone. (Ex parte Brandon 25 Ch. D. 500). It might be contended from some of the expressions used in In re Crispin that a person domiciled abroad can never be held to have committed an act of bankruptcy by departing or remaining out of Australia but I do not agree with this, and in my opinion such a departure or remaining out can be an act of bankruptcy in the case of a debtor as defined, though exceedingly strong evidence would be needed to prove the intent to defeat and delay. (See In re Adcock 22 S.A.L.R. 122 where the debtor was apparently domiciled in Victoria. See at p.122. See also Ex parte Langworthy 3 T.L.R. 544.)

The acts of bankruptcy referred to in sections 52 (e) (g) (h) (i) (k) and (l) must all presumably be committed in Australia on the principle I have referred to above.

Section 52 (f) makes an adjudication of a debtor as defined above in "any Court in the King's Dominions out of the Commonwealth having jurisdiction in bankruptcy or insolvency" an act of bankruptcy in Australia. It is

submitted that the words "having jurisdiction in bankruptcy or insolvency" refer to jurisdiction according to the law of the country where the Court is situated and not to jurisdiction according to the rules of private international law in force in Australia. This paragraph does not say that any such adjudication must be recognized as valid according to Australian law so as to have any extra-territorial effect or would be effectual to pass property in Australia to the trustee or other officer appointed by such Court, but merely makes the adjudication an act of bankruptcy in Australia to found the jurisdiction of an Australian Bankruptcy Court.

The act of bankruptcy defined in section 52 (j) namely the non-compliance with the terms of a bankruptcy notice may be committed out of Australia because the sub-section recognises the power of the Court to give leave to effect the service of the notice out of Australia. It was held under previous legislation that the Court had no power to give leave to serve a bankruptcy notice out of the jurisdiction on a foreigner domiciled and resident abroad. (Ex parte Pearson 1892 2 Q.B. 263) But in my opinion, such leave can now be given, but if at the time of the non-compliance with the notice, i.e. the act of bankruptcy, the debtor is not a debtor as defined above, he will not be caught by the section and the notice will be a mere brutum fulmen. The final judgment referred to in the sub-section, however, must have been obtained in an Australian Court. (See In re A Bankruptcy Notice 1898 1 Q.B. 383 at pps. 384-5), and whether a bankruptcy notice can be founded here on a judgment registered in one of the Australian States (e.g. under The Administration of Justice Act 10 & 11 Geo. V. C.81) will depend upon the terms of the statute allowing registration.

(See In re A Bankruptcy Notice above. Contrast re Richards 2 S.R. (N.S.W.) B & P. Cases 3). The bankruptcy notice must require the debtor to pay the debt in Australia. (See In re a Debtor 1912 1 K.B. 53).

It might be mentioned here that service of a petition may also be effected out of the jurisdiction by leave. (See Rule 156 of the rules made under the Federal Bankruptcy Act.).

The answer to the question posited at the beginning of this chapter - When have the Bankruptcy Courts in Australia jurisdiction to make a sequestration order - then is as follows:

Those Courts may make a sequestration order against any debtor domiciled in Australia or any other debtor as defined in Section 4 of the Bankruptcy Act, who has committed an act of bankruptcy as defined in Section 52 on the petition of the debtor himself or on the petition of any creditor local or foreign of such debtor provided that in the latter case the conditions of section 55 (1) are also complied with, and only such debtors on such conditions.

This jurisdiction may be exercised even though the debtor has been previously adjudicated bankrupt in some other country. (In re Artola Hermanos 24 Q.B.D. 640). But the Court is not bound to adjudicate a man bankrupt in every case in which it possesses the power to do so. The Court has a discretion and it may refuse to exercise its jurisdiction if the justice and convenience of the case require it. This is so whether a petition is presented by a creditor (ex parte McCulloch 14 Ch. D. 716 per James L.J. at p.723) or a debtor (In re Petts 1901 2. K.B. 39). The existence of a prior foreign adjudication may be a very good reason for declining to exercise this jurisdiction because

as we shall see in certain cases an adjudication by a foreign court may act as an assignment of all the debtor's movable property anywhere in the world (and in some cases all his immovable property in the British Empire) to the person appointed by the foreign Court to administer the estate. In these cases, then, if a sequestration order were made by the Australian Court, there might be no property for the trustee appointed by that Court to administer because all the debtor's assets might have already passed to the foreign trustee. On the other hand, the provisions under the Australian Bankruptcy Act as to the relation back of the trustee's title may make assets available to the Australian trustee which would not pass to the foreign trustee. (See Galbraith v. Grimshaw 1910 A.C. 508). If the effect of making a sequestration order here will be to make assets available to the Australian trustee for the benefit of the creditors which could not be reached by the foreign trustee the Australian Court will probably exercise its jurisdiction. (Ex parte McCulloch 14 Ch. D. 716). The absence of assets in Australia and the fact that no debts have been contracted in Australia since the date of the foreign adjudication are good grounds for refusing to make an order. (Ex parte Robinson 22 Ch. D. 816). If the debtor himself procures the foreign adjudication in order to avoid proceedings in Australia a sequestration order will be made here if there are assets and creditors here, even though the conduct of the debtor in so doing renders it impossible for him to comply with the terms of a bankruptcy notice because his property has become vested in the trustee appointed by the foreign Court. (See In re a Debtor 1922 2 Ch. 470). It was said in Ex parte Robinson that the existence of a

bankruptcy in Scotland or Ireland would prima facie be a reason for the English Court refusing to exercise its jurisdiction. How far the existence of a prior bankruptcy in any part of the Empire would prima facie be a reason for an Australian Court refusing to exercise its jurisdiction may be a matter of doubt, seeing that the existence of such a bankruptcy is itself made an act of bankruptcy in Australia by section 52 (j). I think that probably the existence of such a bankruptcy in England Scotland Ireland or India would be such a prima facie reason because such a bankruptcy acts as an assignment and passes all the bankrupt's property in the British Empire by reason of enactments of the Imperial Legislature. I do not think that a prior adjudication elsewhere would be such a prima facie reason unless perhaps it were an adjudication in the country of the bankrupt's domicil. (See Re Artola Hermanos above and see later). However, in each case, the matter is one for the discretion of the Australian Court taking all the circumstances into consideration.

The Scotch Courts adhering more firmly to the theory of the unity of bankruptcy would presumably decline to sequestrate the estate of a person who has already been adjudicated bankrupt by a Court which is regarded by the Scotch Court as competent. (See Royal Bank of Scotland v. Cuthbert 1 Rose 462, Stewart v. Auld 13 Dunlop 1337 per Lord Ivory at p.1344, Goetze v. Aders 2 Rettie 150). Since the decisions of the Scotch Courts on the effect of foreign bankruptcies have been to some extent accepted and followed in the English Courts, this is not entirely irrelevant.

(2) <u>JURISDICTION OF SOUTH AUSTRALIAN COURTS TO WIND UP A COMPANY.</u>

The law of trading companies, like the law of

bankruptcy is the creature of statute. The conception of incorporation has long been familiar to English law, but the common law corporation was a very different body from the joint stock limited company called into existence by the necessities of modern commerce whose creation, existence, liquidation and dissolution are almost entirely governed by the various statutes which have been passed from time to time in England and copied in the Australian colonies. The law on the subject at the present time is contained in the South Australian Companies Act of 1934.

A corporation is an artificial personality: it has no real existance and its legal personality is due to a fiction of law. (See Appendix A). This legal personality is the gift of some system of law and is thus derived immediately -as by Charter from the Crown - or mediately - as by registration under the Companies Act - from some sovereign. Most civilized countries do now use this power to create new legal persons. In South Australia this power to incorporate is exercised by registration of certain documents with the Registrar of Companies and compliance with other conditions contained in Part II of the Companies Act. When the Registrar has granted a certificate of incorporation a new legal personality created by the law of South Australia springs into existence from the date of incorporation mentioned in the Certificate. (See Section 24).

Part VI of the Companies Act deals with the winding up of companies. This is a process by which the assets of the company are collected and distributed amongst its creditors and finally, if there is any surplus, among its shareholders. It is a process of liquidation, not of dissolution. It places the company in a state of suspended animation, but does not destroy the gift of legal personality conferred on registration. Dissolution should follow on the conclusion

of the winding up or it may occur without any winding up. See Sections 241, 253, 262 and 304-310. A winding up may be either by the Court or voluntarily or subject to the supervision of the Court. (See Section 186).

"Company" is defined in Section 8 of the Act as a company formed and registered under the Act or an existing company (i.e. a company not being a foreign company registered under or subject to the Companies Act 1892) and it is to such companies that the winding up provisions apply. In other words, the South Australian Courts have undoubted jurisdiction to wind up every company incorporated by the law of South Australia under the Companies Act 1934 or previous Acts. Such companies may also be dissolved under South Australian law since the same law which conferred the gift of incorporation has undoubtedly power to withdraw it. (See per Eve J. in Russian & English Bank v. Baring Bros. 1932 1 Ch. 435 at p. 443 quoting Scrutton L.J. in Banque Internationale de Commerce de Petrograd v. Goukassow 1923 2 K.B. 682 at p. 691. See also Lazard Bros. v. Banque Industrielle 1933 A.C. 289). The jurisdiction of the South Australian Court to wind up a company registered in South Australia exists even though the members of the company are foreigners and the business of the company is carried on outside South Australia and even though the registrar might have refused registration. (In re Madrid & Valencia Railway Co. 3 De G & S 127 re Factage Parisien 34 L.J. Ch. 140 Princess of Reuss v. Bos. L.R.5 H.L. 176). If the company though having obtained the advantage of incorporation under South Australian law is in fact not trading in South Australia but is carrying on its business elsewhere that may well be a reason why it should be "just and equitable that the company should be wound up" within the meaning of Section 194 (VI) of the Companies Act. (See Princess of Reuss

v. Bos L.R. 5 H.L. 176 per Lord Cairns at p. 202-3.) In the earlier cases there does indeed seem to be some suggestion that even in the case of a company registered in England, some circumstances connecting the company with English law rather than with any foreign law must be found before the English Court has jurisdiction to wind it up. (See In re Madrid & Valencia Railway Co. above). That contention can no longer be advanced since the decision of the House of Lords in Princess of Reuss v. Bos L.R. 5 H.L. 176. In short, "wherever there is a registered company under this Act there is the right to the winding up order". (In re Tumacacori Mining Co. 17 Eq. 534 per Malins V.C. at p.540).

Companies registered under the law of South Australia are not the only corporate bodies recognised here. It has long been a principle of international law that a corporation duly created in one country will be recognised in the Courts of another. (See Dutch West India Co. v. Henriques (1730) 2 Ld. Raymond 1535). (National Bank of St. Charles v. De Bernales 1 C & P. 569, See also Bateman v. Service 6 A.C. 386). South Australian Courts will therefore recognise the corporate personality of a company incorporated elsewhere. Part XII of the Companies Act deals with companies established outside South Australia. That part prescribes certain formalities such as registration here as a foreign company which must be followed by every company formed outside South Australia which desires to carry on business here. If the company does carry on business here without complying with such conditions, it is liable to heavy penalties and is debarred from bringing or maintaining any action set-off counterclaim or legal proceeding here in respect of any contract dealing or transaction in relation to such business until it has complied with the Act,

though the validity of such contracts etc. is not impaired. (Section 363). (See also Gibson Battle & Co. v. James King & Son 1915 S.A.L.R. 14, Concrete Engineering Co. v. Hardie Trading Pty. Ltd. 1928 S.A.S.R. 132 decided under the previous Act of 1892). There is no doubt that any company duly created elsewhere could bring an action here in relation to anything else except business carried on here in defiance of the Act, although not registered here as a foreign company. (See for example Lamson Store Service Co. v. Weidenbach's Trustees 7 W.A.L.R. 166). Section 363 does not deny recognition to a duly created foreign company but merely bars such company's remedy in the South Australian Courts under certain conditions and until the happening of certain events.

The question of winding up companies incorporated outside the jurisdiction which carried on business within the jurisdiction and had assets and creditors there came before the Courts in England at an early stage. At first, the Courts did not seem sure what principles should guide them.(I) But later, it became clear that any company incorporated outside the jurisdiction which had a branch office within the jurisdiction might be wound up as an unregistered company under the provisions in the various Acts dealing with unregistered companies for it was obvious that in general, the provisions as to winding up only dealt with companies registered within the jurisdiction. (In re Commercial Bank of India L.R. 6 Eq. 517, In re Matheson Bros. 27 Ch. D. 225, In re Commercial Bank

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(I) See In re Demre Valley Railway Co. 19 L.J. Eq. 474 where the company was incorporated in Belgium but had English directors and shareholders. It did not have any office or place of business in England and yet the Vice-Chancellor directed a reference to the Master to enquire whether the company had ceased to carry on its business and whether it would be expedient to wind it up.

of South Australia Ltd. 33 Ch. D. 175, In the Matter of the North Australian Territory Co. Ltd. 23 S.A.L.R. 163, In re the Syria-Ottoman Railway Co. 20 T.L.R. 217, In re Federal Bank of Australia Ltd. (No. 1.) 3 B.C. (N.S.W) 80. In re Songvaar Salvaging Co. 14 Tas. L.R. 92). The existence of the branch office within the jurisdiction was essential. If the company had not a branch office, "a residence of its own" within the jurisdiction it could not be wound up. (See In re Lloyd Generale Italiano 29 Ch. D. 219).

This has been altered in South Australia. The combined effect of sections 351 and 362 of the Companies Act 1934 is that any company incorporated outside South Australia which after the commencement of the Act has commenced to carry on business in South Australia or which has before the commencement of the Act carried on business there and continued to do so at the commencement of the Act may be wound up as an unregistered company within the meaning of Part XI of the Act. The requirement of a branch office is no longer necessary. We may say that any company incorporated outside South Australia which carries on business in South Australia may be wound up as an unregistered company by the South Australian Court and no other company incorporated outside South Australia. (See below).

"Carrying on business here" in relation to a foreign company is a somewhat elastic term which has caused the Courts some difficulty in another connection. According to the law of countries which have adopted the English common law, jurisdiction depends on the presence of the defendant within the territory: the carrying on business within the territory on the part of the company has been held to be one of the ingredients to be used in deciding whether it is resident within the territory. If it has a branch office of its own there there is no doubt that it is carrying on business there. But

if it merely acts through agents, the position is not so simple. Three requisites are necessary in order to constitute carrying on business within the jurisdiction, according to the judgment of Buckley L.J. in Okura & Co. v. Forsbacka 1914 1 K.B. 715 at p. 718. The acts relied on as showing that the corporation is carrying on business within the jurisdiction must have continued for a sufficiently substantial period of time, (though under certain circumstances so short a period as nine days will suffice. See Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft 1902 1 K.B. 342). They must have been done at some fixed place of business (though a stand at an exhibition of which the company's agent has the exclusive use is enough. See the Dunlop case above:) and the corporation must do business within the jurisdiction by a person, not through a person. In other words, the agent must be the corporation's alter ego: he must have power to bind it. It is not enough that he should only have power to take orders and submit them to the company for its acceptance or rejection as were the facts in that case. (See also Grant v. Anderson 1892 1 Q.B. 108, Saccharin Corporation Ltd. v. Chemische Fabrik 1911 2 K.B. 516, Pearce v. Tower Manufacturing & Novelty Co. 24 V.L.R. 506 and Thames & Mersey Marine Insurance Co. v. Societa di Navigazione 30 T.L.R. 475 The Lalandia 1933 P. 56.)

This test of Buckley L.J. is laid down by him both in the Okura case and in the Thames & Mersey Marine Society case as the test to be applied in order to discover whether a company is carrying on business within the jurisdiction. But his words must be considered in their context and what the Courts were really considering in these jurisdiction cases was whether the company was carrying on business within the jurisdiction so as to be resident within the jurisdiction for the purposes of service. It would seem that if we have to discover the meaning of

"carrying on business here" simpliciter then possibly the requirement of a fixed place of business is not necessary. "It may be one thing", said Lord Esher M.R. in Worcester City & County Banking Co. v. Firbank . 1894 1 Q.B. 784 at p. 788, "to carry on business within the jurisdiction and another to have a place of business within the jurisdiction". The test of residence for the purpose of service is laid down by Farwell L.J. in the Saccharin Corporation case above, as follows (p. 526): "it is ..... necessary for the plaintiffs to show that the defendants carry on their business in England and have a place of business in England where their business is carried on". (See also the Dunlop case above per Collins M.R. at p. 347). It would seem therefore that a foreign company may carry on business in South Australia, although it has not a fixed place of business here. I am of opinion, however, that the other two requirements are undoubtedly necessary - the sufficiently substantial period of time and the requirement that the agent must have power to bind the company: the company must do business by the agent, not through him: he must make a contract for the company, not sell a contract with it. (See Thames & Mersey Marine Insurance v. Societa di Navagazione above). It is certain that one transaction here is not enough to constitute carrying on business here. (See Lamson Store Service Co. v. Weidenbach's Trustees 7 W.A.L.R. 166 per Parker A.C.J. at p. 171).

Section 357 of the Act provides that no company shall be deemed to carry on business here within the meaning of Part XII by reason only of its investing its funds or other property in this State. It also provides that a trustee and executor company formed or incorporated outside South Australia which does not carry on any business here other than the administration, management or realization of the assets in this State of persons in respect of whose wills or

estates, probate or letters of administration has or have been resealed here or of property here forming part of that comprised in any settlement or deed of trust executed outside and including property outside as well as within South Australia "shall not be required to comply with any of the provisions of this Part." One of those provisions is Section 362 giving power to wind up a company to which this Part applies "as if it were an unregistered company". Such a trustee and executor company, therefore, shall not be required to comply with this section and presumably cannot be wound up under it. Nor can such a company, even if it has a branch office here, be wound up as an unregistered company in accordance with the decision mentioned above, for in my opinion the implied power to wind up a foreign company as an unregistered company no longer exists since the express power to do so was granted by section 362 and the whole extent of the power to wind up foreign companies is contained in that section. Expressio unius est exclusio alterius.

A company incorporated outside South Australia may then if it carries on business here be wound up under Part XI of the Act as an unregistered company. Generally, an unregistered company within the meaning of that Act must consist of more than five persons: (Sec. 345) but this is not necessary in the case of a foreign company, (Sec. 362). The principal place of business in the State is deemed to be the registered office of an unregistered company for the purposes of the Act, (Sec. 346). An unregistered company must be wound up by the Court. It cannot be wound up voluntarily or under supervision. (Sec. 346). The circumstances under which it can be wound up are set out in Section 346 of the Act. If the company has never been

incorporated by the foreign law, it cannot of course be wound up here, even though a body of persons such as, for example, provisional directors have used the name of the proposed company for certain purposes in South Australia and have purported to incur liabilities here in that name. (See re the Imperial Anglo-German Bank 26 L.T. 229). A foreign unincorporated association certainly does not come within Sec. 351 or therefore within sec. 362 and it is doubtful therefore whether it is caught by Part XI. It need, perhaps, hardly be pointed out that the corporations dealt with here must be trading corporations of some sort. A social club or a charitable institution for example is not an unregistered company, and does not come within the scope of the Companies Act 1934. (See In re St. James Club 2 De G. M & G 383.)

Since the Russian revolution and the dissolution of all former Russian banks and other companies by Soviet legislation, the existence of branches of the former Russian corporations in England has caused much litigation and many difficult questions have been raised which will be discussed later. It is now settled that the words "if the company is dissolved" in Sec. 346 (111) (1) are equivalent to "if the company has been dissolved", so that a foreign company which is carrying on business in South Australia and which has been dissolved in the country of its incorporation may be wound up here under that section. (See In re Russian & English Bank 1932 1 Ch. 663 and In re Russian Bank for Foreign Trade 1933 1 Ch. 745). This Court cannot, of course, dissolve a company incorporated elsewhere. It can distribute its assets here and terminate its activities here, but only that law which granted it can revoke the gift of legal personality.

The existence of a winding up in the country of a company's incorporation is no bar to its being wound up here. (See In re Matheson Bros. 27 Ch. D. 225, In re Commercial Bank of S.A. 33 Ch. D. 175, In re Oriental Bank Corporation 10 V.L.R. (E) 154, In the matter of the North Australian Territory Co. Ltd. 23 S.A.L.R. 163, In re Federal Bank of Australia Ltd. (No. 1.) 3 B.C. (N.S.W.) 80.) Indeed, there is no other method by which the assets here may be made available for the creditors generally because it would seem that a winding up, unlike a bankruptcy, does not in general effect an assignment of property to the liquidator. This will be discussed later. The making of a winding up order in the case of a foreign company is, however, a matter of discretion. and it may be refused if, in the opinion of the Court, no useful purpose will be served by it. (In re Union Bank of Calcutta 3 De G & S. 253. In re Federal Bank of Australia 1893 W.N. 77). (In re Jarvis Conklin Mortgage Co. 11 T.L.R. 373).

It might, perhaps,be noted that this Court has apparently jurisdiction to wind up a company incorporated elsewhere in the Empire by Royal Charter as well as under the provisions of any Companies Statute. (See In re Oriental Bank Corporation 10 V.L.R. (E) 154.)

The following rules then can be formulated: The South Australian Court has jurisdiction to wind up:-

(1) Any company formed and registered in South Australia.

(2) Any company incorporated outside South Australia which is carrying on business in South Australia and only such companies.

The South Australian Court and the South Australian law have power to dissolve a company incorporated under the law of South Australia and only such companies.

CHAPTER III.

EXTRA-TERRITORIAL EFFECT OF LOCAL BANKRUPTCY OR WINDING UP.

As we have dealt with the jurisdiction of an Australian Court to adjudicate a man bankrupt and of the South Australian Court to wind up a company, we should now logically deal with the jurisdiction which an Australian or a South Australian Court respectively considers it proper for foreign Courts to exercise in making an adjudication of bankruptcy or winding up a company. But since this topic is interwoven with the topic of the effect given in Australia and South Australia respectively to a foreign bankruptcy or a foreign winding up, it will be best to deal with these two questions together and to deal now with the question of the effect of an Australian bankruptcy or a South Australian winding up from the standpoint of private international law.

(1) The extra-territorial effect of an Australian bankruptcy:

Section 60 of the Bankruptcy Act provides that upon sequestration the property of the bankrupt shall vest in the Official Receiver named in the order. Property is defined by Section 4 of the Act as follows:-

> "Property includes money, goods things in action, "land and every description of property, whether real "or personal and whether situate in Australia or "elsewhere: also obligations easements and every "description of estate, interest and profit, present "or future, vested or contingent, arising out of or "incident to property as above defined."

Thus, the making of the sequestration order will certainly vest in the official receiver all the property of the bankrupt as above defined in Australia. The law regards the making of the sequestration order as an assignment of the bankrupt's property. The bankrupt is completely divested and the absolute title passes to the official receiver. The execution of a deed of assignment has of course the same effect.

This definition is copied from the definition of property in Section 47 of the Imperial Bankruptcy Act 1914. There is, however, an important distinction between the powers of the Imperial Parliament and of the Commonwealth Parliament which renders the effect of the two enactments in this regard very different.

I have already pointed out that all legislation is prima facie territorial. (See Cooke v. Charles A. Vogeler Co. 1901 A.C. 102, Morgan v. White 15 C.L.R. 1.) The legislation of the Imperial Parliament will, therefore, be construed if possible so as not to have an extra-territorial operation. That was done by the House of Lords in the case I have just cited. But where the Imperial legislature clearly manifests its intention to give its legislation such an operation the Courts throughout the British Empire (subject to the Statute of Westminster which is not in force here) (see Appendix B) must obey and must regard the enactment in question as having such an operation. Thus, the effect of the Imperial Bankruptcy Act is, subject to certain modifications which I will deal with later, to vest all the property of the bankrupt movable and immovable, throughout the British Empire, in the trustee appointed by the English Court and moreover, it may possibly be that it must be regarded throughout the British Empire as vesting all the property of the bankrupt, movable and immovable in any other part of the world in that trustee also, subject to any rights duly acquired over it under the local law before the date of the bankruptcy. This does not, of course, mean that if this were so such property would actually vest in the trustee. That would depend on the law of the place where the property in question is situated and the trustee would have to make good his title to the property in accordance with the law of that country so long as it remained therein. It only means

that so far as the matter could arise for consideration in a British Court, it would have to be taken that the English bankruptcy acted as an assignment of such property. It may be, however, and in my opinion the correct interpretation is that the words "or elsewhere" in the Imperial Bankruptcy Act will only be construed to mean "elsewhere in the British Dominions" and that the Courts will not consider that the Act binds them to regard an English bankruptcy as an assignment to the English trustee of property situated in a strictly foreign country, e.g. Italy, except in so far as the law of that country recognises such an effect. This is a question of the construction of the English Statute. The important point for our present investigation is this, that there is no doubt that if the proper construction of the Imperial Act were that it purported to pass property situated in Italy to the English trustee by the mere fact of the English bankruptcy the Courts throughout the Empire would have to hold that the property in Italy ~~were~~ WAS so transferred, no matter what the law of Italy said. If the Imperial Parliament makes its meaning clear, that meaning must be obeyed, no matter how contrary it may be to accepted principles of international law.

And in that, the Imperial Parliament differs vitally from the Commonwealth Parliament. The enactments of a colonial legislature will also be construed so as not to have an extra-territorial effect but if and so far as on their proper construction they do purport to have an extra-territorial effect they are ultra vires of the enacting legislature, unless the power to pass such legislation has been conferred on it expressly or by necessary implication by the Imperial Parliament. (See McLeod v. Attorney General for New South Wales 1891 A.C. 455.) The Imperial Parliament is sovereign, the Commonwealth Parliament subordinate. In the one case, it is a question of construction only; in the other, it is a question

of power as well. This principle may not perhaps be applied as strictly now as in former days and the grant of power to the Commonwealth Parliament contained in the Constitution Act may be construed as conferring power to pass legislation in relation to the peace order and good government of the Commonwealth, either generally or in relation to some specific subject, which has an extra-territorial effect. (See Trustees Executors & Agency Co. v. Federal Commissioner of Taxation 49 C.L.R. 220 per Evatt J. p. 230-241 and see generally Wynes on Legislative & Executive Powers in Australia ps. 65-73). But it would seem probable that the Imperial Parliament did not grant to the Commonwealth Parliament power to pass legislation inconsistent with the ordinary principles of international law as understood in countries which have adopted the common law. (See Croft v. Dunphy 1933 A.C. 156 per Lord MacMillan at p.164). I do not think, however, that on the proper construction of Sec. 60 taken with the definition of property, the Bankruptcy Act purports to effect an assignment of property outside Australia in defiance of the law of the situs of such property, but rather that it would be construed as purporting to effect such an assignment in so far only as the lex situs allows. This is the construction placed by Dicey (p. 371) on the identical words of the definition clause in the English Act, so far as property outside the British Empire is concerned.(I)

(I) See also Phillips v. Hunter 2 H.Bl. 402 where the bankruptcy legislation then in force authorized the commissioners to take the goods money etc. of the bankrupt "wheresoever the same may be found or known" but it was not held by the Court of Exchequer Chamber that it could operate to pass property contrary to the provisions of the lex situs. (See at p. 409).

Whether it is to be viewed as a question of construction or a question of power is immaterial: if the Commonwealth Bankruptcy Act purports to effect by the mere making of a sequestration order the transfer of the property of the bankrupt situated outside Australia to the official receiver irrespective of the law of the situs of the property, I am of the opinion that it is to that extent ultra vires of the Commonwealth Parliament: if it does not purport to do so, then cadit quaestio.

No property outside Australia, then, will pass to the official receiver by the mere force of the Bankruptcy Act. His title to property outside Australia will depend on the law of the country where that property is situate. According to the rules of private international law in force in Australia, his title to all movable property outside Australia should be recognized by the law of other countries as an assignment to him of such property at the date of the sequestration order, at any rate where the bankrupt is domiciled in Australia, on the maxim mobilia sequuntur personam. (See Sill v. Worswick 1 H. Bl. 665 per Lord Loughborough at p. 690. Hunter v. Potts 4 T.L.R. 182 per Lord Kenyon at p. 292 and Phillips v. Hunter 2 H. Bl. 402 at p.404 et. seq.) I will deal with this question when considering the effect in Australia of a foreign bankruptcy. But if the law of these countries does not recognise his title, the property will not be held in Australia to have passed.

It is, however, the duty of the trustee to endeavour to realize property of the bankrupt outside Australia and to make all proper applications to the Courts of countries where such property may happen to be for that purpose. As far as Courts of countries within the British Empire are concerned he will be aided in this task by the provisions of Section 122 of the Imperial Bankruptcy Act 1914. (See re Dunn & Edwards 8 A.B.C. 168). This provides as follows:-

"The High Court ..... the Courts having juris-
"diction in bankruptcy in Scotland and Ireland and
"every British Court elsewhere having jurisdiction
"in bankruptcy or insolvency and the officers of those
"Courts respectively shall severally act in aid of and
"be auxiliary to each other in all matters of bankruptcy
"and an order of the Court seeking aid with a request
"to another of such Courts shall be deemed sufficient
"to enable the latter Court to exercise in regard to
"matters directed by the order, such jurisdiction as
"either the Court which made the request or the Court
"to which the request is made could exercise in regard
"to similar matters within their respective juris-
"diction".

It has been suggested by Foote (Private International Law Fifth Edition p. 268) that the term "British Courts" in this section means Courts in other parts of Great Britain and the islands adjacent thereto such as the Isle of Man and does not apply to other Courts within the Empire. The Courts have taken the opposite view. (See In re Firbank 4 Morr. 50 where the English Court acted in aid of the Court of the Cape of Good Hope and Home's Trustee v. Home's Trustees 1926 Sc.L.T. 214 re Lister Henry & Co. 9 A.L.T. 153). What exact order will be made by the Court whose aid the Australian Court or the Australian trustee seeks is a matter for the law of the country to which that Court belongs. It will probably assist him to obtain posesssion of the property within its jurisdiction in some way but the section does not mean that an Australian trustee's title to the property outside Australia in other countries of the British Empire must be recognised throughout the Empire by the mere force of the Australian bankruptcy. He will derive his title to any property he may obtain by reason of this section from the order of the Court whose aid he seeks, not necessarily from the recognition by that Court of the sequestration order in Australia as effecting an assignment to him of the property of the debtor of international validity. Whether that Court recognises his title from the date of the Australian sequestration order or from the

date of its own order may be of great importance as the validity of rights over the property which have accrued in the intervening period may depend thereon. I will deal with section 122 again when I consider the effect in Australia of a bankruptcy elsewhere in the Empire.

Section 76 of the Federal Bankruptcy Act obliges the debtor to "execute such powers of attorney conveyances transfers deeds and instruments and generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors" as the official receiver and the trustee may require or the Court may direct and also to "aid to the utmost of his power in the realisation of his property" under penalty of being found guilty of contempt of Court. Thus he can be made to execute any instruments necessary to enable the trustee to satisfy the formalities required by the law of the country where his property is situate in order to transfer the ownership thereof to the trustee. But if the lex situs "will not permit or not enable the (bankrupt) to do what the Court might otherwise think right to decree", it will not attempt to use these powers against him. (See ex parte Pollard Mont & Ch. 239 at p. 250). They can in any event only be used effectively when the debtor is within the jurisdiction.

The extent of the extra-territorial effect of an Australian bankruptcy is important where a person within the jurisdiction of the Australian Courts obtains some of the property of the debtor outside Australia. The rules governing such occurrences will be dealt with when the administration of the estate of the bankrupt in Australia is discussed.

The only rule which we can formulate then is the following:

An Australian bankruptcy will only effect an assignment of the bankrupt's property situated outside Australia to the Australian trustee if and to the extent that the law of the country in which the property is situated allows it to do so but Australian Courts consider that an Australian bankruptcy should be considered by the Courts of other countries as effecting an assignment to the Australian trustee of all the movable property of the bankrupt wherever situate at least if the bankrupt was domiciled in Australia at the date of the bankruptcy.

The reasons for the second half of this rule will be developed later.

(2) THE EXTRA-TERRITORIAL EFFECT OF A SOUTH AUSTRALIAN WINDING UP.

The effect of a winding up order is not the same as that of a sequestration order. There is no logical reason why this is so: the law of some countries applies the same principles to the bankruptcy of natural and artificial persons and some writers, notably Westlake, (p. 178) seem to think that in English law also the same effect follows from a bankruptcy and a winding up. (See also Re Alfred Shaw & Co. 8 Qsld L.J. 93 per Griffith C.J. at p. 94 et. seq.) However the bankruptcy and company statutes have proceeded along entirely different lines in this matter and a South Australian winding up does not purport to have any extra-territorial effect.

Bankruptcy, as we have seen, effects an assignment of the debtor's property to the official receiver from the date of the sequestration order: a winding up order does not effect any assignment to the liquidator. Section 211 of the Companies Act obliges the liquidator to take into his custody or under his control all the property and things in action to which the Company is or appears to be entitled. Section 213 in the case

of a winding up by the Court and Sections 245 and 276 in the case of other windings up give the liquidator large powers of bringing actions in the name and on behalf of the company and of realizing the property of the company subject in some cases to the sanction of the Court and the powers of the ordinary agents of the company to act on its behalf are taken away, but the company is not divested of its property. The liquidator is only its agent (I) or representative though he is also its sole legal agent or representative during the winding up.

An Australian bankruptcy is sometimes entitled to have an extra-territorial effect because of the rule that in certain cases an assignment of property validly made by the law of one country will pass property in another country. A South Australian winding up order is not an assignment and therefore can have no such effect. This difference between the effects of a bankruptcy and a winding up order is recognised by the cases. (See New Zealand Loan and Mercantile Agency v. Morrison 1898 A.C. 349 Queensland Mercantile Agency Co. v. Australian Investment Co. 15 Rettie 935 and Primary Producers Bank v. Hughes 32 S.R. (N.S.W.) 14). The practical effect of this is obvious when we consider, say, an execution issued in one country against the movable property of a man who has become bankrupt or a company which is being wound up in another. In the one, no rights can be acquired by the

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(I) The term agent is used to describe the liquidator not as a technically correct description of his station, for which see In re Gooch L.R. 7 Ch. App, 207 at p. 211, but as a convenient term to indicate that he has the sole right of using the company's name in litigation "and that he takes the place of the directors and of the shareholders in general meeting and is entitled to speak for the company and to determine when the company's name shall be used." See Primary Producers Bank v. Hughes 32 S.R. (N.S.W). 14 per Harvey C.J. in Eq. at p. 18).

execution creditor because the bankrupt no longer has any movable property which has all become the property of the trustee: in the other case, the property is still the property of the company.

If the company is registered in South Australia, then since by the South Australian law, the law of the country of incorporation, the liquidator has become its sole effective agent, the South Australian Court will expect foreign courts to recognise his title to sue in the company's name and on its behalf and to realize its property situate outside South Australia. This is, of course, a matter for the law of the particular country concerned. The South Australian Court would not, however, expect that a liquidator of a company being wound up here but incorporated elsewhere would necessarily be recognised as the only effective agent of the company or its agent at all outside South Australia. Foreign Courts would be expected to recognize the validity of any disposition of the South Australian assets made in such a winding up. (See Employers Liability Assurance Corporation v. Sedgwick Collins 1927 A.C. 95 per Viscount Cave L.C. at p. 104.)

A South Australian winding up, therefore, does not act as an assignment of the company's property anywhere.

CHAPTER IV.

JURISDICTION OF FOREIGN COURTS AND EXTRA TERRITORIAL EFFECT OF FOREIGN BANKRUPTCY AND WINDING UP.

(1) BANKRUPTCY:

(á) Bankruptcy taking place under an Act of the Imperial Legislature:

English, Scottish, Irish and Indian bankruptcies are governed by Acts of the Imperial Parliament which purport to bind and are binding upon all the King's Dominions. Their effect in Australia, therefore, differs from the effect of a bankruptcy elsewhere which is governed by ordinary principles of private international law.

As we have seen, Section 167 of the English Bankruptcy Act of 1914 4 & 5 Geo. V. C.59 makes it clear that property within the meaning of the Act includes "every description of property whether real or personal and whether situate in England or elsewhere". The property which passes to the English trustee, therefore is property as thus defined.

Sections 267 and 268 of the Bankrupt and Insolvent Act (Ireland) of 1857 20 and 21 Vict. C. 60 vest in the Irish assignees "all the personal estate and effects of the bankrupt "wheresoever the same may be" and "all lands tenements and hereditaments ..... wheresoever the same may be situate" to which the bankrupt is entitled and all his interests in such lands etc.

Section 7 of the Indian Insolvency Act of 1848 11 & 12 Vict. C. 21 gives to the Court power upon the filing of a petition by a debtor to order and requires the Court to order that "all the real and personal estate and effects of such petitioner whether within the territories within the limits of the Charter of the East India Company or without ..... do vest in the (Indian) Official Assignee"

and Section 11 gives the Court the same powers on the petition of a creditor. The Act also passes after acquired property whether "within or without the said territories."

Section 97 of the Bankruptcy (Scotland) Act of 1913 3 & 4 Geo. V. C.20 provides that the warrant of confirmation issued by the Scottish Court shall as at the date of sequestration vest in the Scottish trustee all the property of the bankrupt including "the movable estate and effects of the bankrupt wherever situate so far as attachable for debt or capable of voluntary alienation by the bankrupt to the same effect as if actual delivery or possession had been obtained or intimation made at that date subject always to such preferable securities as existed at the date of sequestration and are not null or reducible", and also "all real estate situated in England Ireland or any of His Majesty's dominions belonging to the bankrupt and all interest in or regarding such real estate which the bankrupt held or to which he was entitled to the same extent as would have happened, if the bankrupt had been adjudicated bankrupt in England or Ireland or in any of His Majesty's dominions respectively".

The effect of these enactments is that upon an English Scottish, Irish or Indian bankruptcy all the property of the bankrupt movable or immovable in Australia vests in the English, Scottish, Irish or Indian trustee or assignee, so far as the respective laws of these countries provide for the particular kind of property passing and whether or not the particular sort of property would pass under an Australian bankruptcy. (See Salaman v. Tod 1911 S.C. 1214 where an asset in Scotland which under Scotch law would not have passed under a Scotch sequestration, was held to have passed to the English trustee on the construction of the definition of property in the English statute.) According to Dicey (p.476

note) the Irish Act is still applicable to the Irish Free State. It may be noted here that in my opinion Westlake's theory of a discrimination (pps.173 et seq between the effect of these Acts in colonies which have attained a high degree of separate existence and those which have not is untenable. The powers of the Imperial Parliament are just as extensive over Australia as they are over Trinidad though the likelihood of their exercise is much less in the one case than it is in the other. But here they have been exercised for the whole Empire. Again, I am not considering any possible effect of the Statute of Westminster. (See Appendix B.)

These enactments, however, do not override the requirements of the local law as to the formalities of transfer which must still be observed. (See ex parte Rogers 16 Ch. D. 665 per Jessel M.R. at p. 666 and Callender Sykes & Co. v. Colonial Secretary of Lagos 1891 A.C. 460. See also Smith v. Liddlelow 2 W.A.L.R. 69.) Section 53 (4) of the English Act of 1914 provides that the certificate of appointment of the trustee is to be deemed a conveyance or assignment of property for the purpose of any law in force in any part of the British Empire requiring registration and may be registered accordingly. Section 269 of the Irish Act of 1857 and section 121 (7) of the amending Act 35 and 36 Vict. C. 58 contain similar provisions and Section 97 (3) of the Scottish Act of 1913 contains provisions for registering the act and warrant of confirmation in any part of the King's Dominions, so as to effect a transfer of real estate thereon. Section 269 of the Irish Act and section 97 (3) of the Scottish Act also contain provisions for the protection of bona fide purchasers, of any property in the case of the Irish Act and of real estate in the case of the Scotch Act, in the King's dominions, the transfer of which requires registration, without notice of the Irish and Scottish bankruptcies respectively before the registration of the documents mentioned.

It has been held that these Acts only passproperty of the bankrupt in Australia: they do not pass property which is really the property of someone else but is artificially appropriated as the bankrupt's own as being for example in his reputed ownership. This was decided by the Full Court of Victoria (Madden C.J. & Holroyd J: A'Beckett J. dissenting) in Federal Bank of Australia v. White 21 V.L.R. 451: in this case the English Bankruptcy Act of 1883 in which the definitior of property was very similar to the one contained in the 1914 Act was under consideration and the Court held that that definition, so far as its extra-territorial effect was concerned, only applied to property which was really the bankrupt's own and not to property belonging to someone else in the circumstances above mentioned. Goods in Victoria in the possession or order or disposition of the bankrupt, so that he was the reputed owner thereof but belonging to a third person were therefore not "property of the bankrupt divisible among his creditors" within the meaning of section 44 (3) of the Act of 1883 and did not vest in the English Trustee. (See per Madden C.J. at p. 464.) The correctness of this decision seems doubtful. It is difficult to find any reason for attributing different meanings to the word "property" when it occurs in different parts of the statute without anything in the Statute itself to indicate such a difference. The decision of the majority indeed seems to be founded upon a supposed principle that an intention to destroy the rights of third persons over property outside England cannot be imputed to the Imperial Legislature without express words to that effect. (See per Madden C.J. at 464-5 and per Holroyd J. at p.472.)

Now, if the reasoning adopted by the majority of the Court is correct then it can presumably be applied to the problem of relation back to the trustee's title and also to the avoidance of preferences or settlements. The English Act for example provides that the trustee's title shall relate back to the earliest act of bankruptcy committed within three months next preceding the date of the presentation of the petition. Will the property in Australia pass to the English trustee at the date of the adjudication or as at the date to which his title in England relates back? In general, the property of a bankrupt in Australia only passes to a foreign trustee as at the date of the foreign adjudication. Do the imperial Acts alter the law in this regard?

The Scotch Act stands in a position of its own. It provides (section 97) that the warrant of confirmation shall vest the property of the bankrupt as defined in that section (which I have set out elsewhere) in the trustee as at the date of sequestration. The movables in Australia therefore vest in the trustee so far as they were at that date attachable for debt or capable of voluntary alienation by the bankrupt, subject to securities or charges uponthem at that date given by Australian law. The real estate in Australia (Section 97 (3)) only passes to the Scotch trustee to the same extent as would have happened if the bankrupt had been adjudicated bankrupt in Australia. Therefore the Scotch trustee's title to the real estate will apparently relate back to the time to which an Australian trustee's title would have related back if a sequestration order had been made here on the date of the Scotch sequestration. This may present difficulties in practice because of the difference between the two procedures.

The other Imperial Acts are less clear. Dicey, (p. 369 and 477) holds the view that the English, Irish or Indian

doctrine of relation back under an English, Irish or Indian bankruptcy applies to all the property of the bankrupt in the British dominions and if this is so, of course, the rights of third persons over property in Australia validly acquired under our law may be defeated by a subsequent English, Irish or Indian bankruptcy. These Acts having once evinced an intention to bind the colonies I cannot find in them any reason to indicate that the Imperial Parliament intended some of their substantive provisions to operate all over the Empire and others only to operate in England, Ireland or India respectively. I am unable to imagine, in the absence of any guide in the statute itself, any criterion by which a section intended to affect only the home country could be distinguished from one intended to affect the whole Empire. I cannot think that a supposed respect for the rights of third persons over property outside the home country affords such a criterion. I agree with the dissenting judgment of A.Beckett J. in Federal Bank v. White that so far from the general scheme of the English Bankruptcy Act evincing an intention to show such a respect it rather shows an intention to avoid the rights of third persons over property outside England in certain instances. (See pps. 474-5). With great respect I am of opinion that the decision of the majority in that case was wrong and therefore I am of opinion that the title of an English, Irish or Indian trustee to property in Australia relates back to the same date as that to which it relates back in England, Ireland or India respectively and I am also of opinion that goods of a third person in the possession of the bankrupt in Australia will vest in the English Irish or Indian trustee if they would have vested in him if they had been in England Ireland or India respectively. In general, and without considering the construction of any particular section, I am of opinion that

the special rules of an English Irish or Indian bankruptcy relating to property of the bankrupt divisible amongst his creditors or the effect of bankruptcy on antecedent transactions apply to property in Australia to the same extent as they do to property in the forum of the bankruptcy. This result is not due to any principles of private international law, but to the sovereignty of the Imperial Parliament.(I)

Subject to the above remarks the property in Australia will only pass to the trustee under the above Acts subject to charges existing thereon which are recognized by the law of Australia.

If I am right in what I have said above, it follows that the validity of an adjudication by an English, Scottish, Irish or Indian Court cannot be disputed in Australia. Once the bankruptcy is proved in the mode prescribed by the Imperial Acts it cannot be examined here or attacked on the ground of lack of jurisdiction, fraud or similar objections. All such matters must be raised in the forum of the bankruptcy. This position has been accepted by the Scottish Courts. (See Wilkie v. Cathcart 9 M. 168, Salaman v. Tod 1911 S.C. 1214 where the Court of Session has refused to go behind an English adjudication and consider the jurisdiction of the English Court.)

(b) Any other bankruptcy:

(i) Movables:

The theory on which a foreign bankruptcy is in certain cases allowed effect in Australia is that it is regarded as effecting an assignment of the movable property of the bankrupt wherever situate to the representative of his creditors

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(I) See Niven v. Grant 29 V.L.R. 102 where the English trustee was granted a declaration that a transfer of certain property by the bankrupt was fraudulent and void as against him. The Court pointed out that the trustee was suing under the statute 13 Eliz. C.5 which is in force both in England and in Victoria. In my opinion however this is not a necessary condition of the English trustee's right to sue and he can bring any action in Australia with regard to settlements made of or preferences acquired over property of the bankrupt here which he would be entitled to bring in England.

(who is hereafter for the sake of brevity referred to as the foreign trustee) appointed under the foreign bankruptcy law. This is no doubt due to the fact that an adjudication of bankruptcy in England effects an assignment of the bankrupt's property to the English trustee. The theory, however, hardly seems to correspond with the position of a curator or syndic in those countries whose system of law is founded upon Roman law. The view of bankruptcy taken in such countries is rather that it acts as a judgment in favour of the representative of the creditors, giving him indeed the right of administration of the property of the bankrupt in their interests and the right to bring all actions which the bankrupt himself could have taken but not that it operates as a divestiture of his property. The position of such a curator or syndic is, in short, analogous to that of a liquidator of a company under our law rather than to that of a trustee in bankruptcy. (See Westlake 163-8 and see Introduction). Nevertheless, when our Courts give effect to a foreign bankruptcy, the theory on which they do so is, as I shall show, the theory that it effects an assignment to the foreign trustee and may therefore receive extra-territorial effect in certain cases on the maxim mobilia sequuntur personam.

This is not the view taken even by the law of all countries whose law is founded on the common law. It has not apparently found favour in America. Story in his Conflict of Laws 6th Ed. at pps. 542-566 discusses the matter. He does not apparently contemplate a bankruptcy which does not, in its own country, effect an assignment: but he gives reasons both for and against the recognition by other countries of its extra-territorial effect as such. He justifies the rejection by the AmericanCourts of the foreign trustee's claim that the bankruptcy should be recognized as transferring to him the

bankrupt's movables within the jurisdiction of those Courts on two grounds. (pps. 550-2). One is that the assignment effected by bankruptcy being involuntary and by operation of law is not entitled to the same extra-territorial recognition as one effected voluntarily by the bankrupt himself. The other is that, since foreign laws are only recognized in the local forum by reason of the comity of nations, that comity must give way to any paramount rule of public policy of the forum. Foreign laws are only received so far as is not prejudicial to the State or to the just rights of its citizens. Quatenus sine prejudicio indulgentium fieri potest. But it would be prejudicial to the State and unjust to its citizens to regard the foreign assignment as transferring the property in the local movables to the foreign trustee and thereby depriving the local creditors of their right to attach those movables, and sending them instead for relief to the foreign administration. The result of these reasons is that the foreign trustee should not be placed in any better position than the bankrupt himself. He takes the local property subject to all equities good against the bankrupt and subject also to all remedies provided for creditors, at any rate for local creditors, by the local law. If he is allowed to sue for the bankrupt's debts, it is not as an assignee of the bankrupt's property but as the representative of the bankrupt. (See for a summary of the American theory In re Waite 99 N.Y. 433). The great practical difference between the theory of our law and that of Story is that in the one case, the local movables are protected against execution by the local creditors as the property in them has passed out of the bankrupt, and in the other case, they are not. This attitude bears considerable resemblance to the one adopted by continental countries when they recognize a foreign bankruptcy. They recognize it as a judgment against the bankrupt in favor of

his creditors and will, in the language of their law in a proper case, clothe it with an exequatur, in other words allow execution to be taken upon it in the local forum in order that the foreign trustee may get in the local property. This view of a foreign bankruptcy as a foreign judgment, rather than a foreign assignment, should not be forgotten as it has been, as we shall see, recently revived in the English Courts. It would seem however, that the continental Courts would go further and protect the local property from attachment at least by foreign creditors (See Westlake p. 165 and see Goirand French Code of Commerce at pps. 439-40). We should also note the analogy between Story's view of the position of a foreign trustee and our own view of the position of a foreign liquidator which last will be developed later.

I respectfully submit, however, that Story's principles are wrong in theory. Neither of his two reasons are, in my opinion, sufficient and his own arguments (pps. 542-5) refute him.

The distinction between voluntary and involuntary assignments should not have any juristic effect. It is true that an assignment under the bankruptcy laws is effected by operation of law but that should not disentitle it to extra-territorial effect unless it were the result of penal legislation which it is not, as Lord Loughborough points out in Sill v. Worswick 1 H. Bl. 665 at p. 690. If, as we shall see later, it is correct to say that in certain cases an assignment of movable property should be governed by the law of the domicil of its owner, then it can make no difference how that law achieves that result. It would not be valid to attempt to distinguish between the effect of testamentary succession according to the law of the last domicil of the deceased - i.e. by his voluntary act - and of intestate succession according to that law - i.e. by operation of law. The suggestion that a lesser extra-territorial effect should be attributed to the statutory assignment under the

bankruptcy than to a so-called voluntary assignment was emphatically negatived by Lord Loughborough in Sill v. Worswick 1 H. Bl. 665 at p. 690, by Lord Kenyon in Hunter v. Potts 4 T.R. p. 182 at p. 192 and by the majority of the Court of Exchequer Chamber in Phillips v. Hunter 2 H.Bl.402 at p. 405. Effect should not be denied to an assignment merely because it is in invitum unless it results from some penal or political law. And in my opinion Story's second reason is also invalid. While it is granted that the courts of one country will refuse to recognize the laws of another, if they interfere with the public policy of the first, the declaration of new heads of public policy is a matter for the Legislature, not for the Courts. (See Janson v. Driefontein Gold Mines 1902 A.C. 485 per Lord Halsbury L.C. at pps. 491-2). The American Courts seem firstly to hold that rights duly acquired under foreign laws are only enforced in America by international courtesy and that therefore they have a discretion to enforce them or not; secondly, that the local law relating to creditors exists specially for the benefit of local creditors as opposed to creditors generally. There are traces of both these ideas in the English cases but in my opinion they are opposed to the correct principles of private international law as applied in English law. (See Dicey pps. 9-10 and In re Kloebe 28 Ch. D. 175). Moreover, subject to any positive rule of the local law forbidding such a transaction a voluntary transfer by the owner in one country of his property in another might equally defeat the local creditors. In fact, these theories sin against the great principle of the bankruptcy law which is "justice founded on equality" (Phillips v. Hunter 2 H. Bl. 402 at p. 405). This is the result of denying the unity of bankruptcy. By refusing full

effect to a bankruptcy in the country of domicil they render necessary as many different bankruptcies as there are states in which the debtor has property in the interests of the general body of creditors, local as well as foreign, as opposed to the interests of particular creditors who may happen to first take proceedings and issue execution. The result will be that the bankrupt's property will be administered piecemeal according to different laws and different systems of administration and priorities, instead of being administered as one, according to one system of law, and with the costs of only one administration to pay, thereby affording the bankrupt a golden opportunity for fraud by transferring his property from one jurisdiction to another. We see something very like these theories in operation in the case of companies where as we shall see there must be a separate winding up in each jurisdiction with much resultant confusion and difficulty.

There are indications that at one time a view like Story's was entertained by the English Courts. Thus, for example in Mawdsley v. Parke (cited in the argument in Sill v. Worswick 1 H. Bl. 665 at p. 680) the Court had to decide between the title to a debt due to the bankrupt in one of the colonies of the English assignees of the bankrupt and that of a local creditor who had attached it in the colony after the bankruptcy. At that period it was not held that the English bankruptcy laws bound the colonies so that the Court had to decide the question purely as one of private international law. It was held that "the assignment did not divest the property out of the bankrupt as the debt was due in the plantations but only gave the assignees a right to sue for it; that the creditors there also had a right to sue for it, who having commenced a suit first and recovered judgment there ..... had gained a priority over the defendants" (the assignees) (per

Lord Camden at p. 681). Even at the date of this case, however, (1770) there were authorities in favor of the other view and the Court was driven to distinguish them on the ground that in those cases (which see later) there was reciprocity between England and the respective countries of the bankruptcy, but that since there were no bankruptcy laws in the colonies there could be no reciprocity in the case before it. I cannot think that this is a legal ground of distinction. It seems to be a political rather than a juristic consideration. I admit that it would be relevant according to the view of the nature of private international law taken by some systems of law, but it is opposed to the methods of reasoning habitually adopted by English Courts. It assumes that rights acquired under foreign laws are enforced here merely out of international courtesy whereas in fact they are enforced in a proper case in accordance with principles which form part of the law of this country. (See Dicey pps. 9-10). The authorities, however, are overwhelming that a foreign bankruptcy is given effect to here as an assignment transferring the property in the local movables from the bankruptcy to the trustee and therefore removing it from the reach of execution or attachment. (It is also the view of Dicey, p. 479 and Westlake, pps. 166-7.)

In Solomon v. Ross 1 H. Bl. 131 (n) 1764 the facts were that the debtors who were apparently domiciled in Holland were declared bankrupt by the proper Court there and the curators of desolate estates were appointed curators of their property. The defendant, a creditor, attached certain moneys in the hands of one S a debtor of the bankrupt who gave him his note for £1200 the amount of his debt. Then the plaintiff, the attorney of the Dutch curators, filed a bill in the Court of Chancery asking that S should account to the curators for the £1200 and be restrained from paying it to the defendant. S

paid the £1200 into Court. The Court ordered that the money should be paid to the plaintiff on behalf of the curators and the note from S to the defendant was cancelled.

In Folliot v. Ogden 1 H. Bl. 132 Lord Loughborough said that he was counsel in the case of Solomon v. Ross "which was decided solely on the principle that the assignment of the bankrupt's effects to the curators of desolate estates in Holland was an assignment for valuable consideration and therefore acknowledged in this country agreeable to Captain Wilson's case in the House of Lords."

In Neal v. Cottingham 1 H Bl. 133 n (1764) a decision of the Lord Chancellor of Ireland and in Jollett v. Deponthieu 1 H Bl. 132 n (1769) a decision of Lord Chancellor Camden the facts were much the same; creditors seeking to attack the property of the debtor in the country of the forum where the particular case was decided after the bankruptcy abroad, were restrained from so doing, or if they had succeeded in collecting their debt they were ordered to repay it to the foreign trustee. The grounds of the judgments do not appear but there is a significant note in the latter case to the effect that it appeared that by the law of Holland the country of the bankruptcy, the bankrupt's effects vested in the curator only from the time of their being appointed, and not by relation to the time of the committing the act of bankruptcy. (The problems raised by the order in which the various events in some of these cases occurred will be dealt with later.)

If, then, in certain cases, a foreign bankruptcy will be treated as an assignment of property in Australia, what foreign bankruptcies will be so treated and what property in Australia will they assign? This bring us to the consideration of a venerable maxim of international law which though it has met with scant favour from some writers, still has, in my

opinion a powerful influence. This is the maxim mobilia sequuntur personam. This means that movable property is governed by the law which governs the person of its owner. The legal fiction implied in this maxim may be either that movable property has no locality in the eyes of the law or that it is deemed to be situate in the country the law of which governs the person of the owner. These fictions are only fictions: and must not be regarded as extending generally to all cases where the position of movable property in private international law has to be considered. For certain purposes, corporeal moveable property has always been regarded as legally situated in the place where it is actually situated and even incorporeal property for these purposes has been given a local habitation, choses in action for example being regarded as being situate in the place where they can properly be enforced. (See New York Life Insurance Co. v1 Public Trustee 1924 2 Ch. 101 per Pollock M.R. at p. 109) It is, in my opinion, an erroneous deduction to draw from the maxim mobilia sequuntur personam that movable property in general or choses in action in particular are always to be regarded as having no locality in contemplation of law. (See Dicey note 29 p. 942). It is better to disregard these supposed legal fictions and to say that for certain purposes movable property wherever situate legally or physically is to be governed by the law governing the person of its owner.

According to English law as it stands at the present day, the law of the person is the law of his domicil. It is that law which regulates his capacity and his civil status. Some countries adopt the criterion of nationality instead of that of domicil and there are indicia in some of the earlier cases which might lead to the conclusion that English law would follow that course also. But it is indisputable at the present day that according to English law the

personal rights of a party depend upon the law of his domicil (See per Lord Westbury in Udny v. Udny L.R. 1 Sc. App. 441 at p. 457). The maxim mobilia sequuntur personam then means according to English law that movable property is governed by the law of its owner's domicil. My opinion is that this maxim applies to the recognition of foreign bankruptcies and that an assignment of a bankrupt's property under a foreign bankruptcy to the foreign trustee passes the movables of the bankrupt situate in Australia when and only when the bankrupt is domiciled in the country of the bankruptcy at the time of the bankruptcy, because the Australian movables are then governed by the law of the owner's domicil. I hope to show that the earlier cases prove that the recognition of a foreign bankruptcy as an assignment is founded on this ground, and only on this ground and that although some of the later cases may be inconsistent with this principle they are to this extent, wrongly decided and are only decisions of single judges which are moreover not formally binding on an Australian Court, so that the question may still be regarded as open. Immovable property I will deal with later. This theory necessitates careful examination of the cases which I will deal with in chronological order.

Firstly, then, came cases in which the English Courts were considering the position of creditors of the bankrupt who attached property of the bankrupt abroad after an English bankruptcy. The actual decisions in these cases I will deal with later, but there are dicta on the effect which ought to be attributed abroad to an English bankruptcy which throw light on the question now before us as the English statutes then in force did not contain any arbitrary rules to prevent the Courts from applying the ordinary rules of international law as understood by them.

"It is a clear proposition" said Lord Loughborough in Sill v. Worswick 1 H Bl. 665 at p. 690 "not only of the law of England but of every country in the world where law has the semblance of science that personal property has no locality. The meaning of that is, not that personal property has no visible locality but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, it follows the law of the person ..... Personal property, then, being governed by the law which governs the person of the owner the condition of a bankrupt by the law of this country, is that the law upon the act of bankruptcy being committed vests his property upon a just consideration, not as a forfeiture not on a supposition of a crime committed, not as a penalty and takes the administration of it by vesting it in assignees who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignee. The determination of the Courts of this country have been uniform to admit the title of foreign assignees."

This passage is a clear recognition of the principle mobilia sequuntur personam and expressly states that the title of the assignees to the personal property outside the country of the bankruptcy ought to be recognised because that property has been assigned from the bankrupt to the assignees by the law of the country which governs the person of the bankrupt. For "personal property", we must now read "movable property".

Lord Kenyon said in delivering the judgment of the Court of Kings Bench (affirmed in the Court of Exchequer Chamber) in Hunter v. Potts 4 T.R.182 at p. 192: "Generally speaking

it must be admitted that personal property must be governed by the law of that country where the owner is domiciled" and goes on to draw the conclusion that the movable property of an English bankrupt situated outside England had passed to the English assignees, unless there were a positive law of the situs of the property to prevent it.

The same learned Judge said in Smith v. Buchanan 1 East 6 at p. 11:

> "It is true that we so far give effect to foreign laws "of bankruptcy as that assignees are permitted to sue "here for debts due to the bankrupt estates, but that is "because the right to personal property must be governed "by the law of the country where the owner is domiciled."

These are merely obiter dicta. I will now deal with the leading case on the subject, the decision of the Court of Session in Royal Bank of Scotland v. Cuthbert 1813 1 Rose 462 (generally known as Stein's case) which has been favourably commented on in the House of Lords and which has been quoted and acted upon in English and Australian Courts.

In this case, two traders called Stein were resident and apparently domiciled in Scotland. They were in partnership with three other traders who resided in London and the partnership carried on business in London and Edinburgh under different styles in each capital. The two Scotch Steins withdrew into England and procured a commission of bankruptcy to issue against themselves and as a result of this executed a conveyance of all their property to the assignees in bankruptcy the defendants. The plaintiff bank had already begun proceedings in Scotland against them and now applied for a sequestration, (the Scottish equivalent of bankruptcy).

The learned Judges were not all agreed in their reasons but they all held that no sequestration could issue but that all the Scottish movables had vested in the defendants the English assignees. They also held that in similar circumstances a Scotch sequestration would prevent an English

commission of bankruptcy from issuing if the sequestration had had priority. They held (dubitante Lord Bannantyne) that the English commission passed not only the joint estate of the partnership in Scotland but the separate property of the Scotch traders. They also held that though the English commission of bankruptcy could not directly pass the Scotch immovables, yet the bankrupts were under a legal obligation to execute a conveyance of them in proper Scotch form to the assignees. This last finding was afterwards overruled by the House of Lords (See Selkrig v. Davis Rose 291 2 Dow . 230). Lord Craigie thought that the sequestration should have been awarded in the first place, leaving the effect of it to be determined afterwards and as we have seen, this would have been the course followed by an English Court in similar circumstances.

What was the ratio de cidendi of the main part of the decision that concerns us, namely that the Scotch movables vested in the English assignees? Westlake p. 179 suggests that the case depended on Imperial Legislation and this, of course, would place a very different complexion on the matter. The Lord Justice Clerk does indeed refer to some statutes of the Imperial Parliament, p. 486, but the other Judges do not seem to base their decision on this ground and Lord Robertson at p. 478 and Lord Bannantyne at p. 482 in particular distinctly base their judgments on the ground of domicil.

Now, the first point to be noted is that according to Scotch law a trader, at any rate a trading partnership, can have more than one domicil and apparently a firm can have a domicil as such. (I) This is laid down by Lord Robertson and Lord Ballantyne The partnership here therefore had two domicils, one in London and one in Edinburgh. Therefore, there was no way of choosing

(I) And see per Lord President Inglis in Phosphate Sewage Company v. Lawson & Sons Trustees 1878 5 Rettie 1125 at p.1138).

between the bankruptcy in one domicil and the bankruptcy in the other except by the priority in order of time. The maxim mobilia sequuntur personam applied to an assignment either under the law of England or the law of Scotland since the persons of the bankrupts were governed by both laws. The English assignment therefore being first, passed all the movables of the bankrupt wherever situate. It is not certain whether under English law a man (or a partnership which is not separate entity and cannot according to English law have a domicil as such) can have more than one domicil. Dicey is of the opinion that he cannot (p. 88) and this is probably correct. (See per Hatherley L.C. in Udny v. Udny L.R. 1 Sc. App. 441 at p. 448). There is a loose use of the term "commercial domicil" which is sometimes used to mean not domicil at all but merely residence which attaches certain legal consequences to it. It appears, however, from the Scotch authorities I have cited that the trading domicil mentioned therein is in Scotch law a true domicil, not a mere residence, for some purposes at least, and that a firm can have such a domicil and more than one of such domicils. Assuming this, I now quote the judgment of Lord Bannantyne at p. 482.

> "As they (the English and Scottish firms) had a domicil "in both countries they were equally liable to the "operation of the bankrupt laws in the one country and "in the other; that being the case, how can the line "be drawn? Whoever is entitled to the benefit of these "laws has his option to take the benefit of the one or of "the other. But if he take the benefit of the English "commission he cannot take the benefit of the sequestra- "tion and if he take the benefit of the sequestration "there can be no commission. It is a maxim of universal "law that movables follow the person and therefore it is "clear that these must be carried either by the seques- "tration or the commission according as the one or the "other is first issued. Suppose a sequestration were "issued against a man not domiciled in Scotland: this "cannot receive effect in England. In the same manner, "although a commission of bankruptcy was ever so fairly "obtained; yet if it be produced here and we are satis- "fied that the party is not domiciled in England but in "Scotland I should hold in that case that we are not "bound to give effect to the commission."

There is no doubt that the last two sentences correctly state the law of Scotland at the present day, subject

of course to subsequent statutory alteration.(I) Is the principle of international law which they state also valid according to English law?

The next case is Selkrig v. Davis 2 Rose 291 2 Dow 230. This was a decision of the House of Lords on appeal from the Court of Session. The facts were much the same as in Stein's case and an English commission of bankruptcy was held to prevail over the title of a Scotch creditor who had arrested according to Scotch law, certain shares of the bankrupt. Lord Eldon said that the Court of Session in Stein's case were wrong if they were of opinion that there was any legal obligation on the bankrupt according to English law to execute a conveyance of his foreign land to the English assignees. The English bankruptcy did not affect the Scotch immovables. He seemed to approve of Stein's case on the main point and referred to "the very able and learned exposition of the law therein" (2 Dow p. 245). Unfortunately, the reasons for the decision on that point are not clearly given.

In re Blithman L.R. 2 Eq. 23 was a case where a person who had a reversionary interest in a trust fund of personalty in England became insolvent in South Australia. The property fell into possession but before it was paid over the insolvent died. Lord Romilly M.R. held that if the insolvent were domiciled in South Australia the assignees under the insolvency were entitled to the fund but that if the domicil were English the executrix who had proved in England was entitled to it and that the assignees in order to obtain it must

(I) See per Lord President Inglis in Phosphate Sewage Company v. Lawson and Sons Trustee 5 Rettie 1125 at p.1138 (affirmed on another point by the House of Lords 4 A.C. 801): "The great principle that mpvables follow the law of the owner's domicil is not more firmly settled in the case of intestate succession than it is in the case of bankruptcy" but see also Araya v. Coghill 1921 S.C. 462 where however the point was not argued. See per Lord Skerrington at p. 467.

sue the executrix. He, therefore, directed an enquity as to domicil. He said at p. 26 "I am of opinion ..... that this is a question of domicil and depends on domicil alone and that if (the insolvent) was a domiciled Australian at the time then that this property passed to the assignees but that if he was not then it passes to his legal personal representative and she is the person entitled to receive it." This is the first case in which the suggestion appears that the effect of a foreign bankruptcy can be equated with the effect of a foreign judgment. It may well be that a bankruptcy not in the country of domicil if it fulfils the conditions necessary to entitle a party to sue in England on a foreign judgment may have a somewhat similar effect and Lord Romilly was disposed to assent to thisproposition. But he distinctly holds that if the domicil was not in South Australia the English assets did not pass to the South Australian assignee at the date of the bankruptcy, in other words the bankruptcy was not an assignment. The effect of it as a foreign judgment, as he pointed out, would be very different: a judgment would have to be recovered on it in England and questions of priority and of other judgments and other claims on the assets would have to be considered. It is, I think, a fair deduction from this case that a bankruptcy not in the country of domicil has no effect on the Australian assets until, if at all, a judgment has been recovered on it in Australia.

The next case is a decision of the Full Court of Queensland. Harris v. Russell 2 Qsld. S.C.R. p. 17 (1868). Here, one R who was domiciled in Queensland had his estate sequestrated in New South Wales, a creditor obtained judgment against R in Queensland and proceeded to levy execution on the goods of R in Queensland. The Official Assignee in New

South Wales of his property claimed the goods and it was held that the creditor H was entitled to them in priority to the Official Assignee. The Court followed Stein's case and In re Blithman. They agreed that where the bankrupt was domiciled in the country of the bankruptcy then on the principle mobilia sequuntur personam that country had a right to take and distribute the movables of the bankrupt wherever situate. Lutwyche J. who delivered the judgment of the Court said, at p. 18: "I have searched in vain and I do not believe that any case can be found where the English Courts have interfered to assist the creditors claiming under a commission of bankruptcy or what was equivalent to it in a foreign country unless the bankrupt was domiciled there." This is a clear decision to the effect that the property of the bankrupt will not be deemed to pass to his trustee if the bankruptcy occurs in a country in which he is not domiciled.

In Buisson v. Warburton 4 AustralianJurist Reports 119 (1873) where a plaintiff sued in Victoria on a claim for salvage, who had been made insolvent in N.S.W. which was not the law of his domicil, it was argued that his right to sue had passed to the N.S.W. assignee, but Barry J. said at p. 120 "If a man is not domiciled in a country, a statutory assignment under the laws of that country does not pass debts which are nullius loci".

In re Davidson Settlement Trusts L.R. 15 Eq. 383 is the first case where a trustee in a bankruptcy not in the country of domicil was held entitled to property in England. In that case D who was entitled to a share in a fund which had been paid into Court was adjudicated insolvent in Queensland on his own petition and later died in England. The Queensland assignee claimed the fund. It was held by James

L.J. (who was acting for the Vice Chancellor) that he was entitled to it without considering the question of the domicil of the bankrupt at the date of the bankruptcy. "It seems to me," he said at p. 385 "that proceedings under the insolvency in Queensland cannot be disputed by the representative of the insolvent who became insolvent on his own petition and who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a larger amount than the sum in Court will provide for." The personal representatives, he said, were only entitled to the surplus in the fund after the debts were paid. It was not considered necessary to consider the exact principle of the decision in In re Blithman. This is the first case in which the consent of the bankrupt to the jurisdiction played an important part and in which bankruptcy was viewed as a judgment and given the effect of an assignment. This case was followed in In re Lawson's Trusts 1896 1 Ch. 175 where a fund in Court was remitted to an Indian assignee but there was no argument in this case and the property would vest in any event in the Indian assignee under the Imperial Act of 1848.

In re Artola Hermanos 24 Q.B.D. 640 was a case in which a firm was declared bankrupt in France and a petition was also presented in England. The French syndic opposed the making of an English adjudication. There was no evidence as to the domicil of the members of the firm. As we have seen a foreign bankruptcy is no bar to an English adjudication although there may possibly be no assets in England for that adjudication to operate upon. We have also seen that the Court where it has the power to make an adjudication has also a discretion. It came to the conclusion in that case

that it would not exercize its discretion to stay the English proceedings because of a prior foreign bankruptcy which was not shown to be a bankruptcy in the country of the bankrupt's domicil. Lord Coleridge C.J. said that since Stein's case had been recognized in the House of Lords the Court was justified in relying upon its principles (p. 645) and both judges (Lord Coleridge C.J. and Fry L.J.) seemed to think that that case was decided entirely on the question of domicil. Counsel for the syndic had contended that the forum of the country which first makes an adjudication has a right to claim the assets of the bankrupt all over the world. That contention was rejected by both Judges and the following dictum of Fry L.J. shows clearly the difference between a bankruptcy in the country of domicil and one elsewhere: (p.649).

> "There is this broad difference between yielding to the "forum of the domicil and yielding to the forum of the "first country which happens to pronounce a man bankrupt: "personal property is said to follow the person and from "that the forum of domicil has by what has sometimes been "called a fiction of law, a right by judgment against a "bankrupt to divest him of all personal property and vest "it in his assignee and by the fiction to which I have "referred that judgment pronounced by the forum of the "domicil is said to have universal validity and to be "capable of transferring personal property locally situate "beyond the jurisdiction of that forum. The forum not of "the domicil but of the country in which the debtor may "have assets has no such right to claim universal obedience "to its judgment: it has no right to pronounce a judgment "which will extend beyond the personal assets locally "situate within its jurisdiction".

In In re Hayward 1897 1 Ch. 905 the life interest of a domiciled Englishman determinable on bankruptcy or alienation was held by Kekewich J. not to be forfeited by an adjudication of bankruptcy in New Zealand. The learned Judge purported to follow Blithman's case and cited with approval Westlake 3rd Ed. Sect. 134: he appears to have been of the opinion that a bankruptcy in the country of the domicil was necessary but he did not definitely disapprove of Davidson's case because in Hayward's case the adjudication was made against the bankrupt after he had left New Zealand and behind his back; there was no consent

to the jurisdiction. This case is therefore not very helpful.

Next, I must mention two cases decided by the High Court of Australia, though neither throw much light on the matter. The first, A.M.P. Society v. Gregory 5 C.L.R. 615, was a case where a share in the proceeds of real estate in Tasmania was held to be an immovable but the Court stated that even if it was a movable it only passed to the trustee in the foreign bankruptcy of the person entitled to it subject to his compliance with the Tasmanian law as to notice of assignment etc. No point as to domicil of the bankrupt was raised but it appears from the judgment of Isaacs J. (pps. 642-3) that he was domiciled in the country of the bankruptcy. In the later case, Hall v. Woolf 7 C.L.R. 207 the bankruptcy occurred in Queensland, but it was not certain that the bankrupt was domiciled there. By Queensland law, the bankruptcy acted as an assignement of the bankrupt's after acquired property wherever situate. After the bankruptcy the bankrupt ceased to be domiciled in Queensland (if he ever was so domiciled) and it was held that his after acquired movables situated in Western Australia did not under the rules of private international law pass to the Queensland trustee. The rule was stated byGriffiths C.J. at p. 210 to be that "the assignment of a bankrupt's property to the representatives of his creditors under the law of a country which has jurisdiction over his person operates as an assignment of the movables of the bankrupt wherever situate." The Court assumed that even if the bankrupt was not domiciled in Queensland at the time of the bankruptcy his voluntary submission to the jurisdiction of the Queensland Court was sufficient to bring that rule into operation. This was only an assumption on the part of the Court for the purposes of the case and it does not appear that they were of opinion that it was necessarily correct. The actual decision appears to be rather against the correctness of this assumption for if the voluntary submission to the juris-

diction gave the Queensland Court power to make an adjudication which passed movables situated outside Queensland, the property of the bankrupt at the time of the adjudication, even though the bankrupt was not domiciled there, surely that voluntary submission could also give the Queensland Court power to pass by its adjudication movables situate outside Queensland which he might afterwards acquire. It is submitted that the true ratio decidendi of the decision is to be found in the judgment of Griffiths C.J. at p. 211:

> "It is ..... quite clear that as soon as the debtor "ceases to be domiciled in the country of adjudication "the law of that country ceases to have any application "to his after acquired movables situate elsewhere."

Surely this decision is nothing but an application of the maxim mobilia sequuntur personam and is incompatible with a bankruptcy not in the country of domicil acting as an assignment of movables situated outside the country of bankruptcy.

The case of In re Anderson 1911 1 K.B. 896 is the case in which the change of opinion clearly and definitely appears. There, the bankrupt who was domiciled in England and was entitled to a reversionary interest in a trust fund in England was adjudicated bankrupt in New Zealand. He did not consent to that adjudication but appeared by his solicitor on the hearing and afterwards applied in New Zealand for his discharge. The bankrupt later returned to England and was adjudicated bankrupt there. By an oversight, the existence of the reversionary interest had not been disclosed in the New Zealand bankruptcy but it was discovered by the English trustee who gave notice of the English bankruptcy to the trustee of the fund. It was held, however, by Phillimore J, that the official assignee in New Zealand was entitled as against the English trustee in bankruptcy to the reversionary interest. The learned Judge begins by pointing out that Sir Robert Phillimore in his commentaries on international law had suggested that for the purposes of bank-

ruptcy a commercial domicil as distinct from the full domicil ordinarily required might suffice. He merely notes this suggestion without making it any ground for his decision. It would seem, however, that English law does not recognize any other domicil than the full domicil as ordinarily understood at least for the purpose of attracting the maxim mobilia sequuntur personam. Commercial domicil as used laxly only means residence, (See Dicey p. 89). This suggestion is not borne out by any of the previous English authorities. (I have already pointed out the difference between the English and Scotch law on this point) Phillimore J. then proceeds to distinguish the authorities. He explains Blithman's case and Hayward's case by saying that in those cases all that was decided was that the debtor or his representatives were entitled as against the foreign trustee to payment of the fund, "though (at p. 901) in each of these cases all, or at any rate, all subject to charges, of the money must ultimately go over to the foreign ..... trustee"! All that Lord Romilly decided according to the learned Judge was that the foreign trustees in Blithman's case "had not that clean and perfect title which entitled them to receive the money out of Court or which deprived the legal personal representative of the right to receive the money and satisfy prior encumbrances, if there were any, paying at any rate, her costs and testamentary expenses and duties before the balance was taken by the foreign assignees in bankruptcy. The judgment carefully avoids deciding that the balance will not go to the foreign assignees in bankruptcy."(p.901) I do not agree, with all due respect, that this is an altogether accurate rendering of Lord Romilly's judgment, but even assuming that it is, it is still clear that Lord Romilly decided that the foreign

bankruptcy in a country not the country of domicil did not act as an assignment of the English movables to the foreign trustee, otherwise, of course, the executrix would have had no title to the fund as it would not have been part of the property of the deceased. Phillimore J. seems to admit the validity of this distinction between the effect in England of an assignment under a bankruptcy in the country of the domicil, and one not in the country of domicil, for after referring to the kind of judgment which in continental Courts requires "homologation" before it receives full effect, he says at p. 902:

> "Something of the same kind may apply in the case of all "foreign bankruptcies, or at any rate of foreign "bankruptcies where the debtor is not domiciled in the "country where he is made bankrupt. The title is not as "perfect or at any rate as direct as it would be in the "case of an English bankruptcy, and on that ground it "may be that In re Blithman and In re Hayward are "rightly decided."

Even then, on the learned Judge's own rendering of the previous decisions, I cannot see how the conclusion at which he arrives is justified, for he seems to admit that a foreign bankruptcy not in the country of domicil will not act as an assignment of the bankrupt's English movables in itself, but requires something further to be done. That conclusion is. (p/ 902):

> "Therefore, I think on principle and authority that the "adjudication in New Zealand being a valid adjudication "according to the law of New Zealand passed the right to "movable property of the bankrupt in any country to his "official assignee in bankruptcy in New Zealand. If he "had not been a party to the adjudication if it had been "made against him in his absence, other considerations "might very well have applied but he certainly was a "party to the adjudication though he did not invoke it."

If these words mean that the New Zealand adjudication acted as an assignment of the movables in England to the New Zealand trustee, then the conclusion of the learned Judge seems to me to be contrary to the principles which he himself enunciated earlier in the judgment when considering the effect of Blithman's case, and to be in direct conflict with that case.

Finally, Phillimore J. held that the adjudication passed the fund in question to the New Zealand official assignee, subject, of course, to any positive rule of English law governing the transfer of particular property. The fact that notice was not given to the trustees of the fund might have rendered the New Zealand assignee's title subject to that of any subsequent assignee or encumbrancer for value without notice of his title, who gave notice to the trustees of the fund, but the giving of notice by the English trustee in bankruptcy could not make his title better than that of the New Zealand assignee because he stood in the place of the bankrupt himself and could not assert any title which the bankrupt could not have set up. There seems no reason to differ from this conclusion.

Anderson's case has been followed three times in England. In In re Craig 86 L.J. Ch. 62, the adjudication took place in Western Australia by the law of which country it passed all the movable property of the bankrupt wherever situate to the Western Australian trustee. That trustee assigned the reversionary interest of the bankrupt in a fund in the Court of Chancery and the assignees presented a petition for the payment out of the fund. It was held that they were entitled to it irrespective of the domicil of the bankrupt at the date of the bankruptcy. There was no opposition to the petition and Eve J. merely followed Anderson's case. In In re Burke 148 L.T. Journal 175, a domiciled Englishman went to reside in Algiers and presented a bankruptcy petition to the Algerian Court but died before the matter could be decided. After his death, the Algerian Court declared him bankrupt and appointed one A as his syndic the order of that Court purporting to vest in the syndic all the assets of the bankrupt wherever situate including after

acquired property. In the meantime, a creditor had taken out Letters of Administration to the deceased in England. It was held that a bankruptcy order having been made by a Court of competent jurisdiction the French syndic was entitledto the whole of the assets wheresoever situate which must be handed over to him after deducting the costs of the administration proceedings. Anderson's case and Craig's case were followed. In so far as this case recognises that an assignment under a bankruptcy not in the country of domicil can pass after acquired property situated outside the country of the bankruptcy ,it would seem to be in conflict with Hall v. Woolf above. The report, however, is very meagre. In Bergerem v. Marsh 125 L.T. 630, a domiciled Englishman, the defendant, was adjudicated bankrupt in Belgium where he had resided for some months where he was carrying on business and was a member of a partnership. The Belgian adjudication comprised the partnership and all its members. In accordance with Belgian procedure, the decree was pronounced in the defendant's absence but he was subsequently notified of it and appeared to show cause why it should be set aside. It was, however, affirmed. The plaintiff, the Belgian trustee, asked for a declaration that all the defendant's assets in England were vested in him as trustee. The Court (Bailache J.) held that the decree of the Belgian Court was valid inasmuch as the defendant had submitted to the jurisdiction that the proceedings were not contrary to natural justice and that following Anderson's case, Craig's case and Burke's case, there should be a declaration as asked that the plaintiff was entitled to all the movable assets of the defendant and the appointment of a receiver. These three cases all ground themselves on Anderson's case and must stand or fall by it, with the possible exception of the last , as I shall show later.

Thus, on the one hand we have authority to show that

an assignment under the bankruptcy law of a foreign country of the bankrupt's property to the representative of his creditors only operates as an assignment of his movables in Australia when the bankrupt was domiciled in the country of the bankruptcy at the date of the bankruptcy: on the other hand, there is authority to show that it also operates to assign the bankrupt's movables in Australia whenever the bankrupt has in some way submitted to the jurisdiction of the foreign Court pronouncing the adjudication. On the one hand we have the decision of the Court of Session afterwards approved in the House of Lords, the dicta of the learned Judges of the Court of Appeal, the decision of the Full Court of Queensland, of a Judge of the Victorian Supreme Court and of Romilly M.R. and Kekewich J. On the other, we have five decisions of single judges (since Lawson's case cannot be regarded as an authority) together with the opinions of Dicey (p.479) and Westlake (p.173). The hesitation which must naturally be felt in disagreeing with these last two writers has led me to make a somewhat lengthy exposition of the cases but I am of the opinion that the first alternative is correct. A foreign bankruptcy such as we have been considering may be viewed in two ways: as an assignment of the bankrupt's property to the foreign trustee: or as the judgment of a foreign Court. It obviously may be both, but it is as an assignment that it has an extra territorial effect ex proprio vigore. Thus, an assignment by deed by a person in the country of his domicil according to that country's law of all his property to a trustee for the benefit of his creditors without any proceedings in the foreign Court at all will pass his movables here to the trustee, even though it is not in accordance with the law of this country, provided, of course, that no positive law of this country forbids its recognition. (See Dulaney v. Merry & Sons 1901 1 K.B.

536). We must eliminate the curial element if we are to appreciate the way in which an assignment under a foreign bankruptcy has been treated in English law, and look at the matter purely and simply as an assignment. The law as to the assignment of movables in international law is not very definite, (See above under acts of bankruptcy) and the maxim mobilia sequuntur personam has not always been applied in the later cases, but it still applies to the case of the universal assignments such as death, marriage, and according to the authorities I have cited, bankruptcy also, when a man's property is dealt with as a whole and therefore seems to be more naturally and closely connected with his person than in the case of the transfer of an individual asset. (See Westlake pps. 190-193 and see Hockey v. Mother of Gold Consolidated Mines Ltd. 9 A.L.R. 163). It is overwhelmingly clear that a universal assignment of movables made in the country of the domicil of the transferor will be governed by that law. (See Dulaney v. Merry & Son 1901 1 K.B. 536 and as to even an individual assignment see In re Anziani 1930 1 Ch. 407). At any rate, the early cases I have cited show that the bankruptcy in one country is recognised as passing property in another as an application of the maxim mobilia sequuntur personam. The decisions are expressly put upon that ground. Suppose a person with property in Australia who is domiciled, say in France presents a petition and is adjudicated bankrupt in a third country, say Italy! Under the Italian law, all his movables are regarded as passing to the Italian trustee. The French law, the law of the domicil, does not recognize the Italian bankruptcy and does not regard it as having any extra territorial effect. Are we to hold that the Australian movables pass to the Italian trustee? If the later cases are rightly decided we must, because the bankrupt has consented to the Italian jurisdiction. It would be an extraordinary thing for an

assignment of movables to be recognised here which is in accordance neither with the law of the owner's domicil nor with the law of the situs of the assets. I cannot find any principle before the recent cases by which an assignment under a foreign bankruptcy can be held or has ever been held in English law to pass movables outside the country of the bankruptcy except the principle mobilia sequuntur personam.

It is suggested that the later cases have been confused by the analogy of a judgment in personam of a foreign Court. Such judgments may be sued upon here if the foreign Court is regarded as competent according to the rules of private international law prevailing in our law. The judgment of a foreign Court of competent jurisdiction imposes upon the defendant a duty to obey it which duty can be enforced by action here. (See Schibsby v. Westenholtz L.R. 6 Q.B. 155 at p. 159). One of the factors which may make a foreign Court a Court of competent jurisdiction within the meaning of this rule is the submission of the party to the foreign jurisdiction, either by himself instituting the proceedings there or by voluntarily appearing in those proceedings. Now, an adjudication in bankruptcy such as we have been discussing may be a judgment in personam, inasmuch as it imposes certain obligations on the bankrupt, but it is obviously very much more. It is also a judgment in rem. Not only does it affect the bankrupt's status, it purports to effect a transfer of the title to property both within and without the jurisdiction of the Court pronouncing it. The circumstances which we regard as giving a foreign Court power to pronounce a judgment in personam, in other words, to bind the person of the defendant, are not the same as those which we regard as giving it power to pronounce a judgment in rem which is binding upon the world. It has been held that in some cases consent of all parties will not give jurisdiction to a foreign Court to pronounce a judgment in rem which that Court would not according to our law otherwise possess. (See Slater v. Slater 1928 S.A.S.R. 161).

This is not tosay that an adjudication of bankruptcy in a country not the country of domicil may not have effect here as a foreign judgment in personam if the Court of the foreign country is a court of competent jurisdiction. I most readily agree that it might: my contention is that it would not have effect here as an assignment of movables here. It certainly would not lie in the mouth of the bankrupt who had invoked or consented to the jurisdiction of the foreign Court to deny the consequences of that judgment of that Court. But that is no reason for holding that a bankruptcy not in the country of domicil can transfer the bankrupt's movables here, so as to deprive creditors of their remedies against them. It would, in my opinion, be undesirable that a domiciled Australian should have the right to take his Australian movable property out of the reach of the remedies given by the Australian law by going out of Australia and invoking the jurisdiction of a foreign bankruptcy Court. I think that Blithman's case rightly understood holds the key to the situation. The suggestion of Lord Romilly there is the true one, the assignment to the foreign trustee in the bankruptcy of the country of domicil is the only one (subject to a possible exception to be noticed later) which is also an assignment of the bankrupt's movables in Australia: if an adjudication occurs in a country which is not the country of domicil and which purports to assign all his movables to the trustee, that cannot take effect as anassignment ofmovables here but if the foreign Court pronouncing the adjudication is a Court of competent jurisdiction, inthe circumstances, according to our law, it will be a valid foreign judgment in personam against the bankrupt upon which the foreign trustee may sue him. This was more or less what was done in Bergerem v. Marsh and the case may possibly be supported on that ground. If he recovers judgment here, the order of the Court will no doubt be that the bankrupt's movables (and possibly his immovables; see later) be transferred

to the trustee, but they will, of course, be transferred to him subject to all rights duly acquired over them at that time: if the adjudication had acted as an assignment it would have passed them to the trustee at the date of the order of the foreign Court vesting the property in him. I am respectfully of opinion then that both on principle and authority the decisions in Davidson's case and Anderson's case and the cases which followed the latter are wrong: on principle because the only reason why assignments under the bankruptcy laws of foreign countries have been recognized as passing movables here is the maxim mobilia sequuntur personam which cannot apply in these cases: on authority, because I think that they are contrary to the earlier decisions and earlier dicta of Courts of both equal and superior authority.

One exception to the rule as I have formulated it may be mentioned. An assignment of a bankrupt's property to a trustee under the bankruptcy law of a foreign country which is not the country of his domicil may operate as an assignment of movables, in Australia, to the foreign trustee if the law of the domicil recognises it as having an extra territorial effect. If a man domiciled in France is adjudicated bankrupt in Italy and according to the Italian law the adjudication passes all the movables of the bankrupt to the Italian trustee and the French law recognises the Italian adjudication as having such an effect, the movables in Australia will pass to the Italian trustee. This is merely another application of the maxim mobilia sequuntur personam, because, according to the law governing the person of the owner, i.e. the law of his domicil, all his movables have been validly assigned.(I)

(I) I assume throughout this thesis that Australian Courts adopt the doctrine of the renvoi, i.e. that when they apply the law of another country to a particular topic they apply the whole of the law of that country including the rules of private international law adopted there. (See re Annesley 1926 Ch.D. 692). (In re Ross 1930 1 Ch.377).

It might be attempted to reconcile all the cases (since in Anderson's case and the succeeding ones/the bankrupt was apparently domiciled in England) by saying that in the case of a man domiciled in Australia, the Australian law, the law of the domicil, will recognize an assignment of his movables under the bankruptcy law of a country to the jurisdiction of whose Courts he has consented as passing all his movables so the maxim mobilia sequuntur personam still applies and Anderson's case is on that ground rightly decided. That would be directly contrary to the earlier decisions, particularly Harris v. Russell and In re Blithman and I have already given my reasons for preferring them as authorities.

If I am wrong in the opinions I have just expressed, and Anderson's case is rightly decided, it might be pointed out that the only cases in which an assignment under the bankruptcy law of a foreign country not the country of domicil would pass Australian movables would be where the bankrupt had consented to the jurisdiction of the foreign Court either by initiating the bankruptcy proceedings there or by appearing in those proceedings, (See the cases I have quoted above) and possibly in any other circumstances when the foreign Court was according to our rules competent to give a judgment in personam against him, namely, if he was resident or even present in the foreign country when the proceedings were begun or if he were a subject of that country. (See Schibsley v. WesenholtzL.R. 6 Q.B. 155 Rousillon v. Rousillon 14 Ch. D. 351, Sirdar Gurdyal Singh v. Rajah of Faridkote 1894 A.C. 670). The last test is inapplicable to British Courts as there cannot be a local English or Australian as distinct from British allegiance to found jurisdiction. (See Gibson & Co. v. Gibson 1913 3 K.B. 379).

It need hardly be pointed out that/if my opinion is correct the bankrupt must have been domiciled in the foreign country at the time of the bankruptcy.

Of course an assignment of property under a bankruptcy taking place in a country not the country of domicil will be recognised here as assigning the property in such country so far as the question can ever arise in an Australian Court.

I have already mentioned that a debtor may under certain systems of law assign his property to a representative of his creditors by a simple deed or other document. Such assignments bear an obvious analogy to an actual bankruptcy administration. They invoke a collection and a distribution of property a cessio bonorum and a concursus of creditors. The only difference is that they do not require the active intervention of a Court.

If a man executes such a deed in the country of his domicil which is valid according to the law of his domicil his movables in Australia will pass to the foreign trustee (See Dulaney v. Merry & Son 1901 1 K.B. 536) even though the deed is not in accordance with the law of Australia or of the particular State where the movables are situate unless there is some positive rule of Australian law requiring a particular mode of conveyance to be used for the particular kind of property. And in my opinion, again applying the maxim mobilia sequuntur personam such a deed, if valid according to the law of the domicil, would have the same effect no matter where it were executed and no deed not valid by the law of the domicil would have such an effect. (Contrast the case of an assignment of individual movables here which if executed outside the country of domicil would certainly be governed by the lex situs.) I have already discussed this matter when dealing with acts of bankruptcy. The result of these arguments is to place a universal assignment as a result of bankruptcy on the same level as one ~~a~~ the result of death or marriage. I do not

shrink from this conclusion although I admit a lack of direct authority. If, however, I am wrong in the opinions previously expressed as to the interpretation of section 52 (a) and sec. 190 (3) of the Act, it will follow that a deed executed by a debtor within the meaning of the Federal Bankruptcy Act, even if he is domiciled abroad in the form required by Part XII of the Act will pass the Australian movables though it might not have any extra territorial validity. In any event, as I have previously stated a deed executed by such a debtor under Part XI of the Act as a result of a meeting of creditors here would certainly pass the Australian movables. These questions as to the interpretation of a statute do not affect the general principle of private international law.

It has been suggested that the effect of Section 122 of the Imperial Bankruptcy Act which I have already discussed is that an Australian Court must recognize an adjudication of bankruptcy in any country which is part of the Empire as an assignment to the trustee appointed under that bankruptcy of property of the bankrupt in Australia. In my opinion this section does nothing of the sort. The trustee appointed under the colonial bankruptcy may apply to the Australian Court which will act in aid of the other British Court and will assist the trustee to get in the property of the bankrupt, but that is a very different thing from saying that the Australian Court will recognize the colonial bankruptcy as an assignment of the Australian movables to the trustee at the date of the bankruptcy unless, of course, it occurs under one of the Imperial Statutes I have mentioned or in the country of the bankrupt's domicil. A similar provision to Section 122 was in force in one of the earlier English Acts but it was never suggested in any of the cases I have mentioned - Hayward's Case, Anderson's Case or any of the later cases - that it effected an assignment to the colonial trustee. There are dicta of the House of Lords and of the High Court of

Australia with regard to somewhat similar sections in the Act of 1883 (sec. 117 in the first case and sec. 118 in the other) which confirm the view that section 122 is merely procedural. (See Galbraith v. Grimshaw 1910 A.C. 508 per Lord Loreburn L.C. at p. 511 and Hall v. Woolf 7 C.L.R. p. 207 per Griffiths C.J. at p. 212). A bankruptcy in the country of domicil will pass the Australian movables to the foreign trustee even though according to our law the bankrupt would not be amenable to bankruptcy proceedings. See Stephens v. M'Farland 8 Ir. Eq. 444 where a bankruptcy in the country of an infant's domicil was held to pass his Irish movables even though infants were not subject to bankruptcy by the law of Ireland. The case is cited by Westlake (p. 41) as an authority for the proposition that if an infant resides and trades in a country other than that of his domicil, his bankruptcy in such other country would pass his movables in the country of his domicil to the trustee in the bankruptcy. This, however, is not so; the Court apparently held that an infant who resides and trades in a foreign country may acquire a domicil there, even though his parents are domiciled elsewhere. This is probably wrong (See Dicey pps. 124-5), but it does not affect the decision on the other point.

I have mentioned that the assumption that bankruptcy effects an assignment does not altogether square with the theories of Roman law. Westlake apparently holds that by a fiction of law our Courts will conclusively presume that a foreign bankruptcy so acts, (p. 166). I do not agree with this. I have found no direct authority for holding that a foreign bankruptcy will have effect here as an assignment where the foreign law does not provide for a transfer of property from the bankrupt to the trustee but merely clothes the trustee with certain powers to get in and distribute the property. If this were so I do not think that the bankruptcy would be

regarded here as an assignment.(I) Such a trustee would, in my opinion, be in a similar position to a foreign liquidator, appointed in a country which had adopted the British system of company law, (see later.) He would be entitled to sue for the movables (including debts) of the bankrupt but he would be merely the representative of the bankrupt (though under some systems he is also the representative of the creditors) and the Australian movables would therefore not be protected from creditors since there would be no transfer of the property in them. He would presumably be recognized as the representative of the bankrupt either if he were appointed by the Courts of the bankrupt's domicil when his position would correspond more or less to that of a foreign curator in lunacy or other guardian (see Didisheim v. London & Westminster Bank 1900 2 Ch. 15 and see Alivon v. Furnival 1 C.M.& R. 277 per Parke B. at p. 296): or if he were appointed as the result of the judgment of any Court regarded by our Courts as competent to give a judgment against the bankrupt in the particular case according to the rules of private international law adopted here. I have already discussed this latter proposition.

I do not think that a foreign bankruptcy would be given a greater effect here than in its own country. I do not see how our Courts could regard something as an assignment which did not purport to be one by the law by which its validity is governed nor how such a bankruptcy could attract the maxim mobilia sequuntur personam. It equally follows, of course, that no assignment of property here will take place unless the foreign bankruptcy law purports to have an extra territorial effect as an assignment: if it only purports to affect property in the foreign country itself there is obviously no reason to regard it as an assignment of property in Australia.

(I) See for the distinction between a bankruptcy which involves an assignment and one which does not, Official Assignee, Bombay v. Registrar of Small Causes Court at Amritsar 26 T.L.R. 353.)

If these theories are right, we see that our law recognizes so far as movables are concerned the theory of the unity of bankruptcy when the bankruptcy occurs in the bankrupt's domicil, and also purports to effect an assignment of all his movables. Any other bankruptcy will, so far as it will be recognized at all, only be recognized here as against the bankrupt himself, not against attaching creditors.

I advance these theories with diffidence and hesitation: but I am comforted by the thought that in so far as they acknowledge the supremacy of the law of the domicil, they agree with the theories of Savigny, (see Private International Law (translated by Guthrie) p. 209 et. seq.)

The following rules may now be formulated:

An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country will, if the law of the foreign country purports to assign the bankrupt's movables wherever situate, act as an assignment of the movables of the bankrupt in Australia when and only when the bankrupt is domiciled in that country, unless the law of the country where the bankrupt is domiciled recognizes the assignment as effectual to assign the movables of the bankrupt situate outside the country of the bankruptcy, which Australian law will not do if the bankrupt is domiciled in Australia.

An adjudication of bankruptcy by a foreign Court which purports to assign all the movables of the bankrupt wherever situate to the representative of his creditors in a country which is not the country of the bankrupt's domicil may, if the Court pronouncing it is a Court of competent jurisdiction according to the rules of private international law in force in Australia, be sued upon here by the representative of the creditors so appointed as a valid foreign judgment in personam in his favour against the bankrupt.

A representative of the creditors appointed under a foreign bankruptcy law which does not purport to effect an assignment of movables to such representative but gives him the right to collect and sue for them wherever situate will be recognized here as having the right to sue for and collect such movables if he was appointed in the country of the domicil of the bankrupt or as a result of the judgment of a court of competent jurisdiction according to the rules of private international law to give a judgment in personam against the bankrupt but the bankruptcy will have no wider effect.

Let us now consider in more detail the effect in Australia of an assignment within the meaning of the first Rule which I will call hereafter, for the sake of brevity, a valid foreign assignment.

The consequences which I am about to mention all follow logically on the fact that a valid foreign assignment is treated here just as if it were an assignment of the property in question here, at the time when the title of the foreign trustee actually accrues, in accordance with our law.

Firstly, then, a valid foreign assignment passes all such movable property, and only such movable property as would have passed to the foreign trustee if it had been situate in the country of the bankruptcy whether or not such property would have passed to an Australian trustee under an Australian bankruptcy unless, perhaps, the property in question is not by the law of Australia or rather the law of the particular State where it is situate assignable at all. (See Jeffery v. McTaggart 6 M.& S. 126. See also Salamon v. Tod 1911 S.C. 1214 though this was a case of a bankruptcy under an Imperial Statute). This is a natural consequence of our theory. The assignment is an assignment to the foreign trustee of every species of movable property in Australia which the local law of the foreign country transfers to him

in that country but something which is by our law not assignable at all cannot be assigned to him by this kind of assignment any more than by any other. The law of the country where the property is situate of course determines whether it is movable or immovable. (See A.M.P. Society v. Gregory 5 C.L.R. 615 per Isaacs J. at p. 636). Thus, if the foreign trustee sues a debtor of the bankrupt here, and the debtor has a set-off against the bankrupt which, by the foreign law he is allowed to deduct for his debt to the bankrupt as against the trustee, he will only be liable for the balance here, i.e. the debt will only pass to the foreign trustee to the extent that it passes under the foreign law. (See Macfarlane v. Norris 2 B & S. 783) and this although set-off is usually regarded as a matter of procedure to be determined by the lex fori. (See Meyer v. Dresser 16 C.B. (N.S.) 646.)

Secondly, if the law of Australia or of the particular state requires a special form to be observed before the legal title to any particular kind of property is passed, the foreign trustee as the assignee under the foreign assignment must complete his title by complying with this formality just as the assignee under an ordinary assignment must. Thus in A.M.P. Society v. Gregory 5 C.L.R. 615 the bankrupt was adjudicated bankrupt in Natal and amongst other assets he was entitled to a share in an equitable chose in action, in Tasmania. The Natal trustees did not give notice to the trustee of the fund and the bankrupt subsequently assigned his Tasmanian share in the fund to the appellants who took for value without notice of the bankruptcy, and gave notice to the trustees of the fund. By the law of Tasmania, this notice was necessary to complete the legal title to the chose in action and the appellants, having

given notice were by that law entitled to the chose in action in preference to the Natal trustee. The High Court held that the appellants were entitled to the fund. The assignment to the Natal trustee was entitled to no greater validity in Tasmania than an ordinary assignment made by the law of that country the title under which could only be perfected by complying with the special mode of transfer required by the Tasmanian law.(I) So, too, for example , if the bankrupt's property included Government Stock, the foreign trustee to perfect his title would have to register the fact of the assignment to him. In these cases in the phraseology of English law, the foreign trustee, like any other assignee, has only the equitable, not the legal, title to the asset until he has obtained the legal title in the appropriate way.

With regard to some kinds of property there may be some difficulty in deciding whether the Australian or South Australian law requires a particular form to be used in every case or only in the case of an ordinary transfer by a domiciled Australian or South Australian in the country of his domicil. Thus, to take the case of a chose in action, we have seen that if the foreign trustee does not give notice of his assignment to the person liable his claim may be postponed to that of any subsequent assignee or encumbrancer for value who does, and if the person liable pays the debtor without notice of the assignment he will not be made to pay over again to the foreign trustee. But is he bound for example before he can sue in a Court of law for a strictly

(I) However, note that if the appellant in that case instead of being an assignee for value had been a subsequent Australian trustee in bankruptcy the title of the Natal trustee would have been superior as the Australian trustee would merely stand in the place of the bankrupt who could not have himself denied the Natal trustee's title because of the lack of notice. (See In re Anderson 1911 1 K.B. 896).

legal chose in action only assignable pursuant to the provisions of the Supreme Court Act to obtain an assignment signed by the bankrupt as prescribed by that Act? In Jeffrey v. McTaggart 6 M & S. 126 it was held that a Scotch trustee could not sue in his own name in England for a debt due to the bankrupt even though the Scotch sequestration occurred under an Act of the Imperial Parliament. It was held that the Act gave a right of property, not a right of suit. The case seems to have been decided more upon the construction of the Scotch Bankruptcy Act than upon any consideration of private international law, and at the date of that case, choses in action were not assignable at all at law. On the other hand in Alivon v. Furnival 1 C.M.& R. 276 French syndics were allowed to sue for a debt due to their bankrupt upon a judgment of a French Court which may have led the Court to the conclusion that the syndics could exercise over the judgment the right given to them by the law of France to sue for it in their names. In favour of the right to sue there is the dictum of Lord Kenyon in Smith v. Buchanan 1 East 6 at p.11, the cases of Innes v. Dunlop 8 T.R. 595 and O'Callaghan v. Thomond 3 Taunt 82 at p. 84 and the dictum of Faucett J. in Proudfoot v. Stubbins 7 L.R. (N.S.W). 131 at p. 133 (though according to this last case the bankruptcy of the plaintiff abroad gives no ground for the defendant to apply to have the action stayed). On the whole, therefore, I am of opinion that the foreign trustee can sue here for his bankrupt's debts without complying with these formalities, and this opinion is supported by the recent case of Macaulay v. Guaranty Trust Company of New York 44 T.L.R. 99.

Another such question may be raised on the effect of such a deed of assignment as the one in Dulaney v. Merry & Sons cited above. In that case, it was held that the

deed executed in the country of domicil and valid by its law, passed the goods in England to the foreign trustee without being registered under the English Deeds of Assignment Act 1887. Channell J. construed the word "debtor" in that Act in the same way as it had been construed under the earlier bankruptcy statutes and since the bankrupt was not such a debtor, he held that the deed did not require registration. The provisions of Part XII of the Federal Bankruptcy Act contain certain provision as to deeds of a similar nature: that is to say, deeds of assignment by a trustee for the benefit of the creditors of the bankrupt of his property (see sec. 190 (3)). Would a deed like the one in Dulaney v. Merry & Sons be void and ineffectual to pass property in Australia under sec. 193 unless it complied with these provisions? The Federal Act evidently contemplates the execution of such deeds outside Australia. (See Section 193). It has been suggested (see Dicey p. 481 n) that every such deed executed by "a debtor" within the meaning of the Bankruptcy Act must comply with these provisions before it can pass property in Australia. But if my former arguments on the interpretation of Section 52 (a) and section 190 are correct, then the only deeds to which the Act applies are those which are to operate according to the law of Australia and again if I am correct that means those executed by a domiciled Australian, the assignment being a universal assignment and the maxim mobilia sequuntur personam therefore applying. All other such deeds, in my opinion, are valid and effectual to pass property in South Australia if they are valid according to the law of the domicil of the bankrupt, whether they comply with the requirements of the Bankruptcy Act or not. But, as we have seen, my opinions in this respect are open to grave doubt and it may be that a deed executed by a domiciled foreigner who is a debtor within the meaning of the

Bankruptcy Act in Australian form to an Australian trustee will be a deed within the meaning of sec. 190 and therefore inpperative to pass the Australian movables unless it complies with sec. 193.

Thirdly, a valid foreign assignment will pass property in South Australia as at the date of the foreign bankruptcy, that is to say, property which the debtor himself could have assigned at that date. If before that date rights have been acquired over it, the property will only pass to the foreign trustee subject to those rights, even though under the law of the foreign bankruptcy, these rights would be defeated or the title of the foreign trustee would relate back to an earlier date, so as to avoid dispositions of the property or charges acquired over it after that date. The assignment is only recognised here as an assignment on the date on which the trustee's title actually accrued to the extent to which the bankrupt could himself have assigned the property on that date, and the fictional relation back of that title under the law of the country of the bankruptcy can have no effect outside that country's borders.(See Goetze v. Aders 2 Rettie 150 per Lord President Inglis at p. 153, Union Bank v. Tuttle 15 V.L.R. 258 Galbraith v. Grimshaw 1910 A.C. 508,Singer & Co. v. Fry 113 L.T. 552 and Anantapadmanabhaswami v. Official Receiver of Secunderabad 1933 A.C. 394). The leading case on this point is the decision of the House of Lords in Galbraith v. Grimshaw 1910 A.C. 508. In that case, a judgment creditor of one A served a garnishee order nisi on a firm in England who were indebted to A. After that date the estate of A was sequestrated in Scotland and by the Scotch law all his movables were vested in the Scotch trustee. By Scotch law and by English law the trustee's title would have related back to an earlier date so as to avoid the judgment creditor's attachment of the debt. Nevertheless, it was held that the judgment

creditor had obtained an attachment of the debt and that the attachment could not be interfered with by the Scotch trustees - in order words, the debt only passed to the Scotch trustee subject to the charge created by the attachment. The House of Lords said that the Scotch law of relation back had no operation in England and that the English law of relation back only applied to an English bankruptcy. The trustee found himself "falling between two stools" (per Lord Loreburn L.C. at p.510).

Lord Loreburn laid down the following test at ps. 510-1:

> "I think, my Lords, in each case the question will "be whether the bankrupt could have assigned to the "trustee at the date when the trustee's title "accried , the debt or assets in question situated "in England. If any part of that which the bankrupt "could have then assigned is situated in England, "then the trustee may have it but he could not have "it unless the bankrupt could himself have assigned "it. It follows that the trustee cannot have this "debt free from the garnishee order because the "bankrupt could only have assigned it on November "13th, (the date of the Scotch bankruptcy) subject "to the garnishee order."

If it is suggested that in the case of a bankruptcy in another country within the British Empire the concluding provisions of Section 122 of the Imperial Bankruptcy Act (quoted above) would make the title of the Colonial trustee relate back, either to the time to which it relates under the colonial law, or to the time to which the Australian trustee's title relates back under Australian law, the answer is that an argument based on somewhat similar section in the Act of 1883, section 117, was rejected by the House of Lords in Galbraith v. Grimshaw cited above (see per Lord Loreburn L.C. at p. 511).

Galbraith v. Grimshaw was, of course, decided before the Bankruptcy (Scotland) Act 1913 and the position of a bankruptcy under an Imperial statute is, as I have already pointed out, entirely different.

Fourthly, there is the problem of after-acquired property The bankruptcy law of many countries provides that not only the property of the bankrupt at the time of the bankruptcy but also all property which he acquires subsequently before the completion of the bankruptcy e.g. by his discharge, shall pass to the trustee. If the bankrupt is domiciled in the country of the bankruptcy at the time of the bankruptcy and also at a later date when he acquires movables in Australia and by the law of the country of bankruptcy such after-acquired movables pass to the foreign trustee, will they be deemed in Australia to have so passed? It is clear that if the bankrupt is no longer domiciled in the country of bankruptcy at the time when he acquires such movables the law of that country can have no operation over them and they will not be deemed in Australia to have passed to the foreign trustee. See Hall v. Woolf 7 C.L.R. 207. I have already discussed this case.

> "We think therefore" said Griffith C.J. at p. 211 "that whatever might be the rule as to movables "acquired by the debtor after the commencement of "the liquidation and while he was still domiciled "in Queensland, the Queensland trustee cannot assert "any title to movables not locally situated there "which were acquired by the debtor after his domicil "in that colony came to an end."

Obviously, the maxim mobilia sequuntur personam can have no application to such a case. But if the bankrupt still remained domiciled in the country of the bankruptcy the Court was inclined to think that the after-acquired movables situate elsewhere would pass to the foreign trustee. "If" said Griffiths C.J. at p. 211 "the local law as to after-acquired property ought to be recognized elsewhere the reason must be that the law of the domicil of the bankrupt operates as a statutory assignment of his movables wherever situated to the assignee in the bankruptcy, the assignment taking effect automatically as soon as they are acquired by the bankrupt."

But the Court were disposed to think that if such a rule were to be accepted by other countries it would be accepted and applied subject to qualifications such as for example the rule laid down by the Court of Appeal in Cohen v. Mitchell 25 Q.B.D. 262. This rule is that where a bankrupt who has not obtained his discharge enters into transactions in respect of property acquired after the bankruptcy, then, until the trustee intervenes, all such transactions with any person dealing with the bankrupt bona fide and for value and whether with or without knowledge of the bankruptcy are valid against the trustee. But this is a rule of municipal English law applied by an English Court in an English bankruptcy and with respect I am of opinion that whether such a qualification on the right of the foreign trustee to the Australian after-acquired movables of the bankrupt exists in the case we are considering depends upon whether it exists or not by the foreign law. If, by that law, such movables only pass to the foreign trustee subject to such qualification, then of course, they will only be deemed to pass here subject to that qualification. (See Hunt v. Fripp 1898 1 Ch. 675 where the law of the country of bankruptcy as to after-acquired property was applied although since this was a British colony the law was the same as in England). If by the foreign law the property in the after-acquired movables passes to the foreign trustee immediately upon their acquisition by the bankrupt, then on the maxim mobilia sequuntur personam it must be deemed here to have passed to him also. It has never been suggested in any of the cases so far as I can discover that the right of the foreign trustee to the local movables of the bankrupt owned by him at the time of the bankruptcy is subject to a similar qualification in favor of innocent third persons to whom

the bankrupt may have purported to transfer such movables for value after the foreign bankruptcy. In neither case are the movables the bankrupt's property and therefore he cannot dispose of them. They are the property of the foreign trustee. But if the rule in Cohen v. Mitchell does apply to the after acquired Australian movables of a person who has been made bankrupt in the country of his domicil it can only be by virtue of some paramount public policy of this country which induces our Courts for the protection of our own citizens to apply the foreign law only with modifications. In this case, it is conceived that therule would only be applied in favour of third persons domiciled here and at any rate not in favor of those domiciled in the country of the bankruptcy. This is the theory of the American courts with regard to foreign bankruptcies. (Wharton Conflict of Laws Sec. 329). It is true that the Courts of one country sometimes do refuse recognition to the laws of another for such reasons. But I can find no authority for applying this principle to the present case. Moreover, this suggestion seems to be founded on the idea that the enforcement here of rights acquired under a foreign law is a matter for the discretion of the Court, instead of one governed by fixed principles of the law of this country. (See Dicey p.9) The creation of new heads of public policy is a matter for the Legislature, not for the Courts. (Simpson v. Fogo 1 H & N 195 at p.236, Jansen v. Driefontein Consolidated Mines 1902 A.C. 485 per Lord Halsbury L.C./ at p.491-2 In my opinion, if the law is to be applied in its strictness no such qualification as the one I have mentioned should be allowed and in my opinion there is no warrant for the Courts refusing to apply the law in its strictness in the present instance. Sec. 98 (1) obviously applies only to an Australian bankruptcy. The same

remarks apply to the after-acquired personal earnings of the bankrupt in Australia which, subject to sec. 101, do not pass to an Australian trustee.

The rule, however, by which an Australian trustee is sometimes estopped as against subsequent creditors of the bankrupt from claiming after-acquired property (see Troughton v. Gitley Amb. 630) would probably apply to a foreign trustee. Estoppel is a rule of evidence and so would be governed by the lex fori.

Finally, the period of limitation of a foreign trustee's right to sue in Australia for the movables of the bankrupt is governed by the law of Australia or of the particular State, the lex fori.

(ii) IMMOVABLES

If the maxim that movable property is governed by the law of the person of its owner was firmly rooted in English law at an early date, it was even more indisputable that immovable property was governed by the law of the place where the immovable was situated. Both principles now admit of many exceptions. Nevertheless, the general rule that immovables are governed by the lex situs is beyond dispute and it is clear that an assignment of the property of a bankrupt to the representative of his creditors under the law of any country outside Australia does not operate as an assignment of immovables in South Australia, (See Waite v. Bingley 21 Ch. D. 674 per Hall V.C. at p. 682) (except of course under the Imperial Statutes referred to above).

The occurrence of a foreign bankruptcy therefore will not induce this Court to restrain execution against the immovables here.(I) (See Dicey p. 477 and Westlake p.220).

(I) See Central Queensland Meat Preserving Co.v.Bury 4 Q.S.C.R 168: this was a case of the winding up of a company but it seems to have been treated as if it had been a bankruptcy. See also Cockerell v. Dickens 3 Moo P.C.99, the converse case of the effect of an English bankruptcy on foreign immovables.

Nevertheless, under Section 122 of the Imperial Bankruptcy Act an Australian Court, if its aid is sought by another British Court or by the trustee appointed by such Court, will make Australian immovables available in some manner to that trustee subject to all due protection of rights duly acquired by the law of this country over them. (See In re Greenaway 27 W.N. (N.S.W) p. 112 and re Levy's Trusts 30 Ch. D. 119) and even a trustee in a strictly foreign bankruptcy will, it has been held, be assisted in the same manner (see In re Koeperman 13 B. & C. Cases 1928, 49). It used to be thought that the correct way to assist the colonial or foreign trustee was to make an order vesting the Australian immovables in him. (See In re Greenaway above) but it is now settled that this is incorrect and that the proper course is to appoint the trustee a receiver of the rents and profits of the Australian immovables with power to sell and deal with the proceeds of sale as trustee in the bankruptcy (See In re Koeperman 13 B & C Cases (1928) 49 and In re Osborn 15 B & C. Cases (1932) 189). The Court has a discretion as to what assistance it will give and can impose such conditions and require such undertakings as it may think proper in each particular case. (In re Osborn cited above). These proceedings can be justified apart from the Imperial Acts if we regard the foreign bankruptcy as a judgment against the debtor in favour of the foreign trustee in the manner and subject to the conditions previously indicated by me. He then obtains the Australian immovables or their proceeds as a result of his action upon the foreign judgment here. It is from that judgment in that action, not from the foreign bankruptcy, that he derives his title and the immovables here will not be protected against individual creditors until the order of the Australian Court is made. If, of course, there is a bankruptcy in Australia or under one of the Imperial Statutes before the application is made to the Australian Court by the foreign or colonial trustee,

the Australian immovables will have already vested, even though the foreign or colonial bankruptcy may have actually occurred first.

(c) CONCURRENT BANKRUPTCIES

I have already pointed out that the existence of a bankruptcy abroad is no bar to the making of a sequestration order here, but that the Court has a discretion in the matter. I have also stated that the questions of the jurisdiction to make a sequestration order here and of the effect when made are entirely different. (See In re Artola Hermanos 24 Q.B.D. 640). Suppose that there are several bankruptcies, one say in Australia and one in England, and one in the country of the bankrupt's domicil. Under which will the assets pass? The answer is that the movables in Australia will pass under the first in point of time. Each of these bankruptcies acts as an assignment of the bankrupt's property: when the first in point of time occurs all the movables of the bankrupt in Australia which pass under the rules I have mentioned vest in that trustee and are consequently not the property of the debtor at the date of the second bankruptcy. As regards the Australian immovables the contest there of course will be between the Australian bankruptcy and a bankruptcy under one of the Imperial Statutes only and again, the immovables will pass to the trustee under that bankruptcy which is first in point of time. The only difficulty here arises as to the rule of relation back. Dicey, p. 483n holds that for the purposes of this rule, priority depends upon the date of the assignment, (in England, the adjudication: here, the sequestration order) and not on the date of the commission of the act of bankruptcy. He, however, says that a Scotch bankruptcy is an exception to this rule and that though it is only the act and warrant of confirmation which

actually vests the property in the trustee, the title relates back to the date of sequestration not only for the purposes of Scotch law but for that of the whole of the British Empire. I have already noted this peculiarity of the Bankruptcy (Scotland) Act sec.97)

Dicey cites as an authority for the general proposition Geddes v. Mowat 1 Gl. & J. 414. That case is perplexing but it does not seem to me to support his view. There, the House of Lords was sitting as a Court of Appeal from the Court of Session, i.e. as a Scotch Court. The order of events was, first the act of bankruptcy, then the petition for sequestration and the first deliverance thereon, to which the sequestration related, then the English commission of bankruptcy and finally the Scotch award of sequestration. It was held that the sequestration had priority. This seems to me to decide that the local rule of relation back will be applied so as to divest a foreign trustee of local property which he has acquired by assignment under the foreign bankruptcy law between the actual date of the local bankruptcy and the date to which it related back. The case did not apparently turn upon the Imperial nature of any of the legislation. It only actually decides that the English commission did not render the Scotch sequestration null, but we have already seen that the Scotch Courts regard a competent foreign bankruptcy as a bar to a subsequent bankruptcy under their own law. The House of Lords must have held therefore that the sequestration was not subsequent to the commission. While I think that Dicey's opinion, if adopted, would lead to more desirable results and be more conducive to harmony and simplicity of administration, I think that the words of both the Australian and the Imperial Statutes together with the

decision in Geddes v. Mowat are too strong. As I have said before, the Imperial Statutes have evinced an intention to bind the Empire as a whole and I cannot see any justification, in the absence of express language, for holding that some of their provisions relating to transfer of property bind the Empire as a whole and others do not. I think that the relation back clause in these statutes must apply here as against an Australian trustee in bankruptcy as well as against anyone else. I am therefore of opinion that in a competition between an Australian trustee and a trustee in bankruptcy taking place under one of these statutes as to the title of property here, the order of priority in the absence of any contrary provision in any of the Statutes will depend upon the date to which the title of each trustee relates back under the law of his own bankruptcy. Similarly, in a competition between an Australian trustee and one appointed in the country of domicil of the bankrupt in a bankruptcy not taking place under one of these statutes, the order of priority will depend upon the date to which the Australian trustee's title relates back in the first case and the actual date of the assignment to the foreign trustee in the other, for as we have already seen, the date of the relation back under the foreign law cannot be considered and I can find nothing in the Australian Act to enable me to distinguish between the foreign trustee and anyone else in whom property of the bankrupt here has been vested between the date of the bankruptcy and the date to which it relates back. This will have the extraordinary result of placing a trustee in a bankruptcy occurring in another part of the Empire but not under one of the Imperial Statutes in a worse position than a trustee in a strictly foreign bankruptcy,

if a bankruptcy occurs in Australia within six months of the colonial bankruptcy, because under sections 52 (f) and 90 a petition could be founded on the Colonial bankruptcy and the Australian trustee's title would relate back to its date and thus divest the colonial trustee of his title to the Australian movables. It is not, however, an act of bankruptcy to be adjudicated bankrupt by a Court outside the Empire, so that no petition could be founded upon such an adjudication and the foreign trustee's title to the Australian movables would be safe unless an act of bankruptcy within the meaning of section 52 had been committed by the debtor before the foreign bankruptcy and an Australian bankruptcy followed within six months of such act of bankruptcy. The possibility of this result so far as a colonial bankruptcy is concerned appears to have been contemplated by Isaacs J. in Morgan v. White 15 C.L.R.1 at p. 17.

It might be noted that in In re Macfadyen & Co. 1908 1 K.B. 675 it was held that the Court had power to sanction a scheme arranged between the English and Indian trustees of a bankrupt for pooling the assets and making a rateable distribution.

I have pointed out before, and it is now obvious that though many of the Australian assets may have passed under a foreign bankruptcy a subsequent Australian bankruptcy may reach assets which are not available to the foreign trustee.

If there is a foreign bankruptcy which acts as an assignment of property in Australia including after-acquired property within the rules I have mentioned and a subsequent Australian bankruptcy, which trustee will be entitled to the after-acquired Australian property of the bankrupt?

Probably a bankruptcy under one of the Imperial statutes would carry with it even property acquired after the date of the Australian bankruptcy if the particular statute made provisions for the passing of after-acquired property. This would be so, again, under the provisions of the Imperial Statute which is binding on all persons and Courts throughout the Empire. Probably the property acquired after the date of an Australian bankruptcy or even after the date to which it relates back would pass to the Australian trustee rather than to a trustee under a previous bankruptcy, not under one of the Imperial Statutes. There can be no assignment until the bankrupt actually acquires the property in question: and since the two titles would accordingly accrue at the same moment, that conferred by the lex situs would, it is submitted, prevail. In any event this property would probably be held to pass to the Australian trustee under sec. 91 (1). As to property acquired after the date of the foreign bankruptcy but before the date of the relation back under the Australian one I am of opinion that this would pass to the foreign trustee at the moment when the bankrupt acquired it, and therefore could not pass to the Australian trustee. This was the rule as between two local bankruptcies. See In re Clark 1894 2 Q.B. 393 (though now see sec. 61 (1) which obviously only relates to two Australian bankruptcies). Foote, indeed, suggests that such property would pass to the local trustee, (Private International Law 5th Ed. P. 345), citing Morgan v. Knight 15 C.B. (N.S.) 669. That was a case of two English bankruptcies and it was held that the trustee under the second was entitled to maintain an action for conversion of the bankrupt's property acquired between the date of the two bankruptcies as the trustee under the first had not intervened. But this case decides nothing as to the title to the property between the two trustees. It merely decides that ~~the~~ a wrongdoer cannot set up the jus tertii.

The principle of the decision was explained as follows by Romer J. in Barker v. Furlong 1891 2 Ch. 172 at p 186-7: "When there is a right of immediate possession coupled with a title to goods, though the title may not be perfect as against or may even be liable to be defeated by the claim of a third person, yet if that third person has not intervened a wrongdoer dealing with the chattels cannot set up the title of that third person as an answer to an action against him for his wrongdoing".

The case is therefore obviously not an authority for the proposition that property acquired by the bankrupt between the dates of a foreign and an Australian bankruptcy will pass under the latter rather than under the former.

In the case of partnership, difficulty may arise. It was held that where there was a separate adjudication of one partner in England and then a separate adjudication of the other in Ireland, and then a joint adjudication in Ireland, the English assets could not be handed over to the Irish assignees in the joint bankruptcy. This was because the separate English and the separate Irish adjudication made the English and Irish trustees tenants in common of the joint assets. The subsequent joint adjudication could not divest the title of the English trustee as tenant in common. (See In re O'Reardon 9 Ch. App. 74).

(2) WINDING UP.

I have already pointed out that under British systems of law the winding up of a company does not effect an assignment of the company's property to the liquidator, but merely makes him the sole effective agent of the company. While it is clear that the legal title to its assets does not pass out of the company, it has been suggested that the effect of

the statues is to take the equitable estate out of the company and impress all the assets with a trust for the benefit of creditors. (See In re Oriental Inland Steam Co. L.R. 9 Ch. App. 557). There has undoubtedly been a tendency to equate the extra territorial effect of a bankruptcy and a winding up in substance if not in form and to say that a winding up impresses all the movables of the company wherever situate with a trust for the benefit of creditors. Westlake appears to hold this view (p. 166-1, 180) and in In re Alfred Shaw & Co. (1897) 8 Q.L.J. 93 Griffith C.J. said obiter that he thought that the analogy of the individual debtor should be followed and that (at p. 94) "the persons who under the law of the country of domicil are entitled to administer the movable property of the company are entitled as such to that property wherever situated subject however to the provisions of any positive law of the country where the assets are found." If there were no local liquidation in Queensland the learned Judge thought "that the liquidators of the country of domicil would be entitled to assert their title without challenge". (p. 95).

Now, it is quite definite that these views no longer correctly express the law. In Queensland Mercantile & Agency Co. v. Australian Investment Co. 15 Rettie 935 the distinction between bankruptcy and winding up is very clearly stated: "The estate of the company" said Lord President Inglis at p. 939 "is not transferred from the company to the liquidator, it remains vested in the company just as it was before the winding up order, and the liquidator is a mere administrator of the affairs of the company. He can do nothing in the way of using action and diligence except in the name of the company and the company never becomes dissolved and never is completely divested of its estate until the liquidation has come to an end". The Privy Council confirmed this view of the

effect of a winding up order in New Zealand Loan and Mercantile Agency Co. Ltd. v. Morrison 1898 A.C. p. 349; their Lordships again point out that bankruptcy effects a divesting of property and winding up does not, and they say that the English Companies Acts do not bind the colonies. There can be nothing, therefore, in the case of a winding up analogous to the effect in Australia of a bankruptcy under an Imperial Statute. Finally, in Primary Producers Bank v. Hughes 32 S.R. (N.S.W). 14 Harvey C.J. in Eq. held that the liquidation of a foreign company in the country of its domicil (Queensland) gave the Equity Court in New South Wales no jurisdiction to interfere with the rights of creditors of the company in New South Wales. "In my opinion" said the learned Judge at p. 19 "it is stating the rights of the liquidator in the country of domicil too high to say that he has any title to the assets outside the jurisdiction". It was the legislation of the foreign state (Queensland) that had enacted that after the resolution for voluntary liquidation had been passed the assets of the company should be impressed with a trust for their division among the company's creditors. That trust could only extend to property within the jurisdiction of the Queehsland Court.

The authorities are therefore clear that the winding up of a company outside South Australia under a system of law which does not purport to assign the assets from the company to the liquidator will not affect property in South Australia nor will that property be impressed with any trust of which this Court can take cognizance. A foreign winding up will not have any extra territorial effect in South Australia. Thus, we see that in the case of a winding up, unlike the case of bankruptcy, the administration of the assets in each forum must of necessity proceed separately until the stage when a surplus is reached. There is no way of protecting the assets in one forum from individual creditors without a winding up in that

forum. This raises a question which does not arise in the case of bankruptcy, at least under British systems of law, since each bankruptcy purports to be an administration of the whole estate of the debtor so far as it can reach the assets: this is the question of principal and ancillary windings up. I will deal with this question later. I respectfully disagree with the suggestion thrown out in Sack v. Lord Aldenham 7 Tas.L.R. 84 by Nicholls C.J. that where there is a winding up of a foreign company in the country of incorporation the Court should restrain creditors domiciled in that country from attaching the company's assets here. The property is still in the company: and the remedies of our law are open to all creditors no matter where their domicil. Our Courts have never taken the view that local creditors as such are entitled to any preference. The restraining of creditors domiciled in the country of incorporation must be left to that country's courts.

I have already pointed out that under British systems of law the liquidator is made the sole effective agent of the company and is charged with the duty of collecting the property and given the right to sue in its name and on its behalf. If the foreign liquidation is proceeding in the country of the domicil of the company, in other words, the country of its incorporation (see per Griffiths C.J. In re Alfred Shaw & Co. 8 Q.L.J. 93 at p. 94 and see Appendix A Domicil of Corporations) then the appointment of that agent by the law of that country and the powers given to him by that law should be recognized here and he should be held entitled to sue here in the company's name and on its behalf to collect its debts and to otherwise get in its assets. Harvey C.J. in Eq. in Primary Producers Bank v. Hughes, says at p. 18:

> "A liquidator appointed in the country of domicil has "the power of collecting in a foreign country the assets "of the company situated there but this is not by virtue "of any title in himself or of any trust attaching to "the assets of which he is the trustee but because by "virtue of the law of the country of the company's "domicil he has the sole right of using the company's "name in litigation. A company can only act by agents "and the liquidator takes the place of the directors and "of the shareholders in general meeting and is entitled "to speak for the company and to determine when the "company's name shall be used."

(See also Goldsbrough Mort & Co. v. Doyle 6 Q.L.J. 1 per Real J. at p. 5).

A liquidator, however, appointed in a country which is not the country of the company's domicil has no such right and it seems that his title to sue here and collect the assets here would not be recognized. The law of the country which called the company into existence has the sole right to determine by whose voice it shall speak throughout the world: the law of other countries can only determine by what agents it can act within the borders of those countries.

On the making of a winding up order here the power of the liquidator appointed in the country of the company's domicil to collect the company's assets and to act as its agent here is determined in favour of the liquidator appointed by the South Australian Court. This is the result of the combined effect of sections 362, 346 and 350 of the Companies Act which give to the liquidator of a foreign company all the powers given to the liquidator of a company incorporated in South Australia.

All countries, however, do not adopt the British system of winding up and it seems to me that if by the law of any country the liquidation of a company acts as an assignment of all the property of the company to the representative of the company's creditors (hereinafter called the foreign liquidator) then that liquidator's title to the South Australian movables of the company should be recognized if the liquidation takes place in the country of the company's domicil and the same consequences as those of bankruptcy

should follow. In short in my opinion such a foreign liquidation should have exactly the same effect and be subject to exactly the same rules as an ordinary foreign bankruptcy. I can find no case on this point but it seems only logical that it should be so. In Levasseur v. Mason & Barry 1891 2 Q.B. 73, a decision of the Court of Appeal, a receivership order was made over certain goods of a French company in favour of creditors of that company. The company then went into liquidation in France and by the law of France the liquidators acquired a right to all the movables belonging to the company at the date of the liquidation. The whole case turned upon the effect of the receivership order which was held to have transferred the property in the goods to the creditors: but it seems to have been assumed that if the goods had been the property of the company at the date of the liquidation they would have passed to the French liquidators. (See at p. 75 and per Lord Esher M.R. at p. 79). (See also Gibbs v. Societe Industrielle 25 Q.B.D. 399 per Lindley L.J. at p. 410). Can a winding up order made by a foreign Court be regarded here as a judgment in personam against the company in favor of the liquidator so as to give him a right to sue here upon it and obtain the company's property here? I can find no case in which it has been regarded as such. But I submit again that in so far as a winding up in any country is analogous to bankruptcy, the bankruptcy rules should apply. As I have already pointed out, in so far as the British system of company law is concerned the better view now is that a winding up does not purport to have an extra territorial effect. Such a winding up cannot, therefore, act as a judgment against the company that its property in South Australia shall be handed over to the foreign liquidator. His right to the assets here is merely his right to use the company's name. He has no rights here of a nature different from the company's rights

here. This affords no protection from creditors so long as the property remains in South Australia. If the law by which the foreign liquidation takes place is in the nature of a penal or confiscatory law, it will not have any effect on the property of the company in Australia. (See Leconturier v. Rey 1910 A.C. 262 and In re Russian Bank for Foreign Trade 1933 Ch. D. 745 at p. 767). If such a foreign law of the country of incorporation dissolves the company problems of some complexity are raised as to the ownership of the South Australian assets. This question will be discussed later.

It is greatly to be regretted that some broad principle has not been adopted giving to the person appointed to administer the affairs of a natural or of an artificial person in the country of his or its domicil for the purpose of satisfying all claims against him or it so far as his or its property extends, a right to administer all the property wherever situate as a whole, according to one system of law, so as to ensure equality of treatment of all the creditors, instead of making the right of such person depend upon whether or not he is the assignee or merely the administrator of the property. Broadly speaking, the functions of a liquidator and of a trustee in bankruptcy and of a Roman law curator or syndic are the same and the same reasons of justice and convenience which support the theory of the unity of bankruptcy exist in each case, no matter what methods are adopted to achieve the fulfilment of these functions in the particular case. But the decisions with regard to foreign liquidators show conclusively that our Courts do distinguish between the effect of processes which involve assignment and those which do not and I have only endeavoured to take this principle to its logical conclusion.

A foreign trustee in bankruptcy, even though he happens to be in South Australia, with funds of the bankruptcy in his

hands cannot be sued here as such unless it is shown that justice cannot be obtained in the courts of the country of the bankruptcy. (See Smith v. Moffatt L.R. 1 Eq. 397) as if, for example, by remaining out of that country he makes it impossible for him to be sued there. Our Courts will assume until the contrary is shown that foreign Courts possess full and ample powers to do complete justice and to exercise control over their own officers.

These remarks would, no doubt, apply to the case of a foreign liquidator as well.

CHAPTER V.

ADMINISTRATION IN LOCAL BANKRUPTCY OR WINDING UP.

We must next consider the actual administration of the assets in a bankruptcy or winding up instituted in our Courts.

(1) Effect of bankruptcy on antecedent transactions:

I have already mentioned the doctrine of relation back. By the law of most countries the title of the trustee in bankruptcy is given a retrospective operation from the time when the Court actually makes the adjudication or other similar proceeding to some previous date, variously fixed under different systems of law. By Section 90 of the Federal Bankruptcy Act the bankruptcy of a debtor is deemed to have relation back to and to commence at the time of the act of bankruptcy being committed on which a sequestration order is made, or if the bankrupt is proved to have committed more than one act of bankruptcy, to and at the first of the acts of bankruptcy committed by him within six months next preceding the date of the presentation of the petition. Division 4 of the Act (Sections 92-8) deals with the effect of the bankruptcy on execution by creditors, settlements made by the bankrupt and transfers of property or payments of money etc. made "by any person unable to pay his debts as they become due from his own money" in favour of any creditor having the effect of giving that creditor a preference over other creditors These may, if done at certain times before the bankruptcy and under certain circumstances, be avoided as against the trustee in bankruptcy.

Sections 281, 282 and 284 of the South Australian Companies Act 1934 contain somewhat similar provisions with regard to the winding up of a company.

The question that must be considered is the effect of these provisions on the foreign property or foreign creditors

of the bankrupt. Suppose that the bankrupt makes a conveyance of his property abroad to a creditor in that country which would have the effect of giving him a preference over the other creditors or suppose he makes a settlement of his property in a foreign country which, if made of property in Australia could undoubtedly be avoided under Section 94 and suppose that the creditor receiving the preference or the persons entitled under the settlement should happen to be within the jurisdiction of an Australian Court, will that Court enforce the special rules of our bankruptcy law which I have mentioned against such a person if a domiciled foreigner or with regard to such property, if situate abroad, whether the person in possession of it be a domiciled Australian or a domiciled foreigner?

In the first place, if the opinion I have expressed previously is correct we need not consider the definition of "property" in section 4 of the Bankruptcy Act. I have already given my reasons for holding the view that an Australian Court cannot regard an Australian bankruptcy as having any greater extra-territorial effect on property situated outside Australia than the law of the situs of such property, or in default of any information as to that law, the rules of private international law as understood in an Australian Court, will allow.

Secondly, I should mention that I am not at the present moment discussing the position of a creditor who proves in the Australian bankruptcy. Such a person must take the Australian law as he finds it, and if he wishes to take the benefit of it he must submit to all its provisions. He cannot approbate and reprobate. I will deal with this topic later.

The authorities on the question of the application of the special rules of bankruptcy of the forum to foreign property or foreign creditors are extremely meagre. I have

already shown that the special rules of foreign bankruptcy laws as to the effect of bankruptcy on antecedent transactions cannot receive effect here, (See Galbraith v. Grimshaw 1910 A.C. 508) as the assignment under the foreign bankruptcy law only acts as an assignment to the trustee of such property as the debtor could himself assign at the actual date of the bankruptcy, not at its fictitious date in the eyes of the foreign law. We are now considering the converse case, and on this point, I have been unable to discover any authority at all except the decision of the Court of Session in Whyte v. Briggs 1843 5 Dunlop 1148. In that case, nearly all the Judges dealt with the question as one of international law alone, and I have already pointed out that some of the decisions by the Scotch Courts on the effect of bankruptcy in private international law have been referred to and followed in Courts acting under English law. I shall therefore deal with this case as the only direct authority in some detail.

In that case, the defendants, domiciled English merchants, forwarded certain bills of exchange to the bankrupt, a commission agent at Glasgow, for him to discount them and remit the proceeds to them. Instead, he applied the proceeds to his own use. Upon the defendants pressing for payment and finally threatening prosecution, he sent them instead of ready money, which he could not send, a bill of exchange accepted by a Liverpool house and a bill of lading over goods which were being sent to Calcutta. These were duly received by the defendants. Within sixty days thereafter, the bankruptcy occurred and the plaintiff was appointed trustee. Thus, at the time of the bankruptcy the property in question was outside Scotland. By a Scottish Statute of 1696 all voluntary dispositions of his property by a bankrupt at the time of, after, or within sixty days before the bankruptcy in favor of his creditors for their satisfaction or further security in preference to other creditors, were annulled. The defendants

had property in Scotland and the Scottish Court acquired jurisdiction by that process of Scottish law known as arrestment to found jurisdiction. The defendants' property in Scotland was arrested at the suit of the trustee, and they appeared to defend it. They did not attempt to prove in the Scottish sequestration. The Court of Session held by a majority of nine Judges to four that the law of Scotland applied to the transaction in question and that the conveyance of the bills of exchange and of the goods in question to the defendants was struck at by the statute. (Lord President Lord Justice Clerk, Lords Mackenzie Cockburn, Wood Cunninghame Murray Meadowbank and Medwyn, Lords Fullerton, Jeffrey, Ivory and Moncrieff dissenting.)

All the Judges except the Lord Justice Clerk held that since their jurisdiction arose solely from the accidental circumstance that the defendants had property in Scotland which could be arrested to found the jurisdiction they could not decide the question purely on principles of municipal Scotch law, but must decide it as in their opinion it would be justly decided in England, that is, according to the principles of international law as conceived by them. The Lord Justice Clerk, on the other hand, said that it made no difference how the jurisdiction of the Scotch Court arose, whether by arrestment or by residence. In his opinion, no question of international law was raised: it was not sought to apply any rules of any foreign law to the matters under discussion, but rather to deny effect to a Scotch statute because the defendant lived in England and had received there the assets, the subject of the preference,which were originally in Scotland. (See pps. 1178-9). If an attempt were made to enforce the Scotch statute in an English Court against the defendants then, in his opinion, a question of international law would have been raised, and it is interesting to note that the Lord Justice Clerk doubts whether

an English Court would under the circumstances enforce the statute whereas the other judges of the majority were of opinion that an English Court would so enforce it if it applied what they considered to be the correct principles of international law. The question being then in the opinion of the Lord Justice Clerk merely "a question under a Scotch statute tried in Scotland as to a transaction carried through in Scotland by the creditor of a Scotchman and a party who by reason of property in Scotland admits that he must state his defence on the merits to the Scotch Court" (p. 1179), fell to be decided by the ordinary law of Scotland and all the Judges agreed that on the mere construction of the words of the Scotch statute these words would apply to the present case as well as to any other. Even if the question was one of international law, however, the Lord Justice Clerk agreed with the rest of the majority.

The decision of the rest of the majority appears to have proceeded upon the principle mobilia sequuntur personam and quisque debet scire conditionem eius cum quo contrahit, ("everyone wishing to acquire a right by acquisition under another is bound to enquire what the right of that other is by the law under which he lives and makes the conveyance" per Lord Mackenzie at p. 1155: see Lord Cunninghame's judgment at p.1167). The law of Scotland imposes a disability upon its subjects (which must mean those domiciled in Scotland) from conveying their movable property wherever it may be, after bankruptcy. It divests them from the power of disposal of that property. It was hardly disputed that after the bankruptcy no conveyance by the bankrupt of his property outside Scotland could receive effect by the rules of private international law. "Why, then", continues Lord Mackenzie, "may not the legislature of Scotland subject its own subjects to a disability of conveying their movable property in satisfaction or security of prior debts except upon the condition that if a ..... bankruptcy shall supervene within sixty days the conveyance shall be void?" (p. 1156). Persons who take conveyances

of movable property from those subject to the law of Scotland must take them subject to the disabilities imposed by that law upon persons conveying property. The statute in question imposes a contingent nullity on every conveyance made by a domiciled Scot and persons wherever they are domiciled who receive such a conveyance must take it subject to that nullity imposed by that law under which alone they can acquire the right of ownership. The effect is the same on all conveyances under the law of Scotland as if the condition of the statute were expressly inserted in the written instrument of conveyance. (See per Lord Mackenzie p. 1156).

Another and broader argument seems to have been that since the property in question was at the time of the conveyance by the debtor, a Scotch subject, in Scotland, and the conveyance by the debtor itself took place in Scotland, the validity of the transaction must be judged by the law of Scotland. (See per Lord Justice Clerk at p. 1179).

The dissenting judgments, however, in my opinion, rebut these arguments successfully. At the time when the conveyances were made as pointed out by Lord Fullerton at p. 1159, the bankrupt was under no inability whatever, and possessed the absolute and unchallenged administration of his affairs. The direct clauses of the statute annulling conveyances made after bankruptcy are entitled to extra territorial effect because they create from the moment of bankruptcy a disability and a divestiture of power on the part of the bankrupt (per Lord Fullerton at p. 1159). Such conveyances in the words of Lord Jeffrey at p. 1165 "flow a non domino"; the bankrupt is not the owner of the property he purports to convey. But the contingent and retrospective annulling clause has no such effect. It operates "not through the medium of the disability or divestiture of the granter but directly and immediately without the interposition of any such disability against the party receiver of the deed"

(per Lord Fullerton p. 1159). The statute "does not effect an inherent nullity in the original grant. It creates a supervening nullity attaching to a grant originally free from challenge." That retrospective clause did not create a disability on the part of the bankrupt "the granter" to convey because its agency did not commence until after the conveyance was complete, until after the property had passed absolutely to the defendants, had become "fully and fairly vested in" them (per Lord Jeffrey p. 1165). That clause only imposes an obligation on the party receiving the conveyance to restore and that obligation can only reach those subject to the law of Scotland and cannot affect the defendants; because, according to Lord Jeffrey at p. 1165 after the conveyance the property became vested in the defendants and on the maxim mobilia sequuntur personam subject to the law of their domicil, that is, the law of England. Lord Fullerton adds at p. 1163, and in that the Lord Justice Clerk agrees with him, that he cannot agree with Lord Mackenzie's suggestion that the conditions of the statute are impressed into every conveyance executed according to the law of Scotland: he points out that the statute does not say that the conveyance shall be void unless the granter remains free of bankruptcy after sixty days thereafter: it provides that at the happening of the bankruptcy a certain description of transaction happening before shall be annulled, a transaction which conferred rights "perfectly good at the time when they were acquired." I think this reasoning is sound and it would certainly apply to our Act. The antecedent transactions affected thereunder are perfectly valid at the time when they occur: the retrospective invalidity only arises at the time of the bankruptcy. (See In re Holden 20 Q.B.D. 43); the statute does not create a disability on the part of the bankrupt to do or suffer the acts mentioned at the time when these acts occur: it creates an obligation arising at the time of the bankruptcy on the party benefiting by

these acts to restore the unjust benefit he has acquired.

Lord Fullerton also pointed out that in a case of Palmer v. Hunter the Court of Session had decided that creditors who had levied execution against the property of an English bankrupt in Scotland after the commission of the act of bankruptcy at which by the law of England the bankruptcy commenced, but before the issue of the commission which actually divested him of his property were to be preferred to the English assignees. The Court in Lord Fullerton's opinion was merely considering the converse case. The majority distinguished the effect of an attachment acquired by execution under process of law from that of a voluntary conveyance by the bankrupt but in my opinion the point to be considered in each case is whether the creditor acquired at the relevant date a complete and valid right in rem over the property of the debtor at a time when the debtor was competent to dispose of it. (See Galbraith v. Grimshaw cited above.)

Lord Fullerton and Lord Jeffrey, as we have seen, upheld the immunity of the defendants mainly on the ground of their foreign domicil. Lord Moncrieff on the other hand founded his judgment on the situs of the assets at the time of the sequestration. His judgment on this point deserves quotation at length. (at p. 1170).

> "It (the case) is to reclaim by virtue of the Scottish "Statute 1696 property situated in England and fully "vested in the defendants before there was any sequestra- "tion which could divest the bankrupts. It matters not "what the nature of that property otherwise is. It is "property situated in England which at the date of the "bankruptcy stood completely transferred to the defenders "for full onerous consideration. I ask, by what authority "or warrant could an English Court declare that such "property must be restored to the estate of the bankrupts? "I do not pretend to know how such a question might in "fact be disposed of, but as bound to know the principles "of international law, here, it appears to me that the "English Court ought not on sound principles to recognize "any such claim. The transactions of a bankrupt trader "are to be closed at bankruptcy and his property as it "then stands must be ruled by the municipal law of the "state where his domicil and status as a trader are

"situated .... But as to transactions before bankruptcy "as affecting parties and property in foreign states "completed before any bankruptcy, it is a matter of "great doubt and difficulty to me how property existing "locally in a foreign territory and effectually trans- "ferred before bankruptcy in payment satisfaction or "security of a true and onerous debt to a third party "in that foreign territory who makes no claim whatever "under the laws of this country can be effectually "reclaimed on an emerging bankruptcy in virtue of any "particular statutes in force here. I cannot see how an "English Court could so decide and if they could not, "neither can we, on any just or correct principles".

I respectfully suggest that the judgment of the minority is correct. The theory on which British Courts have acted, apart from statute, when they regard a bankruptcy in the country of the forum as having extra territorial effect is the maxim mobilia sequuntur personam.(I) This is clear from my previous arguments. Since the movables follow the law of the person of the owner wherever they are, they are assigned by the bankruptcy under that law. But when we take the case of a conveyance of movables situate abroad to a person domiciled abroad by the bankrupt before the bankruptcy, if the law of the bankrupt's domicil confers a good title to them on the transferee at the date of the transfer, then it is obvious that from that date they will be governed either by the law of their situs or by the law of the domicil of the new owner. The law of the domicil of the former owner has ceased to affect them and therefore his bankruptcy under that law after the date of the transfer cannot affect them. Nor does it make any difference to this reasoning that at the date of the transfer the movables were

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(I) See Sill v. Worswick 1 H. Bl. 665 and note that though in that case the assignment under the English bankruptcy seems to have been regarded as taking effect at the date of the act of bankruptcy the point was not argued and in the case of Hunter v. Potts 4 T.R. 182 the effect of the relation back was expressly excluded from consideration. See per Lord Kenyon at p. 192. The dictum of Lord Eldon in ex parte D'Obree 8 Ves. Jun. 82 is also obiter as the creditors were seeking to prove in that case and the distinction between the actual date of the assignment and the date of the relation back was not discussed.

in this country if they are removed before the date of the actual bankruptcy. The law governing them at that date is the relevant law for this purpose and if the law of the country of bankruptcy is neither the law of the domicil of the new owner nor the law of the situs of the movables at that date then I cannot see how they can be affected by that law. The fallacy in Whyte v.Briggs from the point of view of the private international law of this country -- for of course I am ignorant of the law of Scotland -- is to read into the terms of the original conveyance a condition of defeasance binding on the transferee. The Australian bankruptcy law does not do that. It creates a retrospective invalidity arising at the time of the actual bankruptcy, but by that time, in the circumstances, we are considering, the property in question is beyond its reach.

It is, therefore, my opinion that none of the provisions of the Australian Bankruptcy Act as to the effect of bankruptcy on antecedent transactions extend to persons domiciled abroad in relation to property situated abroad unless such persons prove in the bankruptcy, even if an Australian bankruptcy Court has jurisdiction over such persons.(I)

That, then, is my opinion where neither the domicil of the person nor the situs of the property proposed to be affected by the relation back is Australian. Which of these considerations is to be the dominant factor? It is suggested that the situs of the property should be the governing factor and that if the law of that situs does not recognize the Australian law as to the effect of bankruptcy on antecedent transactions as affecting the property in question, then neither should the Courts of this country enforce that law so

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(I) Contrast the case of a bankruptcy taking place under an Act of the Imperial Legislature which has power to bind persons and property all over the British Empire and has evinced in the Acts mentioned above an intention to exercise that power. These Acts indeed form part of the law of Australia

far as the property in question is concerned, even though the person against whom that law is sought to be enforced is a domiciled Australian. The Australian bankruptcy should only be regarded by Australian Courts as effecting an assignment of those movables abroad which the debtor himself could have assigned at the date of the bankruptcy. This is the reasoning in Galbraith v. Grimshaw cited above as applied to the effect of a foreign bankruptcy and it seems that the same reasoning should be applied to the effect of an Australian bankruptcy abroad, for unless constrained by statute or positive law, the Courts of this country will not claim a wider effect abroad for the laws of Australia than the effect which in Australia they are prepared to concede to foreign laws. There is, however, authority for the view that Australian Courts will enforce the Australian bankruptcy law against all persons subject to their jurisdiction in personam or at all events against all persons domiciled in Australia. This is a subject on which the writers disagree and which I will discuss later.

Of course, if the law of the situs of the assets will recognize the Australian law as to the effect of bankruptcy on antecedent transactions as affecting those assets, there is no reason why the Australian Courts should not apply that law. That is merely one consequence of the proposition that the lex situs should govern the question.

2. POWER OF THE AUSTRALIAN COURT TO PROTECT THE FOREIGN PROPERTY OF THE BANKRUPT OR THE COMPANY.

It may well happen that creditors of the bankrupt may in some way or other obtain payment in whole or part of their debts out of the bankrupt's property outside Australia. On what principles will an Australian Court act in preventing creditors from taking proceedings abroad to obtain payment out of such property or in forcing them to restore what they have obtained by such means?

Here again, I should emphasize the fact that I am not dealing at present with creditors who have proved in the Australian bankruptcy or otherwise made themselves parties to it. Proof, it has been said, amounts to a compact by the proving creditor with the other creditors that the estate shall be administered according to law which must mean according to the Australian law. (See ex parte Robertson 20 Eq. 733 per Bacon C.J. in Bankruptcy at p. 737). Parties cannot approbate and reprobate: and those who seek the benefit of the Australian bankruptcy law must also abide by all its provisions. I am here dealing with creditors who have not proved and do not seek to prove in the Australian bankruptcy.

Such creditors may be controlled by two modes of proceeding depending upon whether they have obtained payment of their debts out of the foreign property or are only attempting to do so. The Court in the exercise of its equitable jurisdiction in personam can restrain them from commencing or continuing proceedings abroad or the trustee can bring an action against a creditor who has recovered judgment for the amount received abroad as money had and received to his, the trustee's, use. (See Sill v. Worswick 1 H. Bl. 665, Hunter v. Potts 4 T.R.182 Phillips v. Hunter 2 H. Bl. 402). Now, in both these cases, the jurisdiction of the Australian Courts is limited by the principle of effectiveness. They will only act if they can act effectually. An injunction will only be granted to restrain a person from taking proceedings in a foreign Court if that person is within the jurisdiction of the Court issuing the injunction, so that in the event of disobedience he can be dealt with by the punitive process of the Court. (See In re Chapman L.R. 15 Eq. 75. In re Boyse 15 C.D. 591.(I) Similarly, if the trustee issues a writ against the creditor out of a South

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(I) Of course, foreign creditors can be restrained from suing in an Australian Court. See ex parte Lovering 27 L.T. 863.

Australian Court, the writ must, generally speaking, be served in South Australia. Thus, it will be seen that a foreign creditor resident in his own country who brings proceedings there and obtains payment of his debt out of the bankrupt's property there is beyond the reach of the Australian Courts. If, therefore, those Courts will prevent creditors within their reach from satisfying their claims out of the foreign property and thus relieving the Australian property for the rest of the creditors, the only effect may be to reserve that foreign property exclusively for foreign creditors. This was cogently pointed out by Eyre L.C.J. in his dissenting judgment in Phillips v. Hunter 2 H.Bl. 402 at p.413. See also In re Vocalion Limited 1932 2 Ch. 196 per Maugham J. at p. 205. However, that is the first principle applicable to the matter. No one can be either restrained by injunction or sued by the trustee who is not subject to the jurisdiction of the Australian Courts which in practice means who cannot be served with process in Australia.

In what circumstances, then, will persons subject to the jurisdiction of the Australian Courts be restrained frm proceeding abroad or compelled to refund what they have received abroad?

In the first place, it seems, encumbrancers of immovable property abroad will not be restrained from taking proceedings in the country of the situs of the immovables, nor will they be forced to refund what they recover by such proceedings. See Moor v. Anglo-Italian Bank 10 Ch.D. 681. The right to immovables is in general governed by the lex situs and, as we have seen, the Australian Bankruptcy Act does not, on its true construction, purport to pass immovables situated outside Australia to the Australian trustee. It would seem, however, that this reasoning should apply to movable property as well. Whoever has a security over property

situated abroad, according to the lex situs at the dateof bankruptcy, should be allowed to get in that security by proceedings against that property and will not be restrained by the Australian Courts. (See In re West Cumberland Iron &Steel Company Ltd. 1893 1 Ch. 713)(I) It is true that sometimes proceedings abroad to enforce a security are restrained from motives of convenience but in reality this is only a matter of form because, in those cases, it will be found that the Courts state that the proceeds of the foreign property when they reach the country of the bankruptcy will be distributed according to the foreign law, so that any creditor who has a security by that law will be able to obtain the full benefit of that security; (See In re Queensland Mercantile Agency Company 1892 1 Ch. 219) or the same result may be obtained in different ways. (See In re Central Sugar Factories of Brazil 1894 1 Ch. 369). Similarly, a party will not be compelled to refund what he has received under a judgment in rem in a foreign country, even against a movable situate there. (See Minna Craig Steamship Co. v. Chartered Mercantile Bank of India. 1897 1 Q.B. 55.) This is in consequence of the principle that a valid foreign judgment in rem (that is, roughly, one as to the title to property within the jurisdiction of the Court pronouncing it and not obtained by fraud or in a manner contrary to natural justice or to international law) is good against the world. (See Cammell v. Sewell 5 H & W. 728 Castrique v. Imrie L.R. 4 H.L. 414). Thus, if a ship of the bankrupt is sold under an order of a foreign Court and a creditor is declared by the Court to have a real right over the ship and therefore to be entitled to have his charge

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(I) Many of these cases refer to the winding up of companies: how far the bankruptcy rules should extend to winding up will be discussed later. In many of the cases it seems to be assumed that the rules to be applied in each case are identical but it has been suggested with some reason that this is not so. However those cases on winding up which seem to proceed on that assumption and to apply the bankruptcy rules are at least good authorities as to what those rules are.

satisfied out of the proceeds, he cannot be compelled to refund to the trustee here. (See Minna Craig Steamship Co. v. Chartered Mercantile Bank above.)

If we take, however, the case of an ordinary creditor who has no security over the foreign assets but who merely sues the debtor in an ordinary personal action in the foreign country and then issues execution against the debtor's property there, or obtains possession in some other way of such property in total or partial satisfaction of his debt we find that the rules on which this Court will proceed are by no means clear. I will discuss firstly the power to make the creditor refund; secondly, the power to restrain him from taking proceedings abroad. Dicey (pps. 372-3) suggests that the principle with regard to a creditor who has not proved and does not seek to prove, in the Australian bankruptcy, is that his liability to refund the value of the property he has received abroad depends upon whether or not the foreign law recognises the Australian bankruptcy as effecting a transfer of the property in question to the Australian trustee. He thinks that if the creditor recovers the property as a result of proceedings in a foreign Court in which the Court had knowledge of the Australian bankruptcy the trustee cannot compel him to refund in accordance with the principle that a title to property in a foreign country acquired under a judgment of the foreign Court will be regarded as valid in an Australian Court. He cites in support of this proposition Cammell v. Sewell 5 H & N. 728 Castrique v. Imrie 4 H.L. 414 and Alcock v. Smith 1892 1 Ch. 238 which are not cases of bankruptcy or winding up and In re Queensland Mercantile Agency Co. 1891 1 Ch. 536 1892 1 Ch. 219 (judgment of the Court of Appeal) and Minna Craig Steamship Co. v. Chartered Mercantile Bank 1897 1 Q.B. 460. The two latter cases, however, dealwith a judgment in rem or some other proceeding giving the party a real right over the foreign

property. As I have pointed out, it is undoubted that a creditor to whom the foreign law gives a security over or other real right in the foreign property is entitled to the full benefit of his charge. It may well be doubted whether the same principles apply to a case of a creditor who recovers judgment in an ordinary personal action against the debtor abroad and is then paid by the debtor or satisfied by execution. Even if, by the foreign law, a judgment in such an action creates a charge on the debtor's property, there is authority for saying that in order for that charge to be recognized here as affecting the foreign property in the case of a creditor subject to this jurisdiction it must have arisen before the date of the bankruptcy. (See In re Oriental Inland Steam Co. L.R. 9 Ch. App. p. 557 per Mellish L.J. at pps.560-1. In re Belfast Ship Owners 1894 1 I.R. 321). Dicey also cites the case of Sill v. Worswick 1 H. Bl. 665 with which I will deal later. Dicey then lays down a second principle that if the creditor recovers property abroad without legal process or by legal process without notice of the bankruptcy to the foreign Court, the liability of the creditor to refund depends upon whether or not the foreign law, the law of the situs of the property recognises the title of the Australian trustee to the foreign property. I agree that on principle this is the proper view.(I) The reason why the trustee is

(I) It may seem inconsistent that here and elsewhere I attribute such influence to the lex situs when, in discussing the effect of a foreign bankruptcy in Australia, I apply the maxim mobilia sequuntur personam and make the lex domicilii the deciding factor. But when property in Australia or South Australia is being considered, our law is the lex situs and the matter is governed by our law, even though the principle of our law applicable is that the matter should be governed by the lex domicilii. Similarly, in a converse case, our law might consider that the appropriate law to be applied by the law of a country where property is situated is the lex domicilii. But if the foreign law does not so hold, I do not think that we should disregard it, except in the case of such a flagrant and wilful violation of the universally accepted principles of private international law as occurred in Simpson v. Fogo 1 H & M. 195 with which contrast In re Queensland Mercantile Agency Co. 1892 1 Ch. 219.

entitled to succeed against such a creditor as the one whose fortunes we are considering in an action for money had and received to the trustee's use is that the creditor has obtained possession of property which was not his to take nor the debtor's to convey since it had already passed to the trustee by the bankruptcy. We are thrown back upon our basic principle that bankruptcy acts as an assignment of the movables of the bankrupt. (How far these remarks are applicable to the case of a winding up is, of course, a doubtful matter.) But whether the foreign property has or has not been assigned to the trustee must depend upon the law of its situs for we have already rejected the theory that the Bankruptcy Act can act or does, in fact, purport to act as an assignment of property outside Australia. We may say, indeed, that the foreign law at any rate if the bankrupt is a domiciled Australian should recognize the Australian bankruptcy as effecting an assignment on the principle mobilia sequuntur personam. But if, nevertheless, the foreign law does not recognize the Australian bankruptcy as effecting any such assignment, how can it be said that a creditor in obtaining property situated in the country in which that law prevails has obtained something which is the property of the trustee?

I respectfully agree, therefore, that Dicey's rules are correct in principle, but, unfortunately, the authorities are neither clear nor consistent. The leading cases on the topic are three cases decided late in the eighteenth century which deal directly with the point and which have never been over-ruled nor, as far as I can discover, doubted. And though there may be dicta in later cases - see for example Banco de Portugal v. Waddell 5 A.C. 161 per Lord Cairns at p. 167 - which might suggest a different rule, there is no later case which I can discover which examines the question anew from first principles.

The first of these cases was Hunter v. Potts 4 T.R. 182 (1791) decided by Lord Kenyon. There, the bankrupt was domiciled in England and the defendant, after the assignment under the bankruptcy laws then in force, and with knowledge of it, ordered his attorney in Rhode Island to attach the bankrupt's property there. The attorney accordingly attached the monies of the bankrupt in the hands of garnishees there, recovered judgment against the bankrupt and remitted the amount attached to the defendants in England. It was held that the assignees of the bankrupt could recover the amount in an action against the defendant for money had and received to their use. Lord Kenyon proceeded upon the reasoning that there was no doubt that the bankrupt, who was domiciled in England, could himself have assigned all his property wherever situated, unless some positive law of the country where it was situated forbade such a transfer or required a particular mode of conveyance. There, no such law of Rhode Island was stated to be in existence. But it could not be doubted that the assignment under the bankruptcy laws was in every manner as effective as a voluntary assignment by the bankrupt himself could have been, subject to the same qualification. All the property in Rhode Island having become vested in the assignees by the assignment, therefore, no positive law of Rhode Island to the contrary appearing, the property recovered by the defendant was the property of the assignees and he must be taken to have recovered it to their use. Lord Kenyon also referred to the rule that personal property is governed by the law of its owner's domicil. (p.192) but he stated at p. 192 that the Court did not mean "to break through the rule that the Courts of one country ought to pay a proper deference to the decisions of the Courts in another, having competent jurisdiction where the facts on which the decision were made were fairly discovered to such Court."

This case rather supports Dicey's view than otherwise: it might

be interpreted as meaning that the creditor's liability to refund depends upon the recognition of the trustee's title by the foreign law but that where at any rate the bankrupt is domiciled in England the Court will presume that the foreign law will recognize that title until the contrary is proved, the mere fact of a judgment havingbeen recovered in the foreign country without its appearing whether the English bankruptcy was disclosed to the foreign Court or not, not being such proof.

The second case is Sill v. Worswick 1 H. Bl. 665 (1791) decided by Lord Loughborough. Here, after the act of bankruptcy, but before the assignment, the creditor resident in England with knowledge of the bankruptcy made an affidavit of his debt before the Mayor of Lancaster and then by virtue of a statute then in force for the recovery of debts in the colonies, his agents in St. Christopher's, proceeding upon the affidavit, were able to attach the amount of the debt by action in the Courts there and by garnishee proceedings, and to forward it to the creditor in England. The assignees of the bankrupt succeeded in an action against the creditor. It was clear that the defendant had obtained the amount by an abuse of the process of the English law, and further, it could have been argued in a similar case today that the English bankruptcy law bound the colonies and that for that reason the property in St. Christopher's passed to the assignees, and that their title related back to the act of bankruptcy. Lord Loughborough, however, dealt with the matter at large, although he did not consider that necessary for the purposes of his decision. In a famous passage which I have quoted in another connection, he enunciated the maxim that personal property is governed by the law which governs the person of its owner and says that if the title of the assignees had been brought to its notice the Court at St. Christopher's unquestionably ought to have preferred that title to the title of the attaching creditor. He also stressed the

fact that the creditor was resident (and apparently domiciled) in England (p. 695). However, he also said (p. 693):

> "It by no means follows that a commission of bankruptcy "has an operation in another country against the law of "that country. I do not wish to have it understood "that it follows as a consequence from the opinion I am "now giving, (I rather think that the contrary would be "the consequence of the reasons I am now using) that a "creditor in that country (i.e. any country outside "England) not subject to the bankrupt laws nor affected "by them, obtaining payment of his debt and afterwards "coming over to this country, would be liable to refund "that debt. If he had recovered it in an adverse suit "with the assignees, he clearly would not be liable. "But, if the law of that country preferred him to the "assignee though, I must suppose that determination "wrong, yet I do not think that my holding a contrary "opinion would revoke the determination of that country "however I might disapprove of the principle on which "that law so decided."

This case is not unfavourable to Dicey's rules in so far as they apply to a creditor who is not "subject to the bankrupt laws"of England. The stress laid on the subjection of the creditor to those laws, however, indicates the principle which was to triumph in the next case.

This is the case of Phillips v. Hunter 2 H. Bl. 402 (1795). This is a decision of the Court of Exchequer Chamber in which six judges concurred, Eyre L.C.J. alone dissenting. It must, therefore, be regarded as of high authority. A., B. & C were partners in an English firm: A and B resided in England, while C went to Pennsylvania to manage the firm's business there. The bankrupt, also resident in England, was indebted to the firm and C, knowing that the bankrupt had stopped payment, and in fact after a commission had actually issued against him, attached in the names of himself and his partners a debt due to the bankrupt in Pennsylvania and obtained payment of it under a judgment of the Pennsylvanian Court. It was held that the bankrupt's assignees had a right to recover the money so received by C in an action against A B and C for money had and received to the use of the assignees.

The majority point out that all the parties were British subjects, that they all resided in England except C,

who was residing abroad to manage the business of his firm, an English firm, and that the debt from the bankrupt to the defendants was contracted in England. "All these facts appearing on the record, this case must be argued as arising between English subjects upon English property. When the debt, therefore, was contracted, all the parties were as much subject to the bankrupt laws as to the other laws of England under which they lived" (p. 405). They also state that every British subject is a party to an Act of Parliament and that British subjects cannot even by residence abroad escape the operation of the Bankrupt Acts. As to the foreign judgment they say that is final and conclusive between the parties to it, but not as to the use to which the money is recovered. On the other hand, they also follow Lord Kenyon's reasoning in applying the maxim mobilia sequuntur personam and in assimilating the assignment under the bankrupt laws to an assignment by the voluntary act of the debtor. (p. 406). The property of the bankrupts is therefore transferred to the assignees without regard to locality except where the particular laws of the situs forbid. They emphasize the exception. (p. 410). "When it is argued that the bankrupt laws of this country do not operate in another it is to be observed that though to some purposes they do not, yet to all civil purposes they do, when such purposes are neither repugnant to the laws of the particular state nor to the general law of nations". They also mention the wide words of the statute then in force which authorized the commissioners to take the effects of the bankrupt "whereso-ever they may be found or known". (13 Eliz. C 7). Lord Eyre L.C.J. dissented. As to the maxim that a British subject will not be allowed to contravene a British Act of Parliament, he said (p. 418): "This proposition can hardly be said to be true in a popular and vulgar sense and as I take it is not true in any sense in which it can be made to bear upon the assignee's

title to recover in this action". He also pointed out that the effect of debarring a creditor who was "so unfortunate as to be a British subject" from proceeding against the foreign property might be that the foreign creditors would exhaust the fund which he could otherwise have used to satisfy his claim and thus relieve the English property for other creditors in England.(I) He cited, with approval, a judgment of Lord Mansfield in Waring v. Knight that the only way to coerce a creditor who had recovered foreign property of the debtor was to refuse to allow him to prove or to receive a dividend until he had refunded. But the pith of Lord Eyre's opinion with regard to the point immediately at issue, is contained in the following words, (pps. 410-11):

> "The judgment against the garnishee in the Court of "Pennsylvania was recovered properly or improperly. If "notwithstanding the bankruptcy the debt remained liable "to attachment according to the laws of that country the "judgment was proper: if according to the laws of that "country the property in the debt was divested out of the "bankrupt debtor and vested in his assignees the judgment "was improper. But this was a question to be decided in "the cause instituted in Pennsylvania in the Courts of "that country and not by us. We cannot examine their "judgment and if we could we have not the means of doing "it in this case."

As I have said, Phillips v. Hunter must be regarded as of high authority, and summing up that case with the two previous ones, we may find two different principles which may govern this matter. It may be that the question as to whether the creditor can be compelled to refund depends on whether or not the foreign law recognizes the bankruptcy as effecting an assignment to the trustee, the Courts presuming until the contrary is proved, that, at any rate in the case of a bankrupt domiciled in the country of the bankruptcy, the foreign law will recognize the bankruptcy as effecting such an assignment, the mere fact of a judgment havingbeen recovered by the creditor in the foreign country not affording such proof, if it is not shown that the foreign Court knew of the bankruptcy. That is

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(I) See for similar reasoning Liverpool Marine Credit Company v. Hunter L.R4 Eq. 62 affirmed L.R. 3 Ch,App. 479.

a ground on which these cases may be explained and is more or less consistent with Dicey's rules: at the same time, we must recognize the force of Lord Eyre's dissenting judgment in Phillips v. Hunter with regard to the case of the judgment of the foreign Court. It does seem an anomaly "for the Courts of one country to take from a man what has been adjudged to him by the Courts of another". (See Brickwood v. Miller 3 Mer. 279 per Grant M.R. at p. 281). On the other hand, it may be said that if the creditor is a British subject (in the case of an English Court, but this could not apply to an Australian Court, see Gibson & Co. v. Gibson 1913 3 K.B. 379) or domiciled in Australia, then he must refund, no matter what the foreign law on the matter is. That is a possible interpretation of these cases and apparently the view taken by Westlake (see Pps. 183-4). It cannot be denied that that view derives support from many of the expressions in the cases I have cited. I nevertheless prefer the first alternative I have expressed as being in my opinion more consistent with the true principles of private international law which should govern the matter under discussion. That conforms more nearly than the second alternative to the view of Dicey, and I put it forward as the law today.

This principle applies where the creditor in question has obtained possession of the foreign movables of the bankrupt. It is submitted that the same principle applies with even more force to the case of foreign immovables which are normally supposed to be governed by the lex situs. If a creditor obtains possession of the foreign immovables of the bankrupt or obtains payment out of them, his liability to refund in an action by the trustee for money had and received to his (the trustee's) use depends on whether the law of the country where the immovables are situated recognises the Australian bankruptcy as effecting an assignment of the immovables to the trustee or not. In this case, however,

the maxim mobilia sequuntur personam having no application, the Court will not presume until the contrary is shown that the foreign law recognizes the Australian bankruptcy as effecting such an assignment. Rather the opposite rule will apply since immovables are generally acknowledged to be governed by the law of the place where they are situate and this Court will presume that the foreign law will not regard the Australian bankruptcy as effecting such an assignment until the contrary is shown. (See Cockerell v. Dickens 3 Moo. P.C. p. 98 per Baron Parke at p. 133-).

It might be added that if a debtor of the bankrupt has paid the debt under process of law in a foreign country whether to a creditor of the bankrupt or not and whether the foreign Court had notice of the Australian bankruptcy or not, and whether the foreign law recognises the extra-territorial effect of the Australian bankruptcy or not, he cannot be compelled to pay it over again to the Australian trustee should he come within the jurisdiction of the Courts of this country. (See Le Chevalier v. Lynch 1 Doug. 170).

There are some later cases dealing with the winding up of companies which are cited by Westlake in support of his view. These are Re South Eastern Railway Company of Portugal 17 W.R. 982, re North Carolina Estate Co. 5 T.L.R. 328 and Re Belfast Ship Owners Co. 1894 1 I.R. 321. The first two of these are decisions of single Judges, the third case a judgment of the Irish Court of Appeal. These are cases of injunctions restraining creditors from proceeding abroad. The jurisdiction in personam of a Court of Equity over those persons who can be served with its process, is very wide and very vague, and a very large discretion is vested in the Court. It can restrain any person who can be served within its jurisdiction from

instituting or continuing any proceedings in a foreign Court. See In re Vocalion (Foreign) Limited 1932 2 Ch. 196. It is much easier therefore for the trustee to stop a creditor within the jurisdiction from taking proceedings abroad than it is for him to compel a creditor who has received property of the bankrupt abroad to refund. It cannot be said that the use by the Court of its discretion in this connection has been entirely consistent.

The first of these cases, the South Eastern Railway Co. of Portugal Case 17 W.R. 982 was the case of a creditor who laid an embargo on a certain Portuguese asset claiming a lien over it. He was restrained from proceeding with his action in Portugal but the Court reserved against the fund comprising the asset in question when it came to the hands of the liquidator all such rights as the creditor then had against it. This would therefore seem to be merely one of those cases which I have already mentioned where it is thought that as a matter of convenience the whole of the assets should be administered in the country of the winding up, all rights acquired over the foreign assets by the foreign law being preserved. (See In re Queensland Mercantile Agency Co. 1892 1 Ch. 219, In re Central Sugar Factories of Brazil 1894 1 Ch. 369).

In both the other cases, as well as in In re Oriental Inland Steam Co. 9 Ch. App, 557, the creditor sought to be restrained had either proved in the winding up or had made himself in some other way a party to the proceedings in the Court of the winding up, as, for example, by presenting the petition (Re Belfast Ship Owners Co. 1894 1 I.R. 321). As I have pointed out, these cases should be governed by entirely different principles. Nevertheless, there are dicta in these cases which indicate two principles, firstly that though after a winding up the legal estate in its assets remains in the company yet the equitable estate is taken out of it and the

assets wherever situate are held in trust for all the creditors and that therefore if one creditor attempt to obtain possession of part of the assets which could give him a larger share in them than other creditors of the same class, the case is analogous to that of one cestui que trust attempting to obtain possession of a larger share of the trust property than the others and the creditor so acting must be restrained (see In re Oriental Inland Steam per Mellish L.J. p. 560); secondly, that British subjects permanently residing in England (assuming that England is the country of the forum of the winding up) will be restrained from attempting to obtain possession of the assets of the company outside England. (See per Chitty J. in In re North Carolina Estate Co. 5 T.L.R. 328). The first of these propositions assumes that the rule in the case of a winding up is the same as in the case of bankruptcy in so far as it effects the equitable if not the legal interest in the foreign assets. The second assumes that the rule in bankruptcy is that British subjects who can be served in England will be prevented from taking proceedings abroad against the bankrupt's property abroad. I will discuss the first proposition later, noting now that it certainly cannot be contended that the rule is wider in the case of winding up than in the case of bankruptcy.

As to the second, this is, of course, the proposition that I have already rejected in connection with the right of the trustee to make a creditor, who has obtained possession of the bankrupt's property abroad, refund. I have already pointed out the difference between the power to restrain a creditor from taking proceedings abroad and the power to compel him to refund if he has obtained possession of property abroad. In truth, the two remedies spring from entirely different sources: from the equitable process of injunction on the one hand, the common law action for money had and received by the defendant to the use of the plaintiff in the other. It cannot be denied

that there are cases where persons have been restrained from taking proceedings abroad in which no mention is made of the question whether or not the foreign law allowed such proceedings, notwithstanding the bankruptcy or the winding up. Thus for example, in Ex parte Ormiston 24 L.T. 197, English creditors whose debts were contracted in England, were restrained from suing in the Belgian Courts a debtor resident in Belgium who had presented a petition to the English Court. "The real question is not of the jurisdiction which is undoubted but of its exercise" (per Palles C.B. in Re Belfast Ship Owners Co. 1894 1 I R 321 at p. 332). It is better to explain the cases of these injunctions on the ground of the peculiar jurisdiction in personam of a Court of Equity than that of any principle of private international law. We may say, then, that Australian or South Australian Courts have jurisdiction to restrain persons subject to their equitable jurisdiction in personam from commencing proceedings outside Australia or South Australia as the case may be, against a bankrupt in the one case, or a company in the course of winding up in the other, or the foreign property of either, but that they have a discretion to exercise or not to exercise such jurisdiction.

This discretion is, like most other discretions in that it is impossible to predicate with certainty all the cases in which it will or will not be exercized. It is clear that the mere presence of property belonging to the person sought to be restrained or the presence of an agent of such a person within the jurisdiction does not give the Court power to restrain that person from taking proceedings abroad. (Carron Iron Co. v. Maclaren 5 H.L.C. 416 per Lord Cranworth L.C. at pps. 441-2). Personal presence or some form of submission, as by participating in the proceedings of these

Courts is necessary.

In a recent case (In re Vocalion (Foreign) Limited 1932 2 Ch. 796) Maugham J. refused to restrain a company registered in England as a foreign company but domiciled in Victoria, from proceeding with an action brought in Victoria against the company which was being wound up, in respect of a liability incurred there. The learned Judge gives many cogent reasons of policy for this decision. He points out (p. 205), that an injunction might well be ineffectual for persons temporarily resident or companies carrying on business within the jurisdiction but domiciled elsewhere, might withdraw rather than submit to it: that creditors in the foreign country cannot be restrained from taking such proceedings as they may deem fit in their own country so that they might obtain all the assets in that country without the English creditors being benefited at all by the injunction and that credit may be given to debtors in another country in reliance on the presence of assets within that country and on the remedies given by that country's law which may be more extensive than they are in England. The mere fact that a creditor domiciled abroad can be served with process in England should not in the opinion of the learned Judge (p. 210) deprive him of rights which he could otherwise enjoy with impunity in his own country.

I respectfully agree with this decision and am therefore of opinion that an Australian or South Australian Court will not, in the exercise of its discretion and in the absence of special circumstances, restrain a creditor domiciled abroad from commencing or continuing proceedings against a bankrupt or a company in the course of winding up or the property of either in the country of his domicil at any rate if his debt was incurred there. If it is said that this is inconsistent with the conclusion I have arrived

at in the case of the duty of the creditor to refund in that it makes the matter depend rather upon the domicil of the creditor than upon the law of the situs of the assets I can only point out the peculiar jurisdiction of a court of equity and say that there may be special reasons for compelling persons domiciled here to submit to the equitable jurisdiction in personam of these Courts which do not exist in the case of persons domiciled elsewhere. The effect of Mr. Justice Maugham's decision is, as he himself points out, (p. 210) in effect to leave the matter to be decided by the lex situs for he assumes that when the Victorian action proceeds to trial, the Victorian Court will note the English liquidation and decide according to Victorian law what effect that liquidation has upon the Victorian assets and upon the creditor's right to sue.

I may now deal with the question - how far do the rules I have enunciated in the case of bankruptcy as to the power of the trustee to compel a creditor to refund and the power of the Court to restrain persons subject to its jurisdiction from commencing or continuing proceedings abroad, apply to the case of a winding up? It is clear law that Section 198 of the Companies Act 1934 referring to the power of the Court to restrain actions after the presentation of the petition, section 200 avoiding attachments and executions and section 204 forbidding the commencement of any proceedings against the company without leave after the making of a winding up order or the appointment of a provisional liquidator only apply to proceedings in the South Australian Courts. (See In re Vocalion Ltd. above). We have seen, however, that the Court, in the exercize of its equitable jurisdiction in personam, has power to restrain by injunction persons subject to its jurisdiction from commencing or continuing proceedings in foreign Courts and many of the cases

we have dealt with have been cases of winding up. We have seen further that the exercize of this power is discretionary and that the rules governing the exercize of the discretion are somewhat vague, and further that the whole matter depends rather on the principles relating to the jurisdiction of Courts of equity than on any principle of private international law. (Note that the appointment of receivers in a debenture holders' action does not give the Court power to restrain creditors subject to its jurisdiction from proceeding against the foreign property of the company. See In re Maudslay Sons & Field 1900 1 Ch. 602).

Is there power, however, to make a creditor who does not seek to prove and who has received payment out of the company's property abroad or who has received such property refund in the same manner as in the case of bankruptcy? It cannot be denied that there are cases in which bankruptcy and winding up have been treated as analogous for this purpose. This view, moreover, has the authority of Westlake, see Chapter VI. These cases, of which In re Oriental Inland Steam Co. L.R. 9 Ch. App, 557 is the most important, proceed upon the following reasoning: Although the company is not divested of its legal title to its property that property is, after the winding up, held on trust for its creditors. The whole of the property of the company wherever situate is impressed with a statutable trust for the benefit of the creditors. If, then, one creditor obtains possession of part of the property of the company, thus giving him an advantage over the other creditors, he is a cestui que trust who has obtained more than his share of the trust property and he must refund for the benefit of the other cestuis que trust. That is the principle in which In re Oriental Inland Steam Co. proceeds although in that case the creditors in question had proved in the liquidation and the actual decision might be upheld on the ground that by proving they had agreed to the distribution of the assets according to the English law.

I have submitted, however, that the reason why a creditor who obtains possession of part of a bankrupt's property abroad is compelled to refund is that he has obtained something which was not at the date when he obtained it, the property of the bankrupt at all but had passed to the trustee by the assignment effected by the bankruptcy. It was at that time the trustee's property, not the bankrupt's. Now, I have already cited authorities for the proposition that a winding up does not effect an assignment: if my previous reasoning is correct founded on such cases as Primary Producers Bank v. Hughes 32 S.R. (N.S.W.) 14, then the theory is no longer tenable, that a winding up under English systems of law has or purports to have any extra territorial effect at all. The foreign property of a company which is being wound up is still the property of the company and is not in my opinion subject to the trust with which the South Australian assets are impressed. In my opinion, the South Australian winding up does not purport to affect the foreign assets at all. If this view is wrong, and the bankruptcy rules are applicable, then there will be little practical difference if my rendering of the bankruptcy rules is correct. For, if the matter is to be determined by the law of the country where the assets in question are situated, then, if the Courts of such country follow the reasoning of Harvey C.J. in Eq. in Primary Producers Bank v.Hughes they will not regard the South Australian winding up as affecting those assets in any way and will not place any obstacle in the path of creditors suing the company in such country and obtaining satisfaction of their judgments out of those assets.

Dicey (p. 371) suggests that the solution to the question is contained in the section of the English Act corresponding to Section 278 of our Companies Act of 1934 which provides inter

alia that except so far as is otherwise enacted, in the winding up of an insolvent company the same rules shall prevail and he observed, with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force for the time being under the law of bankruptcy with respect to estates of persons adjudged bankrupt. It is possible that this may apply the law of bankruptcy affecting the matters now under discussion to the case of the winding up of an insolvent company. If it does, as I have pointed out above, if my interpretation of the bankruptcy rules is correct the practical difference will be small,

In considering this subject, we have seen two principles struggling for mastery - the theory that the rights of creditors to receive payment out of foreign property should depend upon the foreign law, and the theory that persons subject to the jurisdiction in personam of the local Courts should be prevented from exercising their legal rights according to the foreign law and forced to give up what they have obtained by the exercise of those rights in the interests of the creditors as a whole. As we should expect, the first theory has been more in evidence in the courts of common law, the second in courts of equity: as we should expect again, the first theory has been more prominent when it is a question of taking from a person what he has actually received under the authority of the foreign law, the second when it is a question of preventing him from attempting to obtain something under that law. And as we should finally expect, there is a considerable amount of confusion and difference of opinion.

The battle is not yet decided: and , in advancing my views, I am conscious that other opinions have much to support them both on principle and authority.

The views expressed in this section apply with even more force to such provisions as the reputed ownership clause

of the Bankruptcy Act Section 91 (3). Goods situate outside Australia in the possession, order or disposition of the bankrupt with the consent and permission of the true owner under such circumstances that he is the reputed owner thereof should certainly not be deemed in Australia to have passed to the Australian trustee unless they do so according to the lex situs, even though the true owner is a domiciled Australian.

Here again, our law affects a transfer of property from the true owner to the trustee. If the true owner is domiciled here, it may be that we would expect foreign courts to recognize the transfer to him as transferring movables in a foreign country, on the principle mobilia sequuntur personam. It is true that so far as he is concerned the assignment is an individual, not a universal one, but as we have seen, our courts incline to regulate a transfer of property here which takes place in the country of the transferor's domicil, by the law of that country. See In re Anziani 1930 1 Ch. 407. But if the foreign court does not recognize the transfer, the property, it is submitted, should not be held here to have passed.

(3) PROOF, AND EFFECT OF PROOF.

All creditors will be allowed to prove in the Australian Courts, no matter where their debts were contracted or what their domicil. This is laid down in In re Kloebe 28 Ch.D.175 a case of the administration of a deceased person's estate, but it has never been doubted that it applies to the case of bankruptcy and winding up. (See In re Siddall 11 A.L.R. (C.N) 62 In the Bank of Queensland Ltd. 1 Q.S.C.R. 159, In re Australian Midas Gold Estates 1916 V.L.R. 526, In re Weiskemann 92 L.J. Ch. 349.) This Court will treat all the creditors of the same class equally. The creditors must, however, prove, themselves: if there is a concurrent bankruptcy in another country, the foreign trustee will not be allowed to prove here

as representing the creditors who have proved in his bankruptcy, but they must prove their own debts individually. (In re Harris Goodwin & Co. 7 Q.L.J. (N.C.) 94, In re Alfred Fenton & Sons 26 V.L.R. 88).

Creditors who prove in the Australian bankruptcy do so "under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it .... that the bankrupt's estate shall be duly administered among the creditors" (per Bacon C.J. Ex parte Robertson 20 Eq. 733 at p. 737). "Duly administered" in this context means, of course, duly administered according to the law of Australia. Now, the great principle of the bankruptcy laws is "justice founded on equality", (Phillips v. Hunter 2 H. Bl. 402 at p. 406). This means that the aim of the bankruptcy law is to ensure that all creditors shall be treated equally and rank pari passu with all other creditors of the same class. That is the aim which this Court will endeavour to realize. The implied contract into which a creditor enters when he proves, therefore, is that the estate of the bankrupt shall be distributed equally between all creditors of the same class, according to the law of this country. If, therefore, he seeks to prove in the bankruptcy, he must bring into the common fund all the property of the bankrupt which he has received abroad subject to modifications I shall discuss later, quite independently of whether he could be compelled to refund that property if he had not sought to prove under the rules I have discussed previously. The same result may, it is submitted, be obtained in other ways involving a submission to the jurisdiction of this Court and an implied undertaking that the estate should be distributed according to the law of this country, as for instance, if, under the old law, a creditor executed an inspectorship deed, (Ex parte Tait L.R. 13 Eq. 311) or if he presents a petition in bankruptcy or for the winding up of a company (In the Matter of the Belfast Ship Owners Co. 1894 I.R. 321). He who seeks

equity must do equity: persons who desire to take advantage of the law of this country must abide by all its provisions.

Thus, a creditor domiciled abroad, who has received money from the bankrupt in circumstances which would make such receipt a fraudulent preference by Australian law and who proves in the Australian bankruptcy will be forced to refund the amount so received, (ex parte Robertson 20 Eq. 733). Similarly, if there is a concurrent bankruptcy abroad, persons who have proved in the foreign bankruptcy and received a dividend there will not be allowed to receive a dividend in Australia until all the creditors of the same class proving here have received a dividend at the same rate as the dividend received in the foreign bankruptcy. (Ex parte Wilson 7 Ch. App. 490) or until they have brought into the common fund all that they have received abroad (Banco de Portugal v. Waddell 5 A.C. 161). In some cases, a creditor may be restrained from receiving a dividend here unless he undertakes not to prove in the foreign concurrent bankruptcy. (See ex parte Chevalier de Mello Mattos 1 M & A. 345) or not to take proceedings abroad or until proceedings taken abroad are abandoned. (See Cockerell v. Dickens 13 Moo. P.C. 98 at pps. 134-5). Some countries give to creditors, nationals of or domiciled in such countries or whose debts were contracted in such countries a preference as such over other creditors. In such cases this Court can take measures of retorsion against all creditors from such countries and it "would be astute to equalize the payments and take care that no ..... creditors (from such countries) should come in and receive anything till the (Australian) creditors had been paid a proportionate amount." (See per Pearson J. in In re Kloebe 28 Ch. D. 175 at p. 177). A creditor who has received a dividend abroad will not be allowed to receive anything from the Australian bankruptcy until all the creditors have been made equal, even though he might have been entitled to priority according to the foreign law. In so acting, the

Australian Court does not presume to interfere with or sit in judgment on the foreign bankruptcy law; it merely regulates the conditions upon which it will allow persons to share in the funds subject to its control. "If a creditor comes to take the benefit of the English law, and proves against the English estate he cannot take advantage of the preference that he has received under the law of a foreign state," (per Mellish L.J. Ex parte Wilson 7 ch. App. 490 at p. 494).

If the person or persons made bankrupt in Australia and abroad are really the same, this rule will apply although he or they may be carrying on business in the same countries under different names. (Ex parte Wilson & Banco de Portugal v Waddell above). If two firms consisting partly but not entirely of the same persons are made bankrupt, one here, and one abroad, the question whether a person who has proved and received a dividend in the foreign bankruptcy can prove in the Australian bankruptcy will be determined in exactly the same way as if the firm which is bankrupt abroad had been also made bankrupt in Australia, and double proof had then been attempted. (Ex parte Chevalier de Mello Mattos 1 M & A. 345 Ex parte Goldsmid 1 De G & J. 257 affirmed in the House of Lords sub. nom. Goldsmid v. Cazenove 7 H.L. 785). However, it has been held, that if a person receives a dividend here and then receives a dividend in the foreign bankruptcy though he will not be allowed to receive further dividends here until all the creditors have been made equal, yet, he cannot be compelled to refund the dividend which he received here since at the time when he received it, he did so rightfully. (Ex parte Smith 31 L.J. (B) 60). It might, indeed, have been thought that if proof is a contract, that the estate shall be duly administered according to the law of this country, then a breach of that contract has been committed, when the creditor receives the dividend in the foreign bankruptcy, thus obtaining more than other creditors of

the same class, but the Court in the case cited preferred to approach the question from the point of view that when the creditor approaches this Court asking for its assistance the Court may fairly put him upon terms, but if he asks for nothing from this Court, it cannot deprive him of something which he has rightfully and lawfully received. (See per Turner L.J. at p. 62). It may be doubted whether this reasoning is altogether satisfactory or whether the original proof should not have been regarded in the case in question as a contract or an election to abide by the English law that all creditors of the same class should be treated equally. The Court seemed to think that the case would be different if it could be shown that the foreign Court would not have allowed the creditor to receive the dividend there if it had known of the English bankruptcy and the receipt of dividend there. If this had been so, the matter would have fallen within the rule I have previously discussed; the creditor could have been compelled to refund irrespective of proof, what he had received abroad, because by the law of the country where the property in question was situate, he was not entitled to receive such property.

It should be noted that the Australian law of bankruptcy which is applied against persons who prove in the Australian bankruptcy includes the law as to the relation back of the trustee's title and the effect of bankruptcy on antecedent transactions. (Banco de Portugal v. Waddell 5 A.C. 161 per Lord Selborne pps. 169-70. See also Ex parte D'Obree 8 Ves. 82). The implied contract of submission resulting from proof or the result in equity which follows from the election to take the benefit of the Australian bankruptcy applies to these matters also.

Are there any exceptions to this rule that persons who prove in the Australian bankruptcy must bring into the common fund all that they have received abroad, or they will not be allowed to receive dividends here until all the creditors have been made equal?

In the first place, I have already noted the position of secured creditors. Persons who have, by the foreign law, a security over, i.e., a right in rem in, assets situated in a foreign country, are entitled to realize or value their security and prove in the Australian bankruptcy for the balance without bringing into account what they receive for the security, notwithstanding that the security is of a nature unknown to the law of this country. (See In re Somes 3 Mans. 131. In re Sykes 101 L.J. Ch. 298 per Eve J. at p. 300) or that the debt for which it is held is not enforceable here, e.g. because it is statute barred according to our law. (See In re Bowes 1889 W.N. 53 138). All creditors of the same class are to be treated equally. An ordinary creditor holding security over property in Australia is allowed to either surrender his security and prove for the full amount of his debt or to realize or value his security and prove for the difference: the same rule is to be applied to the case of a creditor holding security over property situated outside Australia: whether in fact he does hold such a security over the foreign assets or not depends upon the foreign law. Similarly, if a creditor after the bankruptcy obtains the benefit of a judgment in rem in a foreign country as to property situate in that country he should be allowed to prove here for the balance of his debt, without taking into account what he received abroad.

Secondly, it has been laid down by the Privy Council that "the principle ... that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors and at the same time be allowed to come in pari passu with the other creditors for satisfaction out of the remainder of that fund .. does not apply where that creditor obtains by his diligence something which did not and could not form a part of the fund". (Cockerell v. Dickens 3 Moo P.C. 98 per Parke B. at p.132).

The facts in that case were as follows: a creditor

from Java proved in the bankruptcy in India and received dividends: he then instituted a suit in Java to which the assignees of the bankrupt appeared: judgment however was given in favor of the creditor and real estate of the bankrupt in Java was sold for the benefit of the creditor, the proceeds of which sale amounted to three-fifths of the whole debt. The creditor also instituted proceedings abroad against certain debtors of the bankrupt. The assignees filed a bill in the Supreme Court of Calcutta asking that the creditor should be ordered to refund the dividends already received in the Indian bankruptcy and be restrained from receiving any further dividends until all the creditors had been made equal. The Privy Council held that since the real estate at Java did not pass to the assignees under the assignment under the bankruptcy law, the creditor was neither bound to refund the dividends already received, nor prevented from receiving further dividends until his whole claim was satisfied by reason of what he had received from the proceeds of that real estate, but that he ought to be restrained from receiving further dividends until he had abandoned the proceedings against the bankrupt's debtors abroad which was, of course, an attempt to recover his movables, not his immovables. The opinion of the Judicial Committee was delivered by Baron Parke as he then was and the pith of it is contained in the quotation at the head of this paragraph. The creditor who proves and receives dividends will not be allowed to take part of the fund which would otherwise have been available for the payment of all the creditors: but if he obtains something which did not and could not form part of the fund that is to be entirely ignored, and he can neither be compelled to refund the dividend he has received or restrained from receiving further dividends. "If the real estate in Java did not pass by the assignment under 9 Geo. IV. C.73 S9 (the then Indian Insolvency Act) nor could in any way be got hold of and made available by the assignees for the payment of the general creditors, any individual creditor who could obtain it by due course of law

would have a right to hold it," (per Baron Parke p. 132). It may well be doubted whether this judgment is altogether consistent with the principles I have earlier laid down. With all respect, I would submit that the explanation of the rule is not that a creditor shall not be allowed at the same time to obtain part of the fund which would otherwise be available for the payment of all the debts and at the same time be allowed dividends pari passu with the other creditors out of the remainder of the fund but either that proof amounts to a compact that the estate of the bankrupt shall be equally divided among creditors of the same class according to the law of the country of the bankruptcy or else that persons who approach this Court asking for its assistance in obtaining payment out of the funds under its control will only be granted that assistance on terms of securing, so far as lies in their power, the equal division of the bankrupt's property amongst all creditors of the same class, according to our law. But the judgment of the Privy Council is binding on our Courts, and it is submitted that the principle contained in the quotation at the head of this paragraph is good law. Persons who obtain something which did not and could not form part of the fund available for distribution among all the creditors are entitled to retain it and to prove and receive dividends for the balance of their debts.

It only remains to see what the practical effect of that statement is today. Westlake (p. 182) draws the conclusion that a creditor can retain any payments which he obtains out of the non-British immovables of a bankrupt or company and may receive dividends on the balance of his debt pari passu with the other creditors. I need, of course, make no distinction between British and non-British immovables since I have already come to the conclusion that an Australian bankruptcy or South Australian winding up cannot, of its own force, pass foreign immovables. But even so, Westlake, I respectfully submit,

puts the matter too high. The crux of the question is: why did the Privy Council in Cockerell v. Dickens hold that the real estate in Java did not and could not pass to the assignees nor could in any way be got hold of and made available by the assignees for the payment of the general creditors?

The answer is that it did not pass under the assignment by general international law because immovables are governed by the lex loci rei sitae not by the law of the person of their owner. It did not appear that it passed under the assignment by the law of Java and at that date the bankrupt could not have been compelled directly to assign his foreign real estate to his assignees, nor would it have been proper to compel him indirectly by means of some pressure put upon him, e.g. by withholding his discharge (see per Parke B. at p.133-4). The creditors might possibly have assigned their debts to someone who could have taken out execution against the real estate in question but in fact no such steps were taken.

Now, in the first place, if the law of the situs of the immovables recognized the Australian bankruptcy as effecting an assignment of the immovables or allowed the trustee to get possession of them in some manner, then the immovables would not be something which did not and could not form part of the fund available for the creditor. But secondly, there now exists power to compel a bankrupt to assign his foreign immovables to the trustee. Section 76 (1) (c) of the Federal Bankruptcy Act provides that the bankrupt shall execute such deeds and instruments and generally do all such acts and things in relation to his property as is reasonably required by the trustee. Obedience to this section is enforced by the punitive process of the Court and there is authority for compelling the debtor to convey his foreign land. (See In re Harris 74 L.T. 221). This power did not

exist in 1840 when Cockerell v. Dickens was decided. The principle in Cockerell and Dickens, therefore, must be restricted to cases where the law of the country where the immovables are situated does not recognize the bankruptcy as effecting an assignment to the trustee of such immovables or otherwise allow him to obtain possession thereof and where also the bankrupt is not within the jurisdiction so that he cannot be compelled to execute the appropriate documents to effect a transfer of the immovables to the trustee in accordance with the lex situs. If any method at all exists by which any foreign property of the bankrupt can be got hold of and made available for the payment of the general creditors, then the rule in Cockerell v. Dickens can have no application and the particular creditor who has received payment out of such property will be treated in the ordinary way according to the rules I have previously discussed.

A rule that is possibly a variant of this principle is to be derived from the case of Brickwood v. Miller 3 Mer. 279. In this case, one P who was made a bankrupt in England was a partner in two firms originating in the West Indies where his partners resided and carried on the business. One of the creditors attached in the West Indies property belonging to the firm there. The partners were not bankrupt. It was held that the creditor was entitled to retain what he had so received and could not be compelled to refund and it would seem to follow that he could prove and receive dividends on the balance of his claim if any.(I) The Court criticizes the decisions in Sill v. Worswick and Phillips v. Hunter and while accepting them as binding authorities, refuses to extend their principle to the case before it. It is clear that in such a case as this, the foreign property of the firm did not and could not form part of the fund available for the payment

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(I) This is the conclusion reached by Westlake p. 186 and Dicey p. 738 note (i). The actual decision was merely that the assignees could not compel the creditor to refund.

of the creditors generally, nor could the partners resident in the West Indies be controlled or restrained in any way. "Equality of distribution", said Sir William Grant M.R. at p. 283 "cannot possibly be attained". Referring to some of the cases on double proof the learned Judge said (p/ 283):

> "The Court taking from the creditor his separate remedy "professed to give him his distributive share of the "whole partnership property. But it cannot in this case "reach the West Indian property or bind the West Indian "partners. Then you would take from the partnership "creditor one remedy without substituting any other in "the place of it".

If, however, the law of the country where the assets are situated allowed in such a case as the present the Australian trustee to stand in the place of the bankrupt as far as the foreign partnership was concerned, or if he could in some way obtain possession of the bankrupt's share in the partnership assets, it is submitted that a creditor in the position of the defendant in Brickwood v. Miller could not prove and receive dividends here unless he brought into account what he received abroad, or the creditors were in some way made equal. In that case the foreign partnership property would not be property which could not in any way be got hold of and made available for the payment of the general creditors.

I am fully sensible of the inconsistency of the principles that I have just suggested. If proof is to be regarded as a compact between the proving creditors that the estate shall be duly administered according to the law of this country or if a creditor who elects to take the benefit of the bankruptcy law of this country will be forced to submit to the distribution of the estate equally amongst creditors of the same class, then it would seem that such a creditor who has obtained an advantage over the other creditors by obtaining part of the bankrupt's foreign assets should be forced to abide by his contract or his election as the case may be by bringing what he has received abroad into the common fund or being

allowed to receive no dividends here until the creditors have been made equal whether the property which he so obtained is part of the property which could otherwise have been made available for the creditors here or not. The Court should look rather at the equity affecting the person of the creditor than at the transfer of the title to the foreign property. And it might be added that the contract or the election should relate as well to the future as to the past and to property which the creditor in question obtains abroad after he has proved and received the dividend here as to that which he has received before. (Contrast ex parte Smith above.) It might well be said that the rule in Cockerell v. Dickens would annihilate any difference between a creditor who has received property of the bankrupt abroad and who does not seek to prove or receive dividends here, and to one who does, since we have seen that the answer to the question whether such a creditor as the first one postulated can be forced to refund depends on whether or not the property in question has passed to the Australian trustee, that is in the last resort upon the law of the situs of the property in question: if the position of the second creditor is to depend on whether or not the property in question could, in any way, be got hold of and made available by the trustee for the payment of the general creditors, this, too, must depend upon the law of the situs of the property in question, apart from the consideration of any indirect means which may exist for compelling the bankrupt to convey the property in question. Nevertheless, the rule in Cockerell v. Dickens is binding on our Courts and I can only leave the matter as I have stated it, recognizing the logical inconsistencies which exist.

It is suggested that the effect of Sections 277 and 278 of the Companies Act 1934 is to apply the rules I have just enunciated to the case of the winding up of an insolvent company. In any event, the theory of proof as a contract or an

election to abide by the local law applies to a winding up as well as to a bankruptcy.

Here, again, we see our two conflicting principles, the theory that the lex situs should decide coming to the fore in Cockerell v. Dickens, and the theory that our Courts should deprive persons subject to their jurisdiction, this time by submission, of rights acquired or benefits received under a foreign law in the interests of the creditors as a whole. But here we have a principle of private international law which was not present in the cases we were considering previously, the principle that persons who invoke the jurisdiction and the laws of one country should be bound by those laws in toto.

(4) LIABILITY OF CONTRIBUTORIES.

The liability of a member of a company for the debts of the company is determined by the law of the company's domicil, i.e. of its incorporation. (See General Steam Navigation Co. v. Guillou 11 M & W. 877 Bateman v. Service 6 A.C. 386, Risdon Iron & Locomotive Works v. Furness 1906 1 K.B. 49) and therefore his liability for calls and his liability to be placed on the list of contributories in the event of the company being wound up depends upon that law also. (See Grosvenor Hotel Co. v. Sale and another 9 B.C. (N.S.W) 26 In the matter of the Federal Bank of Australia (Coghlan's case) 8 B.C. (N.S.W). 35. Eveleen Silver Mining Co. v.Padman 1899 S.A.L.R. 56). This, of course, must be so: the contract between the shareholders and the company or between the shareholders inter se, or between various classes of shareholders (See Spiller v. Turner 1897 1 Ch. 911) obviously depends on the constitution of the company which in its turn must be governed by the law of the country which created the company

and gave it its constitution.(I)

In the case of the winding up of a company registered in South Australia under the Companies Act 1934 there is, of course, no difficulty. The law of South Australia as contained principally in Sections 187-192 of the Companies Act 1934 will determine who is to be placed on the list of contributories. In the case of the winding up here as an unregistered company of a company incorporated elsewhere, however, this question will be regulated by the law of the country where the company is incorporated. The questions of jurisdiction and of the settlement of the list will be dealt with when I consider principal and ancillary windings up. Here, I am only concerned with the law which is to determine the liability of the contributory.

Sections 190-192 of the Companies Act deal with the effect of the death or bankruptcy of a contributory and of the marriage of a female contributory upon his or her liability. In the case of death or bankruptcy there can be no difficulty. The personal representative or the trustee in bankruptcy merely stand in the place of the deceased or the bankrupt and the law which must govern their liability is the same law as that which governs the liability of the person whom they represent, namely the law of the country of incorporation.

But in the case of the marriage of a female contributory the position is not the same. Some systems of law, such as our own in Section 192,impose a liability upon the husband of a female contributory to contribute to the

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(I) See generally Young on Foreign Companies and other Corporations at p.98 et.seq. and at p. 178 et.seq. The learned author says that it is held both generally and by English law in particular that the status and capacity of a corporation its legal personality, its organization and internal constitution, the rights and liabilities of the members inter se and the liability or degree of responsibility of the members for its debts are governed by what he calls its personal law. In my opinion in English law the personal law of a corporation is the law of the country of its incorporation. See Appendix A Domicil of Corporations.

funds together with his wife either entirely or as, in our case, to the extent of property acquired by him, from or through his wife. Now, we have seen that the reason why the liability of an ordinary contributory is governed by the law of the country of incorporation is that that is the law which governs the contract between the member and the company. But there is no nexus of contract between the husband and the company. His obligation is imposed by the fact of marriage, and not by the taking of shares in the company: it is not contractual but quasi-contractual. What is the proper law of a quasi-contract? According to Westlake (p. 325) it is the law of the place with which the act which imposes it has most real connection. The law governing the liability of the husband for the antenuptial debts of his wife should, according to Westlake, be the same law as that which governs the effect of marriage upon the wife's movable property, as the liability for the antenuptial debts can only be fairly imposed on the husband in return for any interest the law may give him in her property. I respectfully agree with this opinion and the reason given by Westlake has especial force in South Australia where the liability of the husband is restricted to the extent of the benefit derived by him from the marriage (See Section 192 of the Companies Act, Section 14 of the Married Womens' Property Act 1883-4). This opinion is borne out by the case of De Greuchy v. Wills 4 C.P.D. 362. In that case a woman contracted a debt in Jersey and afterwards married in England a domiciled Englishman. It was held that his liability to the plaintiff for the antenuptial debt was governed not by the law of Jersey but by the law of England. The contract between the plaintiff and the wife was governed by the law of Jersey, the lex loci contractus: but the liability of the husband arose out of the marriage, not out of the

original contract. The learned Judges were inclined to doubt whether the proper law of the obligation was the law of the place where the marriage was celebrated or the law of the matrimonial domicil, but both in this case were English. It is now, I think, clear that in case of conflict the law which should prevail is the law of the matrimonial domicil, i.e. the law of the domicil of the husband at the time of the marriage, unless perhaps a new domicil is acquired immediately after the marriage in pursuance of an agreement to that effect made before it, (See Dicey pps. 566, 716-7, Westlake p. 72, Colliss v. Hector 19 Eq. 334, In re Martin 1900 P. 211, De Nicols v. Curlier 1900 A.C. 21). This law will govern the effect of the marriage contract on the property of the spouses in the absence of express agreement (which cannot of course affect the liability for antenuptial debts) as opposed to the law governing the validity of the marriage contract itself.

Do these principles apply to the liability of the husband of a female contributory? It has been decided in New South Wales that the liability of the husband of a female contributory to be placed on the list of contributories of a company incorporated outside New South Wales but being wound up in New South Wales as an unregistered company depends upon the law of the company's domicil, i.e. of its incorporation, even if the marriage was celebrated in New South Wales and that country was the matrimonial domicil. (In the matter of the Federal Bank of Australia (Coghlan's case) 8 B.C. (N.S.W.) 35). De Greuchy v. Wills was cited but distinguished by the learned Judge (Simpson J.) He pointed out (p. 37) that the liability of a husband in New South Wales to contribute in right of his wife arose not only from the marriage but from the marriage plus the New

South Wales Companies Act which applied primarily to New South Wales companies only. If the liability of the husband was to be decided by the law of New South Wales, therefore, the result would be that he would escape any liability because the law of New South Wales is silent concerning the liability of the husband of a contributory to a company incorporated outside New South Wales. He also relied on the argumentum ab inconvenienti. It may be true that it would be desirable to place the husbands of all contributories upon the same footing instead of allowing one such husband because he happens to be domiciled, say in South Australia, to escape from a liability to which all other such husbands may be subject or alternatively subjecting him to a liability from which the others may be exempt.

Nevertheless, I do not think the reasoning adopted in this case can be supported.

Even if we agree with the learned Judge that the provisions of the Companies Act then in force in New South Wales (1874) imposing liabilities on the husbands of contributories do not relate to foreign companies and that therefore the law of New South Wales is silent on the question of such a liability that would merely throw the matter back upon the ordinary law of New South Wales as to the liability of a husband for his wife's antenuptial debts. Once grant that the question of what liability is imposed upon the husband by the fact of marriage should be governed by the law of New South Wales, our task is then merely to ascertain what the law of New South Wales on the topic is. The fact that there may be difficulty in ascertaining this affords no justification for binding the husband by the law of the country of incorporation by which he has never agreed to be bound and with which he has not connected himself in any way

except that he has married a woman who has entered into a contract which is governed by that law. So, too, in the case of South Australia, even if sections 187-192 of our Companies Act do not apply in any event to the liability of contributories of foreign companies, that could be no justification for holding that the liability of a man whose matrimonial domicil is South Australian, to contribute to the funds of a Victorian companybeing wound up here as an unregistered company should be governed by the Victorian law. But it is not clear that the sections do not apply in this case. It is true that the provisions of the Companies Act only relate primarily to companies incorporated in South Australia. (See the definition of company and existing company in Section 8). But section 347 (2) applies the ordinary winding up provisions with regard to the representatives of deceased, the trustees of insolvent, and the consequences of the marriage of female, contributories to the winding up of an unregistered company. Section 362 provides that in the winding up of a foreign company all the provisions of the Act with regard to the winding up of unregistered companies shall be applied "so far as applicable". If the rights and liabilities in question have to be decided by some foreign law, the provisions of the Companies Act with regard to them will not be applicable: but if on the true principles of private international law the law to be applied to a particular case is South Australian, then the relevant provisions of the Companies Act will be applicable.

We can reach the same conclusion by another path. In my opinion, for the purposes of private international law, the liability of the husband to contribute is part of the matrimonial law, not of the company law. Some support for this suggestion is derived from the words of section 192 whence it appears that for certain purposes the section is to be read into the Married Womens Property Act.(I)

(I) Compare re Martin 1900P.p.211 where the effect of

It is merely part of the larger question of the liability of the husband for his wife's antenuptial debts. I cannot distinguish De Greuchy v. Wills. I cannot see how the question is affected by the nature of the antenuptial debt. The obligation, if it exists, is imposed upon him by marriage: and that law which decides what share of his wife's property he shall receive should also decide how much of her previous liabilities he shall bear. It is not an obligation imposed upon him by any agreement between him and the company or any submission to the law of incorporation. He cannot be bound by the contract between his wife and the company in itself but he can be bound by a quasi-contract imposed upon him at marriage. The legal nexus which binds him to the company is not contractual arising from the wife's contract but quasi-contractual arising from the marriage. It is, therefore, my opinion that the liability of the husband of a female contributory depends upon the law of his matrimonial domicil, and not on the law of the country of incorporation, so that if a company incorporated here is being wound up here, the liability to contribute of a husband whose matrimonial domicil is, e.g. Victorian, will depend on Victorian law, and in the winding up here of a company incorporated in Victoria the liability to contribute of a husband whose matrimonial domicil is South Australian will depend on South Australian law which will, if my construction of the Companies Act is correct, be contained in section 192 of the Companies Act, but if not, will depend upon the ordinary South Australian law as to the liability of a husband for his wife's antenuptial debts, notably the almost identical provisions of section 14 of the Married Womens' Property Act 1883-4. To hold otherwise would be to hold that a woman who had entered into a transaction governed by a cer-

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(I) continued from last page.
marriage on a previous Will was held to be part of the matrimonial law not of the testamentary law and therefore to be decided according to the law of the matrimonial domicil, not according to the law of the last domicil of the deceased, per Vaughan Williams L.J. at p. 240.

tain system of law could carry "in her blood" in the words of Grove J. in De Greuchy v. Wills at p. 364, the rules of that system of law as to the effect of marriage on the transaction in question, so as to bind thereby any man whom she might marry thereafter, wherever she married him and whatever the system of law to which he and after the marriage, both of them, might be personally subject, a novel and startling revival of the maxim that husband and wife are one person in law.

The only other matter to be considered in relation to the liability of the husband to contribute to the funds of a company in liquidation is the effect of a change of domicil. I have stated that his liability depends upon the law of the matrimonial domicil, i.e. the domicil of the husband at the time of the marriage or any other domicil acquired immediately after the marriage in pursuance of an agreement to that effect made before the marriage. Will that liability be altered by a subsequent change of domicil? Dicey holds that where there is no marriage contract, the rights of the spouses to each other's movables will be governed by the law of the new domicil (p. 718,)Westlake (p.72-73), that their rights are not affected by the change. Dicey seems to have considered the matter settled by Lashley v. Hog 4 Paton 581 where the original domicil was English but the parties afterwards became domiciled in Scotland. The wife predeceased the husband and it was held by the House of Lords that a daughter of the marriage was entitled to a share of what the law of Scotland gave to the wife's estate on the husband's death in the movables of the spouses under the communio bonorum. But this is surely a matter for the law of succession rather than of matrimony and so one which should be governed by the law of the last domicil of the deceased and thus Westlake (p. 74) and Foote (5th Ed. p. 355) explain it, but not Dicey (p. 719). The

matter turns upon the exact ground of distinction of Lashley v. Hog by the House of Lords in De Nicols v. Curlier 1900 A.C. 21. However this may be, and whatever the general rule is, it is clear that an express marriage contract between the parties will not be altered by a subsequent change of domicil and the House of Lords has held that where parties domiciled in France married in France and the French law in default of express agreement implied a contract between them that the property of each was to be held on the system of community of goods, then a subsequent change of domicil to England did not affect the rights of the parties under the system of community. (See De Nichols v. Curlier 1900 A.C. 21). Lord Mac - naghten said at p. 33 "But if there is a valid contract between spouses as to their property whether it be constituted by the law of the land or by convention between the parties it is difficult to see how that compact can be nullified or blotted out merely by a change of domicil". This reasoning applies to our case. By the fact of marriage, a quasi-contract is implied by law between the husband and the wife's antenuptial creditors and the husband cannot by changing his domicil nullify or alter that quasi-contract: conversely, if by the law of the matrimonial domicil there is no such quasi-contract then a subsequent change of domicil to a country where such a quasi-contract is implied on marriage cannot subject the husband to the law of the new domicil because he was not subject to it at the time of the juristic act which, under that law, creates the quasi-contract and therefore no obligation was created.(I) The quasi-contractual bond between

(I) This of course assumes that it is the fact of marriage which creates the liability, not that the liability is incidental to the married state. See for the distinction De Nicols v. Curlier above per Lord Macnaghten. p. 35. Lord Brampton p. 43. Contrast the liability to maintain which is created not by the fact of marriage but by the necessity or poverty of the person seeking relief and is therefore governed by the law of the domicil at the time when that necessity arises. See MacDonald v. MacDonald 8 Dunlop 830 per Lord Fullerton at p. 836. The liability for the antenuptial debts created by sec. 14 of the English Married Womens Property Act 45 &46 Vict.C.75 and legislation copied therefrom is created by marriage. See Beck v.Pierce 23 Q.B.D. 316 per Lindley L.J. at p.320.

the husband and the company must, subject to any positive rule of municipal law, have been created at the moment of marriage or it cannot be created at all. (See Generally Burge's Colonial & Foreign Laws 2nd Ed. Vol. 111 pps. 796-7).

(5) PRIORITY OF DEBTS AND ADMINISTRATION GENERALLY.

It has been laid down by the Privy Council that "the proper order and priority of distribution of assets is always a matter for the lex fori, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution". (Thurburn v. Steward L.R. 3 P.C. 478 per Lord Cairns L.C. at p. 513) and by the Court of Appeal, that "in the case of bankruptcy the question of priority of the different creditors inter se must be governed by the law of the country where the bankruptcy takes place and where the assets of the debtor are being administered". (Ex parte Melbourn L.R. 6 Ch. App. 64 per Mellish L.J. at p. 69). It is a general principle of private international law that all matters of procedure are governed by the lex fori and English law tends to make procedure in this sense an exceedingly wide term including everything relating to remedies rather than to rights. The general rule is undoubtedly that all questions of the order of priority in which a fund is to be distributed are to be determined by the law of the country whose Courts are presiding over the distribution. Both Dicey (pps. 737-9) and Westlake (p. 187) agree that the question of priority is to be decided by the lex fori (the law of the country to which the Court in which any legal proceedings are taken belongs) or lex loci concursus (the law of the country where the concursus of claimants to a fund takes place, i.e. where the fund is being administered.)

Westlake says at p. 138 that this maxim is almost inevitable "for if two debts were contracted under different

laws and each by the law under which it was contracted would be prior to the other, how shall their order of priority be determined if not by the law of the forum where they meet?" This reasoning shows the fallacy of attempting to set up the law governing the contract by which the debt in question was incurred as a criterion for determining its priority, as was attempted in the two cases cited above and in the case of Bergl v. Mount Chalmers Copper Mines 1902 Q.S.R. 35. There, the full Court of Queensland applied the Preferential Payments in Bankruptcy Act an English Statute in deciding the order of priority in which the assets of a company incorporated in England but carrying on business and being wound up in Queensland as well as in England, were to be distributed. In that case, the company had granted in England a debenture giving a specific charge over certain assets in Queensland and a floating charge over all its other assets. A receiver was appointed in a debenture holder's action in the English Courts and it was ordered that he should appoint an agent to act for him in Queensland and that out of the assets coming to his hands he should first pay all claims having priority over the claims of the debenture holders under the Preferential Payments in Bankruptcy Act. That Act said that the claims of the debenture holders under a floating charge should be subject to the preferential payment in full of certain claims set out in the Act if the company's other assets were insufficient to meet them. The decision of the Court proceeded upon three grounds. Firstly, it was said that since the floating charge only in the present case related to debts and since choses in action have no locality or at any rate must be deemed to be situate in the country of the owner's domicil, the debts in question must be taken to be situated in England and governed by English law. (See per Griffith C.J. at p. 51). There is certainly authority to support this view but the better opinion, as I have already

mentioned, is in my opinion that debts and choses in action are legally situate in the country where they are properly recoverable or can be enforced. The later cases especially New York Life Insurance Co. v. Public Trustee 1924 2 Ch.101 support this view.

But, secondly, the Court says, that even if these debts are locally situate in Queensland, the contract between the debenture holders and the company must be construed according to the English law and according to that law, ~~they~~ *it* only purports to give a security subject to the Preferential Payments Act. This may be admitted: but the question of priority over assets is not determined by the contract made between any particular creditors or class of creditors and the company, for the decision of that question affects the rights not only of the contracting parties but of all the other creditors as well. As Marshall C.J. said in the Supreme Court of the United States in Harrison v. Sterry 5 Cranch 289 at p. 296 "the right of priority forms no part of the contract itself. It is extrinsic and is rather a personal privilege dependent on the law of the place where the property is and where the Court sits which is to decide the cause".(I) The third reason given is the distinction between a principal and an ancillary winding up which I will deal with later. It might be noted, however, that the Queensland assets were also held to be subject to the charges and priorities created by the Queensland Mining Act. Since the contest was between the receiver appointed by the debenture holders and the liquidator, the decision may, perhaps, be supported on the ground that it did not lie in the mouth of the debenture-holders to repudiate the implied term of the contract, (i.e. that their rights were subject to the English Statute) by

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(I) See for the failure of a similar attempt to incorporate into a contract expressed to be subject to a foreign law provisions of that law in favour of creditors. Ex parte Dever 18 Q.B.D. 660: see also ex parte Melbourn 6 Ch. App. 64.

which alone they obtained their security. It cannot, I submit, be regarded as an authority for the proposition that in the winding up of a foreign company the assets in the forum of winding up are to be distributed according to the priorities given by the law of the company's domicil: if it does decide this, it is respectfully submitted to be wrong.

There have been attempts in the case of the administration of a deceased person's estate, where the authorities are in point on this question, to decide the question of priority by the law of the domicil, (See Wilson v. Lady Dunsany 18 Beav. 293 and see for a modification of this doctrine Pardo v. Bingham L.R. 6 Eq. 485) but these attempts have been generally disapproved. (See In re Kloebe 28 Ch. D. 175 at p. 180 and In re Lorillard 1922 2 Ch. 638 which in effect finally disproves this theory.)

In any administration of assets situated in any forum therefore, they will be there administered according to the priorities given by the law of that forum, irrespective of the law governing the contract by which any particular claim is governed or the law of the domicil of the previous owner of the assets -- the bankrupt the company or the deceased. The proposition, indeed, can be stated more widely than this: every question of the mode of administration of the Australian or South Australian assets will be decided by the law of Australia in the case of bankruptcy or South Australia in the other cases. The distinction is between rights and remedies: (See Dicey at p. 738): the question whether a claimant has a right to claim against the assets will be governed by the appropriate law, e.g. in the case of a party to a contract by the proper law of the contract according to the rules of private international law, or in the case of a right in rem being claimed, by the law of the situs of the property: his remedy against the assets, and the ranking and the valuation

of his claim will depend on the lex fori. Thus, for example, the question of whether the title to goods has passed as between vendor and purchaser and the right to stop goods sold to the bankrupt in a foreign country in transitu in that country will depend upon the lex situs. See Inglis v. Usherwood 1 East. 515. Where the situs of movable property is Australian or South Australian as we have seen the validity of any rights in rem over it will generally be governed by our law, but in the case of a transaction taking place in the country of the domicil of the transferor will sometimes be governed by the law of that country. (Republica de Guatemala v, Nunez 1927 1 K.B. 669, In re Anziani 1930 1 Ch. 407). This statement must be read subject to any positive law of this country, e.g. section 113 of the Companies Act 1934 which applies the provisions of the Act with regard to the registration of charges given by a company on its property to charges over property in South Australia created or acquired by companies incorporated elsewhere carrying on business here. Thus, if a foreign company were in the country of its incorporation to give a charge to a person domiciled in that country, over South Australian property, and the necessary documents were not filed within the prescribed time, that charge would be void against the liquidator, so far as any security on the company's property or undertaking is thereby conferred. (Sec. 100 of the Companies Act 1934). Indeed, apart from any positive law, it would seem that in the case of assignments of individual property as opposed to universal assignments, the validity of the assignment so far as non compliance with requirements of registration such as those of the Bills of Sale Act or those of the Companies Act just mentioned are concerned, depends on the law of the situs of the property and not on the law of the domicil of the transferor or on the law of the place where the transaction took place. (See Hockey v. Mother of Gold Consolidated Mines

9 A.L.R. (V) 163) (In re Australian Federal Life & General Assurance Co. Ltd. 1931 V.L.R. 317, but see on the other hand Brookes v. Harrison 6 L.R. Ir. 85, 332): such requirements are designed for the protection of execution creditors in the local courts as well as for that of creditors generally in the event of bankruptcy or winding up. On the other hand the Bills of Sale Act does not extend to property situated outside South Australia. (See Coote v. Jecks 13 Eq. 597;) The charges caught by sec. 100 of the Companies Act include a mortgage or charge over land wherever situated or any interest therein created by any company carrying on business here wherever incorporated, Sect. 99 (d). In so far as this and similar sections purport to avoid a charge over foreign land, or even foreign movables, valid by the lex situs, I am of opinion that they are ultra vires of the South Australian Parliament under the rule in Macleod v. Attorney General for New South Wales (1891 A.C. 455) mentioned above, and can be ignored in the liquidation here.

Another example of this principle of applying the lex fori is afforded by the case of In re Holthausen L.R. 9 Ch,App. 722. In this case the bankrupt asked for advances from Prussian merchants and promised to deposit as security the title deeds of a house at Shanghai. The negotiations were concluded by a letter sent by the bankrupt from London enclosing the title deeds, after which his bills were accepted by the Prussian merchants. No conveyance or memorandum of deposit was made at Shanghai and the house remained registered in the name of the bankrupt. After that, the bankruptcy supervened. It was ordered that the house should be sold and the proceeds applied to satisfy the Prussian creditors' debt. At first sight, this decision seems somewhat surprising as it would seem that the creditors' rights over the immovables (I) should be governed by the lex situs, the law of Shanghai, and that if no real right was granted by that law they should be

(I) The immovables in this case, however, were in a British possession and therefore passed to the trustee under the Imperial Bankruptcy Act.

left to their ordinary rights as unsecured creditors. English Courts of equity, however, have always enforced trusts and equities even over foreign land by their jurisdiction in personam over defendants subject to that jurisdiction; (See Penn v. Lord Baltimore 1 Ves Sen. 443) unless the carrying out of the trust or other equity would be contrary to the lex situs (Ex parte Pollard Mont & Ch. 239 at p. 250). They will force the defendant, if necessary, to execute the proper documents in the form required by the foreign law. Apart, therefore, from the bankruptcy in this case, if there had been a valid and binding contract to give security a Court of Equity would have enforced that contract against the bankrupt. Whether or not there was such a contract depended on what was the proper law of the contract, but both English and Prussian law recognized the contract to give security as personally binding on the bankrupt. But, according to the English bankruptcy law, all equities which are good against the bankrupt are good against the trustee unless they are impeachable under the bankruptcy law itself. The trustee, therefore, could stand in no better position than the bankrupt himself, and the equity which could have been enforced in England against the bankrupt could also be enforced against him. What was enforced was not so much a right over foreign land as a personal equity against the bankrupt. If, then, a right against the bankrupt, the company or the deceased is established, the effect in Australia or South Australia of the bankruptcy winding up or death on that right will be determined here by the laws of Australia or South Australia respectively. (See also Ex parte Pollard above).

There is, however, one possible exception to the rule that the proper order and priority of the distribution of assets is always a matter for the lex fori and that the country

where the distribution takes place always claims to itself the right to regulate the manner of distribution. This is obviously the case where the assets to be distributed are situate at the time of the bankruptcy, death or winding up in the country where the distribution takes place: Australian assets must be distributed according to Australian law. (See In re Doetsch 1896 2 Ch. 839). But suppose that assets are collected in another country and afterwards brought here. Are they to be administered according to the lex fori or according to the lex situs? One consideration which should not be forgotten is that mentioned by Maugham J. in In re Vocalion Limited 1932 2 Ch. 196 at pps. 205-6. This is that credit may be given to persons in foreign countries in reliance upon their possession of assets in that country and upon the remedies given by that country's law. If such reliance is to be disappointed by the removal of the assets and their subsequent administration by another law, an encouragement will be given to separate administrations and to the non-recognition of foreign bankruptcies. On the other hand, if different priorities are to be applied in the same administration to different sets of assets according to their original situs the actual working out of the scheme and the equalizing of the creditors may be extremely difficult. We have already seen that securities given over foreign assets by the foreign law will be respected here even though the assets are afterwards remitted here: we are now to enquire whether priorities given by the foreign law which do not actually create a right of property in the foreign assets are to be respected under similar circumstances.

Now in the case of the administration of a deceased person's estate, it appears to be definitely established that assets situated in a foreign country and collected there under the authority of a grant from the foreign Court must if they are brought here be administered according to

the foreign law. (See Cook v. Gregson 2 Dr. 286, In re Flood 1933 S.A.S.R. 203). In Cook v. Gregson 2 Dr. 286 the same person was executor both in England and in Ireland and it was held that assets collected by him in Ireland and remitted to England had to be administered according to the priorities laid down by Irish law. As Vice-Chancellor Kindersley pointed out at pps. 287-8 if different executors had been constituted in the two countries the Irish executor would have had to administer the Irish assets according to Irish law and the mere fact that the same person was executor in both countries and that the Irish assets had been remitted to England should not alter this position. "Is it" he said at pps. 287-8 "to depend upon the caprice of executors by sending the assets to another country what are to be the rights of creditors?" In In re Flood 1933 S.A.S.R. 203, the same person was executor in Queensland and South Australia and the question was whether certain Queensland assets remitted to South Australia were entitled to the protection from creditors given to them by the Queensland law. The case eventually turned upon another point, but Richards J. said at p. 209: "the protection of the Queensland statute should operate here ..... supposing this to be a matter of administration and not of distribution because the executor administering here must administer the Queensland assets as the Queensland administrator ought to have done."

In both these cases, the same person was executor in both countries and he had therefore collected the foreign assets in his capacity as foreign administrator. But it is submitted that the same principle should apply whenever foreign assets are being administered here which under the foreign law should have been administered according to that law.

In Hanson v. Walker 7 L.J. Ch. (O.S.) 135 the proceeds of the sale of foreign land were administered in England according to the priorities of the foreign law. It does not appear from the report how the assets found their way to England. In the American case cited by Dicey p. 744 In re Miller's Estate 3 Rawle 312 24 Am. D. 345, this principle was applied with modifications. There, Mexican assets were remitted to Pennsylvania. It was held that they should be administered according to the law of Pennsylvania because the creditor contending for the Mexican order of priority was not a Mexican creditor. "Were a Mexican creditor" said Gibson C.J. (29 Am. D. p. 350) "to appear the case would be different. Perhaps our Courts would direct a portion of the assets sufficient for the demand to be returned to the proper officer in that country. Certainly they would not compel payment to be made in a way to deprive him of any advantage he could claim by its laws or suffer him to be prejudiced by an irregular abduction of the assets from its jurisdiction. But the appellant is not entitled to the same considefation." I have already mentioned the theory of the American Courts, enunciated again in this case, that local creditors are to be regarded as in some way more privileged than foreign ones and that rules of priority, execution, attachment, etc. are established for the especial protection of such local creditors. (See also Wharton Conflict of Laws sec. 369). This has never been the view of English law (See In re Kloebe 28 Ch.D.175). If, in the case above referred to, the Mexican law adopted our view and regarded the rights given to creditors by its law as equally open to foreign and local creditors and also took the view that the assets of deceased persons situated in Mexico should be administered according to its rules, then that law would have been equally outraged by the removal of the assets to another country to be administered by another law even though the

only creditor actually prejudiced thereby was resident in a foreign state. That, I submit, is the true principle upon which foreign assets should be administered here according to the foreign law - the violation of the foreign law occurring when assets situated within its jurisdiction which in its opinion should be administered according to its rules are removed elsewhere and administered by another law. That violation is more gross when the assets are actually collected under a title given by it to be exercised in accordance with its provisions but it exists also if the assets are irregularly abducted without any title at all.

I have dealt with the cases on the administration of deceased person's estates at length, because most of the authority is contained therein. But I submit that the principle rightly understood, is equally applicable to the cases of bankruptcy and winding up. That it has not been applied and has even been denied (see Dicey p. 738) in these cases is due to the different views taken by British systems of law of the nature of these processes. But if my argument is correct, it is the view of them taken by the lex situs which is important for this purpose. If the theory of the unity of bankruptcy is accepted by any country, that country will then presumably hold with the suitable modifications of the particular system, that a foreign trustee in a bankruptcy which it regards as competent is entitled to the local property of the bankrupt which should be administered by him in the forum of the bankruptcy according to its law. Since, as we have seen, English law to some extent accepts the theory of the unity of bankruptcy, countries whose systems are founded on that law will to that extent take this view. On the other hand, countries which do not adopt that theory will not recognize the title of the foreign trustee but will hold that

there must be a separate administration in its courts according to its laws. If, nevertheless, property is abducted from that country after the bankruptcy and it finds its way here, it should still, it is submitted, be administered according to the lex situs. Again, under English systems of law, as we have seen, while the right of the liquidator of the country of domicil to collect the local assets in the name and on behalf of the company will be recognised, there must be a local winding up to protect the local assets and from the date of that winding up, the right of the liquidator of the domicil so to get in the assets will cease in favor of the local liquidator who will alone be entitled to use the name of the company for that purpose. A foreign liquidation not in the domicil will not give the foreign liquidator any right to act in the company's name outside his own country at all. If, therefore, a company being wound up in South Australia has assets situated in a country whose laws adopt these views and the company is not incorporated here or, if being incorporated here, a winding up has begun in the other country and the assets or their proceeds nevertheless find their way here, they have been irregularly abducted and they should be administered here according to the lex situs. The rights of creditors should be certain and should not depend on the chance of assets being spirited away from one country to another. In my opinion it would be contrary to the comity of nations and the rules of private international law for our Courts to countenance and encourage the evasion of the foreign law which would result if foreign assets were to be sent here and administered in a manner contrary to the provisions of that law. The rule, of course, is more naturally applied in the case of death because in the first place according to English law, a separate grant of administration is necessary in each forum to enable the assets there to be collected and secondly, a dead man must be dead everywhere,

and therefore a process of collection and distribution rendered necessary everywhere that he has property, while a living man or a company may be bankrupt or in course of winding up in one country and in full possession of all his or its normal capacity and rights in another. The rule as I have enunciated it is more clearly applicable and parallel to the case of death where a concurrent bankruptcy or winding up has already been begun in the country of the situs of the assets. Assets abducted after that date and sent here, which according to the lex situs, should have been administered in its bankruptcy or winding up by its law, are clearly sent here in violation of that law and our Courts should endeavour to restore the status quo not to consummate the breach. But the same violation exists, though less clearly, if the assets are removed to be administered in our bankruptcy or winding up before one takes place in the situs, if, according to the foreign law, they should not have been so removed. Perhaps in an extreme case the assets will be remitted back to the situs as suggested by Gibson C.J. in In re Miller's Estate above.

There is some authority in the case of winding up both for and against this view. There are certain cases, as we shall see later, where the proceeds of assets are transmitted from the forum of one winding up to that of another and in some of these cases the Courts of the transmitting country insist on security being given by the liquidator in the receiving country that the funds will be applied in a certain way (See In re Australian Federal Life & General Assurance Co. Ltd. 1931 V.L.R. 317 and In re Union Theatres Ltd. 35 W.A.L.R. 89). In the latter case, one of the conclusions reached by the learned Judge (Dwyer J.) was that where the liquidation of a company is proceeding in more than one jurisdiction and where

any preference or priority subsists under the laws of any forum, such priority should, in the distribution of the particular assets, be preserved, and he stated that had he directed that the Western Australian assets should be forwarded to the foreign liquidator, he would also have directed that the latter should give security that they would be applied in the first place towards payment of a creditor who had priority according to the law of Western Australia. Ours is, of course, the converse case, namely the administration of foreign assets in the hands of the local liquidator, not the terms on which local assets should be handed to a foreign liquidator, but it is the second half of the same process, and in my opinion in such a case the foreign assets should be administered here according to the foreign law without forcing the foreign Court to exact security for this purpose from the South Australian liquidator.

On the other hand, we have the decision of the Full Court in In re Commonwealth Agricultural Service Engineers Ltd. 1928 S.A.S.R. 342. In that case the company was incorporated in South Australia and was being wound up there. It also carried on business in other States and had assets in Queensland which, or the proceeds of which, were in the hands of the South Australian liquidators. The company had given a debenture over its assets, including its Queensland assets, which debenture was not registered in Queensland. The Queensland law invalidated unregistered debentures as a security against the liquidator or any creditor. The Court held that this provision did not create any substantial interest in the property of the company in favor of the liquidator or of any creditor and was to be disregarded in distributing the property in South Australia, and accordingly the Court was not bound to distribute the

Queensland assets so as to pay the claims of Queensland creditors in priority to all other creditors. Certainly, even if the Court had held that the Queensland law prevented the debenture holders from obtaining any benefit from the Queensland assets, it seems hard to see why the Queensland creditors should be entitled to a priority over other creditors of the same class unless the Queensland law invalidated the debenture for the benefit of the Queensland creditors alone, which would be contrary to the principle of private international law laid down in In re Kloebe (28 Ch. D. 175). The Court held that since the Queensland law created no interest in the property itself it affected the remedy only and was irrelevant for the purposes of distribution under the law of South Australia (see per Napier J. at p. 347) The argument based on Cook v. Gregson does not appear to have been mentioned. In any event it does not appear whether there was any winding up in Queensland or not: nor how the assets came to the hands of the South Australian liquidator, nor whether the Queensland law considered that they should be administered according to its law or according to the law of South Australia: indeed, if the reasoning in In re Alfred Shaw & Co. 1897 8 Q.L.J. 93 and Bergl v. Mount Chalmers Copper Mines 1902 Q.S.R. 35 still represents the law of Queensland, its Courts apparently hold that the assets of a company in the course of liquidation should be administered according to the law of the country of its incorporation. Moreover, it seems doubtful whether the Queensland law affected the validity of the debenture until the property was "dealt with or seized or sequestrated to answer the demand of the creditor" (per Napier J. at p. 347) and perhaps the liquidator against whom the debenture was void was on the proper construction of the statute, a Queensland liquidator only.

In spite of this decision I respectfully submit that the true rule should be that where foreign assets are being administered in an Australian bankruptcy or in a South Australian

winding up, then if the foreign law holds that they should not have been removed but should have been administered in the foreign country according to the foreign law, or if they were transmitted here under the authority of the foreign law in order to be administered here according to that law, they should be so administered here. And as between English speaking countries this will generally result in the administration of foreign assets according to the foreign law in the case of winding up but not in the case of bankruptcy.

There are two points which, if this rule is correct, require elucidation. Firstly, it often happens as will be seen when I discuss principal and ancillary liquidations and administrations, that in an ancillary liquidation or administration (i.e. one not in the country of domicil) there is a surplus after due administration, which is sometimes sent to the forum of the principal winding up or administration, Such a surplus does not come within the rule I have mentioned. If a company for example is being wound up both in New South Wales and in South Australia where it is incorporated, and the New South Wales liquidator sends the surplus from the New South Wales winding up here, that surplus is to be administered according to the law of South Australia and not according to the law of New South Wales. The New South Wales assets have already been completely administered according to the law of New South Wales and there is no need to apply that law to what is left, in which that law by handing it over to the South Australian liquidator has disclaimed all interest. This is, of course, only so if what is handed over is the surplus after due and complete administration in the forum of the ancillary winding up by the law of that forum: if all the

assets in the country of the ancillary winding up are handed over in bulk to the South Australian liquidator as is apparently sometimes done, these assets must be administered here according to the lex situs, at any rate if the foreign law expects they will be so administered.

Secondly, if foreign assets are administered here according to the foreign law, creditors who receive priorities according to the foreign law must, if they are not paid in full and seek to prove against the South Australian assets for the balance of their claim, submit to be made equal with other creditors of the same class according to South Australian law. The rules I have previously mentioned that "if a creditor comes to take the benefit of the English (South Australian) law and proves against the English (South Australian) estate he cannot take advantage of the preference that he has received under the law of a foreign state", (per Mellish L.J. in Ex parte Wilson 7 Ch. App. 490 at p. 494) still holds good: the creditor has merely obtained the preference under the foreign law out of the foreign assets in South Australia instead of in the foreign country.

I have already mentioned that all creditors of the same class will share pari passu in the administration of Australian assets in an Australian bankruptcy or South Australian assets in South Australian winding up, no matter what their domicil or where their debts were contracted. That is the rule of private international law: where priorities are given to various classes of creditors by statute it will, of course, depend on the proper construction of the particular statute whether these priorities are held to be restricted to Australian or South Australian creditors of the required class or not. Generally, it would seemthat in

in the absence of any indication of contrary intention the Legislature will be deemed to have intended to confer these benefits on all creditors of the specified class and not to have restricted them to local ones. Thus, it has been held that the priority given by the Companies Act of 1892 to the wages of servants of the company applied to the wages of servants employed outside South Australia as well as within. (See In re Commonwealth Agricultural Service Engineers 1928. S.A.S.R. 342, here differing from the construction given to a similar section of the Victorian Companies Act in In re Australian Cycle Motors Ltd. 7 A.L.R. (C.N.) 53).

(6) PRINCIPAL AND ANCILLARY WINDINGS UP:

A principal winding up is the name given to the winding up of a company in the country of its domicil, i.e. of its incorporation. (See Appendix A Domicil of Corporations)

An ancillary winding up is the name given to the winding up of a company in any country not the country of domicil. See North Australian Territory Co. v. Goldsbrough Mort 61 L.T. 716. Re Alfred Shaw & Co. 1897 8 Q.L.J. 93. In re Union Theatres Ltd. 35 W.A.L.R. 89. See also In re Russell Wilkins & Son 11 A.L.R. (C.N.) 26.

"The general principle" says Vaghan Williams J. in re English Scottish & Australian Chartered Bank 1893 3 Ch. 385 at p. 394 "is - ascertain what is the domicil of the company in liquidation, let the Court of the country of domicil act as the principal Court to govern the liquidation, and let the other Courts act as ancillary as far as they can to the principal liquidation".

Any winding up in South Australia then, of a company not incorporated here, will be an ancillary winding up. This distinction between principal and ancillary windings up is taken from the distinction between principal and

ancillary administrations in the case of death. A principal administration is the administration of the estate of a deceased person in the country of his domicil and an ancillary administration is any other administration. Westlake's statement of the law (p. 138 sec. 110) has been judicially approved. (In re Kloebe 28 Ch. D1 175 at p.177 and In re Lorillard 1922 2 Ch. 638 at p. 642).

> "Every administrator principal or ancillary must
> "apply the assets reduced into possession under
> "his grant in paying all the debts of the deceased
> "whether contracted in the jurisdiction from which
> "the grant issued or out of it and whether owing to
> "creditors domiciled in that jurisdiction or out of
> "it in that order of priority which according to the
> "nature of the debts or of the assets is prescribed
> "by the law of the jurisdiction from which the grant
> "issued."

This is the general rule of administration which we have formerly noticed and we have also noticed the exception to it, following upon the rule in Cook v. Gregson 2 Dr.286.

It will be seen by this rule that in the administration of the assets of a deceased person it will not make much difference whether the administration is principal or ancillary. The same rules will be applied in each case. The one possible divergence which will arise will be if there is a surplus in the ancillary administration after all debts have been satisfied.

How far is this rule applicable to the case of companies?

The ordinary rules which I have already enunciated unquestionably apply to a principal winding up and we need only consider an ancillary winding up. There are three possible views which can be taken. There is no doubt that it is the duty of the liquidator in an ancillary winding up to collect all the local assets. What is he to do with them when collected?

The first is the view expounded by the Supreme Court

of Queensland in In re Alfred Shaw & Co. 8 Q.L.J. 93 and Bergl v. Mount Chalmers Copper Mines 1902 Q.S.R. 35. In the latter case the Full Court said at p. 51:

> "The company being an English company, the English "winding up is the principal, the Queensland winding "up is ancillary only. Strictly speaking, therefore, "the Queensland assets might be sent to the English "liquidator to be distributed according to the "English law."

In other words, the duty of the ancillary liquidator is merely to collect the local assets: he need not administer them at all but should simply send them in bulk to the principal liquidator, leaving, apparently, all claims against the assets to be decided in the country of the principal liquidation by its law. These views depend upon the fallacy of assimilating liquidation to bankruptcy and regarding the liquidation in the country of domicil as effecting an assignment to the principal liquidator of all the company's movables. It is admitted by Griffith C.J. in Shaw's case (pps. 95-6) that if an ancillary liquidator is appointed his title is formally superior to the principal liquidator's but it is said that that superiority is merely formal and the actual result should remain the same, the appointment of the ancillary liquidator merely giving him the only title to collect the local assets. I have already expressed my disagreement with these views and, in my opinion, they are not tenable since the decision in Primary Producers Bank v. Hughes 32 S.R. (N.S.W). 14. I submit, therefore, that the first view is not the right one.

(2). The second method is to hand over all the assets collected in the ancillary winding up to the principal liquidator unadministered, on obtaining from him security that they will be administered according to the law of the country of the ancillary winding up. This course seems to be pointed out by two of the recent cases In re Australian

Life & General Assurance Co. Ltd. 1931 V.L.R. 317 and In re Union Theatres Ltd. 35 W.A.L.R. 89. The actual order in the first case is rather puzzling, because the learned Judge (Lowe J.) after holding that a debenture given by the company, which was incorporated and being wound up in New South Wales (as well as being wound up in Victoria) which was not registered in accordance with Victorian law was void against the Victorian liquidator and gave no security over the Victorian assets, ordered that those assets, after deducting the costs of the Victorian winding up including the remuneration of the Victorian liquidator, should be handed over to the New South Wales liquidator on "his giving security that they would be applied to the satisfaction of the claims of Victorian creditors pari passu with other creditors of the same class". One would think that when the New South Wales liquidator received these assets it would be quite open to him to satisfy the claims of the debenture holders out of them, since they would presumably stand in a class by themselves, and thus nullify the declaration of the learned Judge. The second case, however, quite clearly lays it down that while all creditors of equal degree should be treated equally, "where any preference or priority exists under the laws of any forum such priority should in the distribution of those particular assets, be preserved." In that case, it was held that, according to the law of Western Australia where the ancillary winding up was taking place, the Crown had a priority for its claim over the Western Australian assets and that the proper course would have been for those assets to have been handed over to the principal liquidator on his giving security that they would be applied in the first place towards payment of the Crown's debts. The principal liquidator had, however, intimated that if the claim of the Crown to priority were upheld, he did not desire this to be done.

(3) The third method would be for the liquidator in the ancillary winding up to administer all the assets collected under it according to the lex fori.

It is suggested that whether the second or the third method is adopted is a matter of discretion. In both cases the same result would be achieved. The second method would probably be less expensive than the third. As we have seen, the ancillary winding up order must be made to protect the local assets from seizure by creditors since the principal liquidation affords no such protection. Once the assets are collected they must be administered according to the lex fori and either method would achieve this. If the third method is adopted all creditors of the same class must be treated equally. The ancillary winding up is not for the benefit of local creditors alone, but all creditors who establish their claim are entitled to be treated pari passu (See In re Australian Federal Life & General Assurance Co. and In re Union Theatres above: also Re Oriental Bank Corporation 10 V.L.R. (Eq.) 154 per Molesworth J. at p. 176). The great principle is to effect an equal distribution of the assets. It is suggested by Lowe J. in In re Australian Federal Life & General Assurance Co. at p. 322 that to effect this equal distribution money may have to be sent from the situs of the principal winding up to that of the ancillary winding up as well as vice versa. The same result could, however, be achieved by creditors proving in both windings up. A creditor who adopted this course would receive nothing in the second winding up in which he proved until all the other creditors of the same class proving in that winding up had received dividends equal to the dividend which he had received in the first winding up, unless he brought that dividend into the fund of the second winding up. This would solve the difficulty

arising from the fact that the order of priority recognized by any particular forum must be observed in the distribution of assets collected in that forum. If, for example, a person received payment under a priority given by the law of one winding up, which was not acknowledged by the law of the second winding up, he could not receive anything on account of the balance of his debt out of the second winding up, until all the other creditors of the same class according to its law had been made equal. Generally speaking, the Court in which the ancillary liquidation is taking place will endeavour to assist the Court of the principal liquidation as much as possible, but that desire "will not ever make the Court of the ancillary liquidation give up the forensic rules, which govern the conduct of its own liquidation". (In re English Scottish & Australian Chartered Bank 1893 3 Ch. 385 per Vaughan Williams J. at p. 394).

The South Australian Court will, therefore, in the winding up of a foreign company proceed in the ordinary way according to the ordinary rules of South Australian Courts and indeed, section 346 of the Companies Act applies "all the provisions of this Act with respect to winding up" to an unregistered company - which of course for this purpose a foreign company is deemed to be.

These provisions must, however, be applied with caution to companies incorporated under a different system of law: the provisions relating to unregistered companies are only to be applied to foreign companies "so far as applicable". (Sec. 362). It is uncertain whether the proper course is to callseparate meetings of creditors in each country in which the company is being wound up. (In re Queensland National Bank 1893 W.N. 128) or to call one meeting only in the country of the principal winding up, foreign creditors being represented by proxy. (In re the City of Melbourne Bank 3 A.L.R. 220).

It is suggested by Lowe J. in In re Australian

Federal Life & General Assurance Co. Ltd. at p. 320 quoting Young on Foreign Companies and other Corporations that the ancillary liquidator should also see that the list of local contributories is settled and presumably that the proper calls are made and collected. This Court is, however, always reluctant to interfere in the internal affairs of foreign corporations: and in my opinion though this Court has power in an ancillary winding up to settle a list of local contributories it will, in the exercise of its discretion(I) use that power very sparingly remembering that the rights and liabilities of the contributories must be determined according to the law of the country of the incorporation of the company and that that country's courts are better equipped to apply that law than it is. (This is a relevant consideration: see Moor v. Anglo-Italian Bank 10 Ch. D. 681).

A suggestion was thrown out by Jordan C.J. in United Service Association v. Lang (35 S.R. (N.S.W.) p. 487) that the recognition of the law of the country of incorporation of a company as governing the relation of the members is subject to certain modifications. Thus, he suggested, (p. 492) that a provision of the law of Victoria that the articles were to bind the members to the same extent as if they had signed and sealed them then would not in New South Wales be regarded as constituting them a deed if they were not actually signed and sealed, relying on Payne v. Rex 1902 A.C. 552. That was a revenue case where the situation of assets was in issue and it was held by the Privy Council that a debt could be a simple contract debt in one State and a specialty debt in another so as to be exigible both where the debtor resided and where the document containing

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(I) See the proviso to Sec. 224: I suggest that it may appear to the Court that it will not be necessary for it to make calls on or adjust the rights of contributories because that can safely be left to the foreign Court. Therefore it can dispense with the settlement of the list.

the contract was situate. A matter like this, however, cannot affect the contract between the members and the company or between the members inter se. That contract is founded on the constitution of the company but there is no doubt that it must be governed by the law of the country of its incorporation. The law of that country is its proper law. That being so, it follows that all the incidents of the contract must be governed by that law. If the law of the country of incorporation declares that the articles shall bind the members as if they had signed and sealed them, then since by the proper law of the contract, all the effects of a contract under seal are to be attributed to the contract between the members those effects must also be attributed to the contract in South Australia, in so far at least as they are matters affecting the right and not the remedy - not mere matters of procedure such as the period of limitation. That is not to say that the document would for any extrinsic purpose be regarded as a deed.

If the Court does settle a list of contributories it will follow the list settled in the principal winding up, (see In the Matter of the Federal Bank of Australia 8 (N.S.W). B.C. 35). The liquidator in the country of incorporation can bring an action here in the name and on behalf of the company against persons resident here to enforce calls made by the Courts of that country or by the liquidator himself in the winding up there, (See Grosvenor Hotel Co. v. Sale 9 B.C. (N.S.W) 26 and Eveleen Silver Mining Company v. Padman 1899 S.A.L.R. 56) if there is no winding up here: if there is, the action will have to be brought by the South Australian liquidator because he will be the only person recognized here as entitled to sue in the name of the company. It is submitted that he can still sue here for the call made by the foreign Court, i.e. to enforce a duty arising out of the contract between the company

and the contributory by the law governing that contract, the law of the country of incorporation.

If the principal liquidator obtains a judgment in the forum of the principal winding up for calls against a shareholder resident here at the time when action was commenced that judgment cannot be enforced against the shareholder here unless he either voluntarily appeared in the action in the foreign Court:) (See Victorian Phillip Stephan Photo Litho Co. v. Davis 11 L.R. (N.S.W) 257) or contracted to submit himself to its jurisdiction. And such a contract will exist if, by the constitution of the foreign company, the members agree to submit to the jurisdiction of the foreign courts, but it will not be implied from the mere fact of the shareholder's becoming a member of a foreign company. (See Copin v. Adamson L.R. 9 Ex. 345 1 Ex. D. 17, Bank of New Zealand v. Lloyd 14 W.N. (N.S.W) 160(and note that by becoming a member of a company the shareholder enters into a contract which is to be governed by the law of the country of incorporation (see above under Contributories) but not necessarily into a contract to submit to the jurisdiction of its Courts and for this distinction see Copin v. Adamson above at p.384. See also Appendix C for the effect of the Constitution on these principles.) In other words, the enforceability of such a judgment here will depend upon the ordinary rules relating to foreign judgments. My opinion, therefore, is that the list of contributories may be settled and calls made by the Court of the principal winding up and that this procedure will be binding on shareholders resident in South Australia; (See Eveleen Silver Mining Co. v. Padman cited above) but that an action to enforce such calls against such shareholders should be brought here unless such a contract to submit to the jurisdiction of the foreign Court exists as is described above.

Let us suppose that the third method is adopted and that after the ancillary liquidator has paid all the debts

which have been proved according to the lex fori in full, he has a surplus in his hands. What is to be done with this surplus?

If we follow the analogy of the administration of the estate of a deceased person, we find that the normal rule is that the ancillary administrator, when he has paid all debts of which he has notice, hands over the surplus of the proceeds of the deceased's movables collected by him to the principal administrator appointed by the Court of the deceased's domicil. (See Eames v. Hacon 18 Ch. D. 347 per Jessel M.R. at p. 357). It is, of course, settled law that succession to a deceased person's movables as distinct from the administration of them, is governed by the law of the deceased's last domicil. (See Dicey Chap. XXXI). If the administrator seeks the direction of the Court, however, the Court may adopt one of two courses: it may either direct payment to the principal administrator or it may determine for itself who are the persons beneficially entitled to succeed to the deceased's movables according to the law of his last domicil and distribute, or direct the ancillary administrator to distribute, the surplus among such persons. It would not, of course, be prudent for the administrator to determine this for himself and distribute accordingly without obtaining the directions of the Court.

(See Dicey Pps. 747-8. Westlake pps. 135-6, and see Weatherby v. St. Giorgio 2 Hare 624, re Lorillard 1922 2 Ch. 638, In re Achillopoulos 1928 Ch. 433).

A remarkable instance of the Court adopting the latter course was afforded by the decision in In re Lorillard 1922 2 Ch. 638. In this case, the deceased died domiciled in New York leaving assets both in New York andin England and administration was taken out in both countries. There was a surplus left in England after paying all creditors who had

come in and claimed under the English administration. The assets in New York were exhausted, leaving unpaid certain creditors whose debts were statute barred by the law of England but not by the law of New York. The Court gave the American creditors a limited time to come in and prove in England but they did not do so. The New York administrator applied to the Court to have the surplus transferred to him. The Court refused to do this but directed the executor to distribute the surplus amongst the beneficiaries entitled thereto, ascertained in accordance with the law of New York the last domicil of the deceased. This judgment was affirmed by the Court of Appeal. The English assets had been administered in accordance with the lex fori: according to that law the claims of the New York creditors were barred: the surplus which was left after due administration by the lex fori had to go to the persons entitled by the law of the domicil and it was entirely a matter of discretion for the trial Judge whether that was effected by handing it over to those persons direct or to the administrator appointed by the law of the domicil. Administration has nothing whatever to do with the law of domicil at all. As was pointed out by Younger L.J. (pps. 646-7) if the deceased had died domiciled in England leaving assets in New York these creditors whose claims were valid by the law of New York though barred by the law of England, would have been able to satisfy their debts out of the New York assets. This was the converse case and this case illustrates the lengths to which the Courts will go in securing administration in its widest sense by the lex fori and by the lex fori alone: even when all the debts valid by the lex fori have been satisfied it will not, if it can help it, allow debts invalid by the lex fori, though valid by the lex domicilii, to be satisfied out of the assets under its control.

The beneficiaries in that case were in England and it would, of course, have been useless for the Court to have exercised its discretion in ordering payment direct to them if they had been in New York. In exercising its discretion in circumstances such as these the Court will, as Dicey points out (pps. 938-9) be influenced by the place of residence of the beneficiaries.

Since the analogy to the administration of a deceased person's estate has, as we have seen, been followed in the use of the term "principal and ancillary winding up", perhaps it should be followed here, and the Court in the country of an ancillary winding up, if there is a surplus, has a discretion as to whether it will hand the surplus over to the principal liquidator or distribute it amongst the persons entitled to the property of the company after its debts have been paid. It may have such a discretion: but I do not think it will ever exercise it by distributing direct. It has no power to dissolve the foreign company. It is reluctant to interfere in the internal affairs of a foreign corporation. (See Sudlow v. Dutch Rhenish Railway Co. 21 Beav. 43). If it distributed the surplus South Australian assets amongst allthe shareholders those resident in the country of incorporation would probably be liable to refund there if all the debts were not paid according to its law, and an unfair advantage would be given to the South Australian shareholders, and even these might not be exempt from actions in the Courts of the principal winding up which might be enforced here if they had contracted to submit to the jurisdiction of those Courts or possibly under the Service & Execution of Process Act. (See Appendix C.)

Even if the company were insolvent in the country of its incorporation and had creditors there, whose claims were barred in South Australia and if the majority of the shareholders were resident in South Australia, I think that the South Australian Court would still hand over the surplus

to the principal liquidator. Moreover, the analogy with the case of death falls short. b A person who is dead has ceased to exist: his assets ex necessitate must devolve upon somebody else for they can no longer be vested in him and the Courts are faced with the task of finding out who, according to the appropriate law, that somebody else is. But a company which is being wound up has not necessarily - I will deal with the case of dissolved companies later - ceased to exist. The legal entity though paralysed still lives. The Court of the ancillary winding up, therefore, when it has a surplus in its hands should, it is submitted, pay that surplus over to the company, that is to say, to the liquidator in the country of the principal winding up who is the company's sole effective agent throughout the world, once the limited and localized agency of the ancillary liquidator is disregarded. It is, therefore, my opinion that the South Australian Court in the exercise of its discretion, if it possesses one in this connection, will not distribute any surplus which may result from an ancillary winding up in South Australia among the persons whom it considers to be beneficially entitled thereto but will hand it over to the principal liquidator.

Let us suppose that there is a winding up in South Australia of a company incorporated elsewhere but that there is no other winding up. In that case the course of the Court is, it is considered, clear. It should administer the South Australian assets according to South Australian law in the manner which I have indicated and hand over the surplus, if there is any, to the company in the country of its incorporation.

What if there is a winding up here of a company incorporated elsewhere and a winding up in another country not the country of incorporation and no winding up in the country of incorporation: in other words, two ancillary

windings up and no principal winding up? In In re Alfred Shaw & Co. 8 Q.L. J. 93 an application was made for the transfer of funds from the situs of one ancillary winding up to that of another and the Court refused to make such an order until the liquidators in the principal winding up had been heard. There is no authority that I can discover directly on the point. There again, however, it is submitted, that each Court should proceed to administer the assets within its jurisdiction according to its law, taking care to treat equally all creditors of the same class according to that law and equalizing the creditors who have received dividends in one winding up with those who have done so in the other to the utmost extent of its power, according to the rules I have previously discussed. Any surplus remaining in either winding up after all creditors proving in each have been satisfied should be handed over to the company in the country of its incorporation. To facilitate this equal distribution, there seems no reason why funds should not be sent from one country to another if care is taken to ensure that such funds shall be administered in the second country according to the laws of the first. (See In re Alfred Shaw & Co. at p. 97).

In both these cases the Court of the ancillary winding up would probably have to settle the list of contributories within its jurisdiction and make calls upon them according to the law of the country of incorporation to the best of its ability.

If there is a winding up in the country of incorporation which is, however, merely voluntary or under supervision, and a compulsory winding up in South Australia, will the South Australian winding up still be ancillary to the winding up in the country of incorporation? In In re Egerton & Gordon Consolidated Gold Mines 1908 V.L.R. 22 there was a

voluntary winding up in the country of incorporation, South Australia, and A.Beckett J. directed the liquidator in the compulsory winding up in Victoria to proceed just as in an ordinary winding up, taking no notice of the winding up in South Australia (at p.23). On the other hand, in In re Alfred Shaw & Co. cited above, Griffith C.J. said at p. 97:

> "I apprehend, however that that to which the Court has "regard in such cases is the substance of the law of "the foreign State under which the affairs of insolvent "companies are administered and not the form of the "proceedings by which their laws are made applicable. "If this is the true view it is immaterial whether the "fact of being in course of winding up is brought about "by a judicial proceeding or by any other proceedings "which the law of the domicil recognizes as effectual. "I, therefore, treat the Victorian winding up, though "voluntary, as the principal administration".

In In re Australian Federal Life & General Assurance Co, Ltd. 1931 V.L.R. 317 Lowe J. at page 320 referred to this conflict but did not decide the point. My own opinion is that on this point the principle expressed by Griffith C.J. is correct. If the affairs of the company are in the course of administration in the country of its incorporation, its assets being collected there and a concursus of claimants established there, it would seem to be immaterial from the point of view of private international law how that result was brought about, so long as the law of the domicil recognises the proceedings as effectual for that purpose. The exact way in which this is done is a matter of procedure of the foreign law and irrelevant in South Australia. The fact that the liquidators appointed under a voluntary winding up will probably be less careful of the interests of the creditors than a liquidator appointed by the Court would be, or might even be adverse to their interests, should, as Griffith C.J. said at p. 97 "induce the Court to act with caution at their instance but would not ..... affect the application of the rules of international comity". Thus, for example, the South Australian Court would probably take more

care than usual to ascertain that foreign creditors were given notice of the South Australian winding up and an opportunity to prove in South Australia considering that the voluntary principal liquidation might be inadequate to protect those creditors.

It will be noticed that I have not attempted, in considering this question of principal and ancillary windings up to distinguish between movable and immovable property. The reason for this is clear. There is no question of the title to South Australian immovables being effected by any proceedings outside South Australia. It is because winding up does not effect any transfer of title at all that such distinctions are irrelevant. The South Australian immovables, like the South Australian movables, remain vested in the company and when they are sold by the South Australian liquidator in the name and on behalf of the company their proceeds are administered according to the law of South Australia.

Generally, on the subject of principal and ancillary windings up it may be said that the great object of both these is to secure the equal treatment of all creditors of the same class subject only to the necessity of administering the assets in each forum according to the law of each forum. All the rights and liabilities of the members of the company as between themselves and the company are, however, to be determined by the law of the country of incorporation. Subject to these rules the Court of the ancillary winding up will act as auxiliary to and in aid of the Court of the principal winding up. There are many questions of machinery into which I have not thought it necessary to enter. The Court has a fairly large discretion in these matters within the framework of the general rules.

Before leaving this subject, I desire again to emphasize that all these rules as to principal and ancillary windings up apply only as between countries which follow the

English system of law on the nature of winding up. The liquidation of a company in the country of its incorporation, if by that country's laws the liquidation purports to effect an assignment of the company's movables all over the world from the company to the liquidator, would have exactly the same effect here as a bankruptcy in the country of the bankrupt's domicil. The subsequent winding up order could still be made here but there would be no movables of the company in South Australia on which it could operate as these would have passed by the assignment to the foreign liquidator: it would, of course, operate on the South Australian immovables, if any, and these should be then administered as in an ordinary ancillary winding up: (So, too, in the case of a bankruptcy occurring here after a bankruptcy abroad, in the administration here of those assets of the bankrupt which had not passed under the foreign bankruptcy to the foreign trustee.)

(7) ADMINISTRATION OF THE SOUTH AUSTRALIAN ASSETS OF A DISSOLVED FOREIGN COMPANY.

We have already seen that a company which is dissolved by the law of the country of its incorporation is regarded as dissolved everywhere.

"But" says Lord Wright in Lazard Bros. v. Banque Industrielle de Moscou 1933 A.C. 289 at p. 297 "as the creation depends on the act of the foreign state which created them (foreign corporations) the annulment of the act of creation by the same power will involve the dissolution or non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one as the other fact."

One problem arising out of this recognition of the dissolution in the country of incorporation might be dealt with here. Where the corporation has been dissolved in the country of its incorporation but a branch of it existing in another country is still recognized there, what will be the status of that branch in South Australia if it claims to have a legal existence here? (See Dicey pps. 520-1). For example, let us suppose a Russian corporation with a branch in France and a branch in South Australia. The corporation is dissolved by the law of Russia and therefore is regarded as dissolved here. The French Courts, however, take a different view and regard the French branch as still existing Can that branch for example sue here? It is conceived that the answer to this question depends upon what the French law really does. If it, while recognizing the creation of the corporation by Russian law, merely refuses to accept the Russian dissolution but regards the company as still existing it is submitted the French branch ought not to be recognized here. The corporation is dissolved by the law of its incorporation, i.e. Russia and must be regarded as dissolved here. (See Banque Internationale de Commerce de Petrograd v. Goukassow 1923 2 K.B. 682 reversed on another point by the House of Lords 1925 A.C. 150). If, on the other hand, the French law regards the branch as a separate legal entity, apart from the parent body then the branch should be recognized here because the branch itself would be a corporation created by the law of France and therefore one which should be recognized here. In other words, the question is whether the French law recognizes the branch as the old corporation or as a separate new corporation.

We have also seen that a foreign company within the meaning of Section 351 of the Companies Act 1934 may be wound up here as an unregistered company, even though it has been dissolved in the country of its incorporation.

It is obvious that when a foreign company which has assets and liabilities in South Australia is dissolved in the country of its incorporation, difficult questions of law will arise as to the effect of the dissolution upon those assets and liabilities. These difficulties are added to by the fact that in nearly all the cases which have been considered by the English Courts the dissolution has resulted from the confiscatory legislation of the Soviet Government which has annihilated corporations created by the former Russian law without making any provision for the settlement of their debts. In many of these cases the English branches of the former Russian corporations continued to function in England after the dissolution. In view of the startling consequences which must follow from these circumstances, it is not surprising that the English Courts took the view at first that the Soviet legislature had not destroyed the corporations as juristic entities though it had stripped them of their possessions and paralyzed their functions within the borders of Russia. (See Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse 1925 A.C. 112 and Banque Internationale de Commerce v. Goukassow 1925 A.C. 150). But subsequently, with further information concerning the foreign law before them, the House of Lords came to the conclusion that the corporations had indeed been dissolved (Lazard Bros. v. Banque Industrielle de Moscou supra) and it has therefore become necessary to examine carefully all the consequences of that dissolution.

The legislation of the various Australian States patterned on the precedent of the English Companies Acts makes careful provision for the winding up of a company and the satisfaction of all claims against it before dissolution. In the case of a company carrying on business in South Australia and incorporated in one of the other States of the Commonwealth it will, therefore, be only an accident if any of its assets

remain unadministered or its creditors unsatisfied after its dissolution in the country of its incorporation. Nevertheless, such accidents do happen and have happened and the subject is therefore of more than academic interest in Australia as well as in England.

Perhaps the best way to deal with this difficult question is to discuss first the position which arises where the foreign company is dissolved by the foreign law apart from the making of a winding up order by the South Australian Court. When that position is ascertained we will see how it is affected by the making of the winding up order.

Obviously, if the foreign dissolution is to be recognized in South Australia, the company becomes non-existent. Now, a non-existent person cannot sue or be sued, nor can it enter into a contract. No action, therefore, can be commenced by or against that which for the sake of convenience I will continue to call the foreign company but which is of course in reality only the name of something which once had, but no longer has, existence. If such a proceeding is commenced any judgment obtained will be a mere nullity as a non-existent person cannot give a retainer. No garnishee proceedings or other form of execution can be taken under it. (See Lazard Bros. v. Banque Industrielle de Moscow 1933 A.C. 289). (Russian & English Bank v. Baring Bros. 1932 1 Ch. 435, Burr v. Anglo-French Banking Corporation 49 T.L.R. 405).

If it once becomes apparent to the Court that the supposed plaintiff or defendant is a dissolved foreign corporation it should stop the action of its own motion. (See United Insurance v. Lang 35 S.R. (N.S.W). 487). The suggestion thrown out by Lord Finlay in the Mulhouse case above at p. 141 that the English branch could use the name of the dissolved corporation to get in the English

assets and that the branch had, in fact, some sort of separate existence of its own was not accepted by Eve J. in Russian & English Bank v. Baring Bros. 1932 1 Ch. 435. Indeed, if we once recognize that the corporation is dissolved everywhere, it seems hard to discover what right anyone has got to sue in or otherwise use the name of a non-existent person in the absence of statutory warrant. If the local branch - whatever that may mean - possesses a legal entity of its own, it must have derived the gift of personality from some system of law: in the absence of any proof that the foreign law confers such a gift on it after the dissolution of the corporation itself, no provision of the South Australian law can be found which does so. Corporations cannot, in English law, be created entirely by implication (I) though it would seem, as we shall see later, that such an act of creation or something very like it may be implied from slight statutory authority if circumstances demand it. (See Russian & English Bank v. Baring Bros. 52 T.L.R. 393). There is no statutory authority whatever for creating a new corporation out of the local South Australian branch of a foreign company when the company itself is dissolved by the foreign law. Part XII of the Companies Act 1934 does not purport to do anything like this. I think, with respect, that the opinion of Eve J. mentioned above is correct and that the local branch has no right to sue or contract here in the name of the dissolved company and has no title to its assets and is not and does not become on the foreign dissolution, a separate legal entity.

A suggestion was also made in the Mulhouse case by Lord Wrenbury at p. 148-9. He points out that though a foreign corporation is to some degree recognized in England, it is not, apart from the question of winding up, a company within the meaning of the Companies Act.

(I) Except by prescription, i.e. existence from before the time of legal memory when a lost charter is presumed. See Re Faversham Free Fishermen 36 Ch.D. 329.

"The question which arises", he says, "is whether the "association of persons which is in the foreign country "bound together by a nexus of corporation is not in "this country an association of natural persons bound "together by a nexus of partnership. No objection "arises by reason of the association consisting of more "than ten persons for the word "formed" in section 1 of "the Companies Act 1908 means "formed in this country" "and the association was in such a case "formed" abroad "by incorporation there. The question then is whether "the association is not to be treated here as an "association or partnership of natural persons whose "relations inter se are to be found in the articles of "association of the company and are to be ascertained no "doubt with reference to the lex loci contractus but "which is nevertheless an association whose existence is "not terminated by the death of the foreign corporation "but continues for the purpose of winding up its affairs "so far as this country has control over the persons and "the assets within its jurisdiction. The natural persons "forming such an association are not dead, even if the "corporation is".

An expression of opinion by so great a master of company law must be regarded as of high authority: but, with all respect, I cannot think that foreign corporations have been treated in English law as foreign partnerships. They have been allowed to sue and be sued in their own name: they have been treated as legal entities apart from their members. If the association of persons bound together in the foreign country by a nexus of corporation were treated in England as an association of natural persons, bound together by a nexus of partnership one would think that each of those persons would be treated in England as personally liable for the acts of the association, even though by the foreign law they were not responsible therefor, just as in ordinary law, one partner is responsible for the acts of the firm. This, however, is not so. See General Steam Navigation Company v. Guillou 11 M & W 877. Bateman v. Service 6 A.C. 386. The liability of members of a foreign corporation for its acts has been governed in English Courts by the law of the country of incorporation, not by the rules governing the liability of the members of an English partnership. (Contrast the position of members of a foreign unincorporated association. See Lindley

on Companies 6th Ed. p. 1227). If, on the other hand, it is suggested that the foreign corporation is regarded as a corporation here while it exists but that a new partnership of natural persons springs into existence on the dissolution of the old artificial person by the foreign law, the same answer as that to Lord Finlay's suggestion holds good, how and by what law, English or foreign, is this new association of partnership created and how can it succeed to the rights and liabilities of the vanished corporation? It will hardly be likely that the foreign law will create a new partnership out of the corporators of the old corporation and it is hardly likely that such would be the intention of the former corporators themselves after the dissolution of the corporation. If the foreign law recognizes their succession to the assets and their liability for the debts of the corporation the position is entirely different.

It is, therefore, my opinion that in the absence of any relevant provision of the foreign law, there can be no continuance in South Australia of the existence of the dissolved company either by personifying the local branch or by giving it a title to use the name of the non-existent corporation or by regarding the prior corporators as partners. It follows from this that none of the acts done in the name of the former corporation by the persons de facto in charge of its South Australian affairs can have any legal validity. They cannot give title to any of its assets: a non-existent person cannot give title to anything and these persons have no right to dispose of the assets except as agents for that non-existent person, and in any event their authority as agents disappeared with the extinction of their principal. Moreover, as I shall show later, at the moment of dissolution the assets became vested in other persons so that even if in some way we can imagine these persons de facto in charge in South

Australia as having authority to deal with the affairs of the former corporation, its assets have already become the property of those other persons. Similarly, no contract can be made on behalf of the dissolved corporation. Nothing, in short, purporting to be done on its behalf after the dissolution can be of any validity whatever. Persons dealing with those whp purport to be its agents may have a remedy against them, e.g. for breach of warranty of authority, but acquire no rights against, as they incur no liability in favour of, the dissolved corporation. We can, therefore, ignore anything purporting to be done on behalf of thecompany after the dissolution: that cannot affect the matter at all. Whether it can be in some way regularized after a winding up order has been made is another matter.

What, then, is to become of the assets of the former corporation? If, by the foreign law, its assets pass to some other person or persons it is suggested that with one exception, and if the foreign law is not of a confiscatory nature, the South Australian movables should also pass to that person or persons. That is simply the proposition that I have put in the case of bankruptcy. Mobilia sequuntur personam. The movables are assigned by the law of the company's domicil and the assignment should be recognized here. This is a universal assignment in which, as we have seen, the Courts will generally apply the law of the domicil with the exception which I shall mention later. It does not matter who the persons entitled by the foreign law are: they may, for example, be the representatives of the creditors of the former corporation or they may be the former corporators themselves. As we have seen, it is only because in countries governed by English law winding up does not involve an assignment that the South Australian movables do not pass for instance to the Victorian liquidator. In this case, then,

the ordinary rules which I have given as to the effect of a foreign bankruptcy as an assignment and the limitations thereon will apply. A South Australian winding up might, of course, be able to operate on property which would not so pass. It is true that in the case of natural persons the representative of the deceased constituted by a foreign Court even by the Court of the domicil will not be regarded in that capacity as entitled to property in South Australia. A grant must be obtained from the South Australian Courts in order to constitute a person with title to the South Australian assets of the deceased. But this rule depends upon the peculiar jurisdiction and rules of the Ecclesiastical Courts and on the original right of the ordinary to administe the effects of the intestate within his diocese or province at the date of death and the subsequent right of the spiritual Court to grant probate and letters of administration in respect of the effects within its jurisdiction at the date of the death of the deceased.(See Attorney General v. Dimond 1 Cr. & J. 356 at pps. 369-70). But these rules do not exist in the case of corporations. A corporation cannot make a will and it has no next of kin. No one can take out a grant of probate or letters of administration to its estate when it suffers the equivalent of death.

Nevertheless, the South Australian movables will not pass to the foreign State, if that is the person entitled to the company's property by the foreign law. In the case of Russian companies this is obvious: for we have already seen that confiscatory legislation can have no effect on property situated outside the particular country whose legislation it is: (and see Barclay v. Russell 3 Ves.Jun.423 Lecocturi er v. Rey 1910 A.C. 262. The Jupiter (No.3) 1927 P.122-250. In re Russian Bank for Foreign Trade 1933 Ch.745). Thus, the Soviet legislation cannot confiscate for the

benefit of the Soviet State property - including choses in action - situated in England or in South Australia. But to permit the Soviet State to take the English or South Australian movables by assignment or quasi-succession existing under the Soviet law would merely be indirectly to recognize the confiscatory legislation.

But even apart from this, if the foreign State or its representative is, by the foreign law, entitled to the property of the dissolved company even if only on the principle that the State is the owner of everything which has no other owner, it will not take the South Australian movables. Here, I adopt the analogy of the succession to deceased persons estates, depending, however, not on the technical rules as to the constitution of a representative to the deceased, but on the rules as to beneficial succession to movables depending also on the rule mobilia sequuntur personam. In In re Barnett's Trusts 1902 1 Ch. 847 the deceased died domiciled in Austria in testate and heirless. By the Austrian law the succession in such a case is confiscated as heirless property by the Austrian fiscus. It was held that the right in such a case was not a true right of succession but a right of ownership to that which had no other owner and the Austrian Government's claim to the English movable property of the deceased was rejected. Instead, it was held that the British Crown took the property as bona vacantia. That is the rule which I suggest should apply to the movables of a dissolved foreign corporation also. The Companies Act 1934 makes provision for the disposition of the former assets of a dissolved company (Sections 307-310), but those provisions only apply to companies formed and registered under the Act or existing companies not being foreign companies registered under or subject to the Companies Act 1892. (Section 8). These provisions, therefore, have no application. The rule as to a common law corporation,

however, is that its personal chattels and personalty, such as, for example, an equity of redemption in leaseholds - but not a leasehold estate itself, see later - vest after the dissolution of the corporation in the Crown as bona vacantia (See In re Wells 1933 Ch. 29 dissenting from the dictum of Wright J. in In re Higginson and Dean 1899 1 Q.B. 325 at p. 332 that the Crown can only maintain an action for such property where it can allege a trust on behalf of the former company.) Whether this, however, applies to a mere debt due to the company or whether such a debt is not rather extinguished is doubtful. It is suggested that in cases where by the foreign law the property of the dissolved corporation vests in the foreign state, the South Australian movables of the former corporation will vest in the Crown as bona vacantia to the same extent as those of an ordinary common law corporation would. This appears to be the view taken by learned Judges in several of the cases on Russian corporations: the point has not yet however arisen for decision. (See for example Russian and English Bank v. Baring Bros. 52 T.L.R. 393 per Lord Atkin at p. 398, Lord Russell of Killoween at p. 401 and Lord MacMillan at p. 402). In Barclay v. Russell 3 Ves. Jun. 423 Lord Loughborough held that property held in England on trust for the old "Government of Maryland" which appears to have been a body of somewhat singular constitution created by Letters Patent "in some degree similar to a corporation" (p. 434) and which had ceased to exist as a result of the American War of Independence passed to the Crown and not to the new State of Maryland or to its assignees. The new State was not the legal successor of the extinct Government of Maryland and its political legislation could only affect property within its borders. In that case, however, the old Government was a quasi corporation created by English Letters Parent, i.e. by English law and it was held that it "ought to

be regulated by the law of England under which it had its existence." It was not, therefore, strictly a foreign corporation at all.

As far as debts owed to the dissolved corporation are concerned they are probably totally extinguished by the dissolution. I will deal with this question later. If this is so, then obviously the debts of the former corporation situatedin South Australia cannot pass to either the persons entitled by the foreign law or to the Crown.

With regard to immovables, the devolution of these on the dissolution of the company ought to be regulated by the lex situs. Here again, we can seek no assistance from the provisions of the Companies Act. The effect at common law of the dissolution of a corporation on the realty and leaseholds of the former corporation is uncertain. It is doubtful, whether the realty escheated to the feudal lord— in South Australia, of course, the Crown - or reverted to the donor. The latter rule is probably the modern law: it was so held by Coke (Dean & Canons of Windsor v. Webb Godbolt 211) by Blackstone(Comm. I. 3rd. Ed. 501)., and has been applied recently (Re Woking Urban Council 1914 1 Ch. 300): the subject is discussed in Holdsworth History of English Law Vol IX p. 68. The dissolution terminates a lease made to the corporation and the land reverts to the lessor. (See Hastings Corporation v Letton 1908 1 K.B. 378.) This case was doubted by Lawrence and RomerLJ. J. in In re Wells 1933 Ch. 29: it was however mentioned without dissent and apparently treated as an authority by Lord Sumner in Morris v. Harris 1927 A.C. 252(at p. 259).

Owing to the fact that modern statutes make elaborate provisions for the winding up and dissolution of trading companies, the whole law on the subject of the dissolution

of a common law corporation is ancient and obscure: the old authorities are, it is submitted, still good law. On the dissolution of a foreign corporation, therefore, the probability is that all land in South Australia leased by it will revert to the lessor and all land in South Australia held by it in freehold will revert to the person who conveyed it to the corporation.

We have seen that a practice of somewhat doubtful correctness has grown up in the case of bankruptcy of allowing a foreign trustee in bankruptcy to apply to the Court here for an order making him receiver of the rents and profits of the bankrupt's local immovables with power of sale to sell and deal with the proceeds of sale as trustee in the bankruptcy. (In re Koeperman 13 B & C. Cases 49 In re Osborn 15 B & C Cases 189). If the foreign corporation is dissolved and its property assigned by the foreign law to a person who for want of a better name I shall call the foreign liquidator for the purpose of getting in the property and paying the debts of the former corporation, could he make a similar application? It is submitted not; because on the dissolution the South Australian land would at once revert to the grantor or the lessor and their rights should not be disturbed.

The contract between the former corporation and its creditors is governed by what Dicey calls the proper law of the contract which may be either the law of the place where the contract is made or the law of the place where it is to be performed. (See Dicey Chap. XXV). Whether or not that contract is discharged by the dissolution of the corporation depends upon its proper law: if, therefore, the proper law of the contract is the foreign law, and by that law, the debt is discharged on the dissolution it will be treated as discharged in South Australia. Thus, in Perry v. Equitable Life Assurance Co. 45 T.L.R. 468 it was held that the proper law of the contract between a policy holder and a Russian

insurance company (this case was decided in 1929 when the Soviet legislation was not treated in England as effecting a dissolution of the Russian companies) was the law of Russia and that by that law the contract was annulled and the policy holder therefore failed in his action against the company in England or, in other words, its English branch, for a declaration that the company was liable to him under the policy. What, however, if the proper law of the contract is South Australian, as would happen in the case of an ordinary contract made here at the company's office here to be performed here? Here again, to discover the South Australian law, we are thrust back upon the common law corporation. "The debts of a corporation," says Blackstone (1 Com 3rd. Ed. 501) "either to it or from it are totally extinguished by its dissolution", but his subsequent language suggests a doubt whether this means anything more than that they are not recoverable by or against the members in their natural capacity. It was suggested in In re Higginson and Dean 1899 1 Q.B. 325 per Wright J. at p. 330 and in In re Wells 1933 Ch. 29 per Lawrence L.J. at p. 51 that these statements and others like them in later textbooks (Grant on Corporations p. 303) either refer to the individual corporators only or are else obsolete: but in Russian and English Bank v. Baring Bros. 52 T.L.R. 393 Lord Atkin at p. 398 accepted the proposition that at common law the debts of a corporation are extinguished by its dissolution and disagreed with the proposed restriction of Blackstone's statement. This is also the view of Professor Holdsworth (History of English Law Vol. IX p. 687). It is supported by the Bishop of Rochester's Case (1596) Owen 73 where the Bishop brought a writ against the Dean & Chapter of Rochester for an annuity due by prescription from a dissolved Priory whose possessions had been granted to the Dean & Chapter. It was stated that "the annuity does not remain for

an annuity chargeth the party and not the possession and therefore when the corporation is dissolved which is the person the annuity is gone" and this statement was not contradicted, the argument turning upon whether the annuity was a right in rem or in personam. It would, therefore, seem that all personal rights of or against the corporation disappear on its dissolution. The American Courts would seem not to accept this view but to hold that the creditors have a right to follow the assets and be paid out of them. See In re Higginson and Dean above cited at p. 332. The only English case which I can discover which in any way supports this view is Naylor v. Brown Rep. Tem. Finch 83 where the corporation before its dissolution assigned property to one W for the payment of its debts and W declared the trust as to certain creditors only. It was held that the declaration of trust was void as the corporation did not join therein or give W any authority to declare it in that manner: that the property was in equity still part of the estate of the company and that the plaintiff, a creditor, was entitled to be paid out of it. The decision, however, is hardly satisfactory as it would seem that the property should have vested in the Crown as bona vacantia. It is the decision of a Court of Equity in the days when those Courts were less fettered by precedent than they are today, and in truth courts of conscience rather than of law, and cannot, I think, be regarded as an authority for the proposition that the former creditors of a dissolved corporation can attack what was its property before the dissolution. The property was property which should have been applied before the dissolution in payment of the creditors and the Court seems to have thought that it could be in some way regarded as still in the state in which it was at the time the trust was created.

It is, therefore, my opinion, given with the hesitation natural in the scarcity of authority, that all the personal rights and liabilities of a corporation are extinguished by its dissolution. The truth is that after the dissolution the remedy of any creditor had undoubtedly disappeared, for there was no one who could be sued. The abstract question as to whether the right had disappeared also was therefore not likely to be raised. I think on the authorities that I have citedthat it did. If this is so, then the suggestion of Mr. Wortley in his article on "The Dissolution of Foreign Corporations" in the British Year Book of International Law Vol. XIV. (1933) p. 1 at p.11 that the assets of the dissolved corporation might vest in the Crown subject to the payment of debts as in the case of intestacy cannot be accepted because there are, in the eyes of the law, no debts to pay. Indeed, the Crown sometimes expressly granted the property of the dissolved corporation on trust for the payment of its debts which would seem to indicate that the property would not ordinarily be subject to any such liability. (See for an example Naylor v. Cornish 1 Vern. 311).

These enquiries into the common law have been rendered necessary by the lack of authority on and the doubt which exists as to the effect of dissolution on a common law corporation.

-To sum up, then, my opinion is that on the dissolution of a foreign corporation by the law of the country of its incorporation, it ceases to exist in South Australia: it cannot sue or be sued here, nor can it contract nor c can any act of legal validity be done in its name or on its behalf: its movable corporeal property in South Australia will vest in the persons entitled to its property by the foreign law unless that happens to be the foreign state itself or its representatives or unless the disso-

lution occurs as the result of confiscatory legislation in which case they will vest in the Crown as bona vacantia, its leasehold property in South Australia will revert to the lessor and its realty to the grantor: its debts either to it or by it will, if they are governed by South Australian law, be extinguished; if by some other law, their fate will depend upon that law.

If these propositions are correct, the position is far from satisfactory, especially from the point of view of creditors. We are now to consider the effect of the making of a winding up order.

It will be as well here to recapitulate the relevant provisions of the Companies Act 1934.

(1) The effect of Sections 351 and 362 is that any company incorporated outside South Australia which, after the commencement of the Act commences to carry on business in South Australia or which has before the commencement of the Act commenced to carry on or carried on business within South Australia and continues to carry on business there after the commencement of the Act, may be wound up under the Act as if it were an unregistered company within the meaning of Part XI and all the provisions of that part with reference to the winding up of unregistered companies shall, so far as applicable, apply to and in the winding up: it is not, however, necessary to prove that the company consists of more than five members.

(2) Under Section 346 (1) any unregistered company may be wound up under the Act and all the provisions of the Act with respect to winding up shall apply to an unregistered company with certain exceptions and additions.

(3) Under Section 346 (1) (iii) such an unregistered company may be wound up inter alia if the company is dissolved.

(4) Under Section 350 the provisions of the Act with respect to unregistered companies are expressed to be in addition to and not in restriction of any provisions in the Act with regard to winding up companies by the Court and the Court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercized or done by it or him in winding up companies formed and registered under the Act: provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under the Act and then only to the extent provided by Part XI.

The South Australian Act does not contain any provision corresponding to Section 338 (2) of the English Act which enacts that where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to do so, it may be wound up as an unregistered company, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the law of the country under which it was incorporated.

It has been decided that the words "is dissolved" in Section 346 (1) (iii) are equivalent to "have been dissolved". (See In re Russian & English Bank 1932 1 Ch.663).

The legislature, then, seems to have contemplated that a dissolved foreign company should, if necessary, be wound up here. Yet, if my previous analysis is correct, the difficulties are obvious. To begin with, how can a petition be presented if the company has no creditors? On what is the winding up order to operate if the assets have vested as I have suggested? Is the company recreated, and if so, by what law, and at what date - that of the dissolution or of the winding up order - and who are its corporators? Or, is the liquidator to act in the name and on behalf of a still non-existent person? Are the acts of the persons de

facto in charge of the affairs of the company in South Australia to be validated? Yet, unless the winding up order under the command of the Legislature is to be an idle form some answer must be attempted to these questions and some effective result must ensue.

These matters have been examined by the House of Lords in Russian & English Bank v. Baring Bros. 52 T.L.R. 393. There, after the winding up order was made, the liquidator obtained under an order of the Court permission under the English equivalent of our section 213 (1) to bring an action in the name and on behalf of the company against the defendants. It was held by the House of Lords, reversing the Court of Appeal, that the order giving the permission was rightly made: and that the action so brought was rightly constituted. (Lord Blanesburgh, Lord Atkin and Lord MacMillan, Lord Russell of Killowen and Lord Maugham dissenting).

Now, all that this case actually decided was that the liquidator could bring the action in the name and on behalf of the company. Opinions expressed by their Lordships on other points, though naturally to be treated with the greatest of respect, are not binding upon the Courts.

The first point to note is that Section 338 (2) of the English Act, which, as I have mentioned, is not to be found in the South Australian Act, was relied on to some extent as giving authority to make the winding up order (see per Lord Blanesburgh at p. 395.) Lord Atkin however thought that it was only inserted for the removal of doubt and to make it clear that the words "if the company is dissolved" were meant to apply to an incorporated company dissolved according to the law of its incorporation. (p. 398). I will treat the matter, therefore, on the assumption that the South Australian act does not materially differ from the English Act on this point.

Now, as to the main point, Lord Blanesburgh and Lord MacMillan seem to have proceeded mainly upon the construction of the statute. The Act says that the company may be wound up as an unregistered company even though it has been dissolved. It also says that in the winding up of an unregistered company all the provisions of the Act with respect to winding up shall apply. One of these provisions is that the liquidator, with the sanction of the Court, may bring an action in the name and on behalf of the company. The legislature must be obeyed and the action was therefore well constituted.

Lord Atkin, however - it would appear that Lord Blanesburgh agreed with his declaration of principle (see per Lord Blanesburgh at p. 397) - analyzed the nature and effect of an order for the winding up of a dissolved foreign corpration. After pointing out that if the company, in spite of the winding up order, is still to be regarded as non existent, then the consequences must be that there is no company to wind up, no assets to administer and no debts to pay, he says at p. 399:

> "My Lords, I think that we are entitled to imply - "indeed I think it is a necessary implication - that "the dissolved foreign company is to be wound up as "though it had not been dissolved and therefore "continued in existence. This seems to me with respect "the necessary result of saying that it shall be wound "up in accordance with the provisions of the Act. There "is nothing abnormal in such a provision. The municipal "law of this country as of other countries accepts the "principle of international law that countries ordinarily "accept the existence of juristic persons brought into "being or recognized as existing in their country of "origin. Similarly, they accept the destruction or "cessation of such a juristic personality under the law "of its country of origin. But if the municipal law choose "it may in defined conditions refuse to accept or may "accept only under conditions either the creation or "destruction of a foreign juristic person. Whether it "has done so is for the municipal Courts to decide but "if it has then the Municipal Courts must accept the "situation. I see nothing indongruous in the Legisla- "ture saying in effect: we accept the existence of a "foreign corporation coming to trade in this country: "we shall only impose a condition of registration. But "if the corporation does trade here, acquires assets "here and incurs debts here we shall not accept its "dissolution abroad without a stipulation that if "desirable it may be wound up here so that its assets "here shall be distributed amongst its creditors (I do "not stop to consider whether English creditors or "creditors generally) and for the purpose of its winding "up it shall be deemed not to have been dissolved for

"that event would defeat our municipal provisions for "winding up a corporation. That does not appear to me "to be recreating or reconstituting a new corporation. "It is for particular and limited purposes refusing to "recognize the dissolution of the old."

Lord Atkin rejects the theory that the corporation is still existent but that the winding up is of the affairs of the company and that the liquidator of the affairs of the company is to have recourse to what would have been the assets of the company if it had not been dissolved and distribute them amongst those who would have been its creditors in the same circumstances.

"I suggest" he says at p. 399 "that you cannot distri- "bute the value of non existent rights among the owners "of non existent obligations and that you must subsume "for the rights and obligations a juristic person who "possesses the one and is subject to the other".

According to the two learned Lords who dissented the appellants had to establish one of two propositions before they could succeed.

"Has the statute enacted that a non-existent person may "nevertheless sue as a plaintiff?..... Or has the "statute enacted that the corporation shall be restored "to life and if so, is it restored to life as a cor- "poration constituted by Russian or by English law and "who are the corporators, and is it resuscitated only as "from the date of the winding up order or retrospectively "as from the moment of its dissolution? (per Lord Russell of Killowen at p. 400).

Both of their Lordships were of opinion that the words of the statute "do not justify so remarkable a novelty as an action without a plaintiff" (per Lord Maugham at p.403).

The difficulties of the second proposition are forcibly put:

"On the happening of that event (the winding up order) it "is alleged the Act which contains express and carefully "framed provisions for resuscitating dissolved companies "which were registered under the Act enacts without any "express words at all but merely by implication that "dissolved foreign corporations are to arise from the "grave in full force and vigour and entitled to sue to "recover property which for fourteen or fifteen years "has been the property of the Crown or that they are to "be so entitled notwithstanding that they do not exist." (per Lord Russell of Killowen at p. 401).

> "If there is now a legal entity bearing that name (of "the Bank) it must be a different corporation existing "by English law domiciled in this country possessing "assets if any only within the British jurisdiction "and apparently it must be a quasi-trading corporation "without statutes or charter or articles of association "and without any corporators unless it may be held that "such shareholders if any in the original company as may "be domiciled in this country are in some sense corpora- "tors of the new corporation. Russian corporators have "plainly had their rights and liabilities extinguished." (per Lord Maugham at p. 403).

Lord Maugham further pointed out that it was not contended that the dissolution could be declared void. Nothing done in England could destroy the effect of legal acts in Russia. His Lordship further said in reference to the suggestion that the company should be wound up as if it had not been dissolved:

> "It has been de facto legally dissolved and the phrase "if analyzed must mean that a new corporation is to "spring into existence on the making of the winding up "order." (at p. 403).

Finally, it might be mentioned that the learned Judges of the Court of Appeal had thought that a way of escape might be found by making a vesting order under the section corresponding to our section 212. But as was pointed out by Lord Blanesburgh at p. 396 Lord Atkin at p. 398 Lord MacMillan at p. 403, if the dissolved corporation is not a company in whose name and on whose behalf an action may be brought within the meaning of section 213 (1), it cannot be a company whose property can be the subject of a vesting order under Section 212.

The lapse of time between the foreign dissolution and the winding up order affords the greatest difficulty in the working out of the principle laid down by Lord Atkin that for the purpose of its winding up the company shall be deemed not to have been dissolved or, as Lord Blanesburgh puts it, that for that purpose the dissolution is to be ignored. (p. 397).

For it is obvious from the authorities I have cited - particularly Lazard Bros. v. Banque Industrielle de Moscow 1933 A.C. 289 - that after the foreign dissolution but

before any winding up order the company is in very truth deemed to be dissolved in England. It is not "deemed not to have been dissolved" until the winding up order is made. We have a period when it is dead and then a period when it is deemed to be still alive. The force of Lord Maugham's objection that this is in reality creating a new corporation is apparent. Nevertheless, we must accept the opinion of the majority that it is no new corporation which is created but the old one which is resurrected. I need not dwell on the anomaly of winding up a company because it has been dissolved and then from the date of the order deeming it not to have been dissolved. Is the ignoring of the dissolution, the deeming of the company not to have been dissolved, to relate back from the date of the winding up order to the date of the dissolution so as to affect the validity of acts done in the interim? This would appear to be the view of Lord Atkin. "On the assumption I prefer to adopt", the learned Lord said at p. 398 "the Crown acquired a defeasible title (to the assets) defeated on the making of the winding up order." But this involves remarkable consequences. Suppose that the Crown had taken possession of the chattels of the company after the date of the dissolution as bona vacantia - as on my previous arguments it would certainly be entitled to do - and disposed of them to third persons. Or, suppose that lessors or grantors to whom leasehold or freehold estates have reverted have done likewise. Are the rights of innocent third parties to be destroyed and property which may have changed hands many times to be suddenly overtaken by the liquidator, perhaps, as in the case of the Russian & English Bank fifteen years after the foreign

dissolution?(I) Such an intention cannot surely be imputed to the Legislature from the words of Section 346.

In the case of Morris v. Harris 1927 A.C. 252 the House of Lords had to consider the effect of the section in the English Act corresponding to our Section 304 which gives the Court power in certain cases to declare the dissolution of a company registered under the Act to have been void. Their Lordships held (Viscount Dunedin, Lord Sumner and Lord Blanesburgh, Lord Shaw of Dunfermline and Lord Wrenbury dissenting) that an order made by the Court under that section does not affect the validity of proceedings taken during the interval between the dissolution and the avoidance. The particular act under consideration was an award of an arbitrator which purported to have been given between a creditor and the company during that interval and it was held that the award was void.

Lord Sumner said at p. 258:

> "The Legislature would never have imposed upon the "Court a power to declare the dissolution void "without imposing terms, as by the section it certain- "ly is empowered to do, if the effect of the order "of avoidance might be to undo the reversion of "freeholds to an original grantor or the acceleration "of a reversioner's immediate title to leaseholds "in the case of lands accidentally undisposed of in "the winding up ..... yet such would be the effect "of the construction contended for with a consequent "avoidance of all dispositions made by such grantor "or reversioner in favour of third parties wholly "innocent of any irregularity. This must be the "result if the judge's order simply puts back the "clock and restores things as though the dissolution "had never been".

Lord Blanesburgh said at p. 269:

> "An order made under the section, made it may be as "long as two years after a dissolution which up to "that moment was completely effective is not at once "and as of course to ratify acts done during the "interval which if done at all must necessarily have "been acts of mere usurpation by a liquidator or "other pretended agent with no office, knowingly "done on behalf of a company which had no existence. "On consideration it appears I think clear that "automatically to validate such acts as being the

(I)Statutes of Limitation will not be regarded after the winding up as running either for or against dissolved corporations after their dissolution for there is then no one who can sue or be sued. (See In re Russo-Asiatic Bank 1934 Ch.720).

> "acts of a duly constituted officer on behalf of a duly "incorporated company might involve consequences too "disastrous to be even envisaged. These are avoided "by the terms of the section. The company is restored "to life as from the moment of dissolution but continu- "ing a convenient metaphor it remains buried unconscious "asleep and powerless until the order is made which "declares the dissolution to have been void. Then and "only then is the company restored to activity."

If these words apply to a company dissolved under the Act when power is given by the Act to declare the dissolution void, surely they should apply a fortiori to a company which the Act does not purport and is powerless to dissolve but which, by an implication by no means clear from a section speaking alio inticitu, the Act is construed to have ordered on the happening of a certain event, to be deemed not to have been dissolved although it has, in fact, been dissolved by the law of another State. I cannot think that an implication can be drawn from section 346 producing in the case of a foreign company what in the case of a domestic company Lord Blanesburgh thought "consequences too disastrous to be even envisaged."

In my opinion then the making of a winding up order does not affect the validity of anything done between that date and the foreign dissolution. On the making of the order the company will be deemed not to have been dissolved but until that date it remains "buried unconscious asleep and powerless." The acts which the persons de facto in charge of the local branch may have purported to have done on behalf of the company are not in any way validated and if any of the persons whom I have designated as entitled to the assets of a dissolved foreign company have taken possession of those assets they will not be compelled to refund to the liquidator, still less, can he follow them into the hands of subsequent assignees. If these persons have taken no steps to assert their title they will not be able to do so after the making of the winding up order. It should be noted that the learned Lords are careful

to state that the company is deemed not to have been dissolved for the purpose of winding up - not for the purpose of affecting the validity of acts done before the winding up.

This viewpoint is supported by the case of Russian & English Bank v. Baring Bros. 1934 Ch. 276, an earlier stage in the efforts of the Russian & English Bank to institute a properly constituted action against Baring Bros. The action had been commenced in the name of the dissolved company and had accordingly been struck out. (1932 1 Ch. 435): now, after the winding up order the liquidator applied for the stay to be removed and the action allowed to proceed in the name of the company. This was refused. As we have seen, he was held by the House of Lords entitled to bring a fresh action in the name of the company: but there was no appeal against the refusal of Bennett J. to hold that the winding up order made the action previously commenced in the name of a non-existent person thenceforward a properly constituted action. This case was, of course, decided before the decision of the House of Lords and needs to be considered in the light of their judgment. It was held that there was nothing in the section corresponding to our section 346 to revive the company for the purposes of the action which an end had been put by the order of the Court or to avoid the dissolution brought about by the foreign law. It is of course now clear that the order of the Court does for certain purposes avoid the consequences of the dissolution brought about by the foreign law.

Nevertheless, I think the actual decision for what it is worth supports my view.

Then, it is suggested that the liquidator may be able, after the winding up order has been made, to ratify "the acts of those who have intermeddled with the affairs

and assets of the branch after the destruction of the parent company", (see per Eve J. in Russian & English Bank v. Baring Bros. 1932 1 Ch. 435 at p. 444 and see the article above referred to in British Year Book of International Law Vol. XIV at p. 12). But the law of England and of South Australia is that before a person can ratify a contract purporting to be made by an agent on his behalf that person the supposed principal must have been in existence either actually or in contemplation of law at the time when the act of the agent was done (see Kelner v. Baxter L.R. 2 C.P. 174). If I am right in my contention that the effect of the winding up order is not to affect the validity of acts done between that date and the date of the dissolution, then it is obvious that the company was not in existence when those acts were done and that they, therefore, cannot be ratified by the liquidator. This view of the law is supported by the dictum of Scrutton L.J. in Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse 1923 2 K.B. 630 at p. 658. "If," he says "there was no such juridical person as the alleged plaintiff when the writ was issued, no one claiming to be that person at a later date could ratify the earlier action". The case was reversed on another ground by the House of Lords 1925 A.C. 112.

In Morris v. Harris 1927 A.C. 252 referred to above, the case of the English company whose dissolution the Court had declared to have been void, Lord Sumner said at p.259 that the award made against a company which did not exist was null and "no subsequent validity has been or could be given to it". Here again I cannot think that the words of section 346 in the case of a foreign company can be more powerful than the words of section 304 in the case of a domestic company. (Contrast the words of section 305 (6) under which"the company shall be deemed to have continued in

existence as if its name had not been struck off" and the Court is given power to impose just terms "for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off". Lord Atkin in Russian & English Bank v. Baring Bros. above cited at p. 399 draws an analogy between the effect of the English equivalents of Sec. 305 (6) and sec. 346. With very great respect I submit that owing to the absence of a gift of power to the Court to impose terms the analogy, if there is one, is rather between sec. 304 (1) and sec. 346).

Again, it is suggested that the liquidator on the one hand and persons dealing with the company on the other hand "should be estopped from denying the continued existence of the corporation in cases where the dissolution was unknown to them". (See the article above referred to p. 12). But estoppels must be mutual (see De Mora v. Concha 29 Ch. D. 268); and any estoppel existing between persons dealing with the branch after the dissolution and persons de facto in charge of the affairs of the branch cannot exist between the first named persons and the company itself, as represented by the liquidator after the winding up, if my contention is right that the winding up order does not affect the validity of acts done between its date and the date of the dissolution, for at the time of the dealings in question the persons de facto in charge had, in the eyes of the law, no power to bind the company at all and it is entirely unaffected by their acts.

If these arguments are correct, then, after the date of the winding up order the company is deemed not to have been dissolved but as the validity of acts done between the time of the dissolution and the winding up is not affected, only those assets will pass to the liquidator which have not been reduced into possession by those persons

whom I have pointed out as entitled to them on the dissolution and only those claims can be enforced by or against the company which existed at the time of the dissolution. It will follow from this that the liquidator will be able to recover assets disposed of after the dissolution by persons purporting to act on behalf of the company and will conversely have no title to assets purporting to be acquired by those persons on its behalf. And if it is said that innocent parties must suffer by these proceedings I can only say that they must look to their rights against the persons purporting to act on behalf of the company, and that it would be a greater evil that those who have acquired legal rights should have them retrospectively taken away than that those who have suffered loss under the mistaken belief that they were acquiring legal rights should not have those rights retrospectively conferred upon them.

On that basis, then, the liquidation will proceed in the ordinary way. The assets which I have mentioned in the last paragraph will be administered by the liquidator and distributed among the creditors I have mentioned in the last paragraph according to the rules I have already given relating to the conduct of a winding up. All creditors whose claims existed at the date of the dissolution, whether English or foreign, should be allowed to prove as usual but the question whether a person has any right at all against the company will depend upon the law governing that right and if a person has rights which are governed by some foreign law and by that law those rights are extinguished they will be treated here as extinguished also. This will not be so if the foreign law merely bars the remedy.(I)

(I) Westlake p. 326-7 holds that in the case of obligations in personam there can be no distinction between the right and the remedy inasmuch as the right is merely the right to sue. However true this remark may be of general jurisprudence the existence of such a distinction is too deeply founded in English law to be disregarded now.

It appears, however, that any person who was a creditor of the company at the time of its dissolution may present a petition for winding up although, on my contention, his debt would have been extinguished by the dissolution. The deeming of the company not to have been dissolved which occurs on the winding up order apparently extends sufficiently far to cover this.

> "I might add" says Lord Atkin (Russian & English Bank "v. Baring Bros. 52 T.L.R. 393 at p. 399) "that if "the company continues to exist for the purpose of "winding up I find no difficulty in holding that "such assumption is valid for the purpose of validating as a creditor of the company a person who on "that assumption presents the petition for the "purpose of winding up".

Winding up orders were made in In re Russian & English Bank 1932 1 Ch. 663, In re Tea Trading Company 1933 Ch.647. In re Russian Bank for Foreign Trade 1933 Ch. 745 and In re Russo-Asiatic Bank 1934 Ch. 720 without this objection being taken to the presentation of the petition.

We have already seen that the rights and liabilities of members are governed by the law of the country of incorporation. The liquidator's right to proceed against contributories resident in South Australia will therefore depend upon that law. If by that law the contract made between the member and the company or at any rate the liability to contribute to the funds of the company has been discharged or annulled, the South Australian liquidator will not be able to force the local members of the company to contribute to its funds. If, on the other hand, by the foreign law they still remain liable to do so notwithstanding the dissolution, that liability can be enforced here. In the case of United Service Insurance Co. v. Lang 1935 35 S.R. (N.S.W) 487 the plaintiff company was incorporated in and dissolved by the law of Victoria but that law provided that the liability of members of the company should continue as if the company had not been dissolved. After the Victorian

dissolution the company was ordered to be wound up in New South Wales as an unregistered company and the New South Wales liquidator brought an action in the name and on behalf of the company against the defendant for calls. It was held that the plaintiff company had ceased to exist and that as soon as the Court became aware of this it could proceed no further with the hearing. Jordan C.J. said at p. 495 "If a company incorporated in Victoria has been dissolved in Victoria it must be treated as dissolved everywhere and the provisions for enforcement of liability of members as if the company had not been dissolved can have no operation beyond Victoria". The Court followed the decision of the Court of Appeal in Russian & English Bank v. Baring Bros. 1935 1 Ch. 120, which, as we have seen, has now been reversed by the House of Lords. The decision, therefore, is not good law in so far as it decides that even after the liquidation an action cannot be brought in the name and on behalf of the company. This being so, it is my opinion that the decision is also wrong in so far as it decides that the provision for the continuance of the liability of members cannot be enforced outside Victoria. The Victorian law cannot authorise a non-existent person to sue in the Courts of New South Wales: but once grant the right to maintain the action in the name and on behalf of the company and it seems that the New South Wales liquidator as the sole effective agent of the company in New South Wales can, in New South Wales in the name of the company enforce any rights against the members of the company which exist by that law which governs the relations between the members and the company. The right to sue is a matter of procedure to be governed by the lex fori: but the substantive rights and liabilities of the members should be governed by the law of the country of incorporation. It is, therefore, my opinion that all liabilities of members existing by the law of

the country of incorporation after the dissolution can be enforced by the South Australian liquidator here against persons subject to the jurisdiction of our Courts.

Subject to these matters, then, the liquidation will proceed in the normal manner. The only question left for consideration is the question of the disposal of a possible surplus. I have already indicated what should be done with this. In my opinion, the persons entitled by the foreign law to the company's movables after dissolution should be entitled to the surplus of the proceeds of the South Australian movables unless those persons benefit as the result of confiscatory legislation or unless the person entitled by the foreign law is the foreign State itself, in which case the South Australian surplus will go to the Crown as bona vacantia. The surplus of the proceeds of the South Australian immovables should go to the persons entitled by the South Australian law, the lex situs, namely the lessor or the grantor. Questions have been raised as to the right of the former corporators to the surplus. This problem, however, is answered in general by the above principles. Their rights must be governed by the law of the country of incorporation. If by that law they have no right to the property of the company after dissolution, then they have no right to the surplus of the South Australian movables. If, on the other hand, by that law they are entitled to the surplus after payment of debts after dissolution, then they are the persons entitled by the foreign law under my first rule. Mr. Wortley in the article I have previously cited (British Year Book of International Law XIV at p. 17) suggests that the underlying nexus of partnership between the corporators might not be destroyed by the dissolution of the company and the vesting of its property in the foreign government,

with the result that the surplus should be divided among the corporators and quotes in support of this suggestion In re Metcalfe 1933 Ch. 142. But the Court of Appeal in that case was dealing with an English company and the question whether such a nexus remains in the case of a foreign company must depend upon the foreign law. If the foreign law discharges the contract between the corporators inter se or between the corporators and the company, the corporators obviously have no right to the South Australian surplus. If the foreign law merely confiscates the property of the company while leaving the contractual rights of the members undisturbed it might be argued, as he does, that they would have such a right and would be treated, as it were, as deferred creditors. This is possible, but the matter is hardly likely to arise. It cannot be raised except in the case of confiscatory legislation and it is hard to imagine a confiscatory state which says in effect to the corporators: "we shall confiscate all the company's property which we can reach: but we shall leave in full force and effect the contract between you and the company (which we dissolve) and between you inter se that you shall be entitled to the surplus of the company's assets after the company's debts have been paid although we have seized all the assets we can reach and do not intend to pay any of the debts". It is clear from the judgment of Branson J, in Perry v. Equitable Life Assurance Society 45 T.L.R. 468 that the confiscatory state cannot set up one set of rules as its law to be applied internally, and another set of rules as its law to be applied in foreign countries, but that the law which will be applied here as the law of that state will be the law applied by it in its own Courts. (See at p. 472-3).

I have already given my reasons for rejecting the theories that foreign corporations are regarded here as foreign partnerships or that a foreign partnership will spring into

existence on the dissolution of a foreign corporation.

There is little authority on the effect of dissolution on a common law corporation: the effect of the dissolution of a foreign corporation has only recently had to be considered by our Courts and the matter has not yet been thoroughly explored. Under these circumstances, all the opinions which I have given are given with the utmost hesitancy and doubt. There must be many more possible contingencies in the winding up of a dissolved foreign company which I have not considered; in dealing with them it should be borne in mind that the whole procedure is highly artificial: and that it is inevitable that anomalous consequences must ensue. (See Russian & English Bank v. Baring Bros. 52 T.L.R. 393 per Lord Macmillan at p. 402); also that the provisions of the Companies Act must be applied with caution, remembering that Part XI only applies to foreign companies so far as applicable (sec. 362) and that it is not every provision of the Act with respect to winding up which can be applied to the winding up of an unregistered company; many of these provisions are totally inapplicable to foreign companies such as the provisions relating to contributories.(See above). (See Russian & English Bank v. Baring Bros. cited above per Lord Maugham at p. 403). The whole subject calls most loudly for legislative intervention.

CHAPTER VI.

EFFECT OF BANKRUPTCY AND WINDING UP AS A DISCHARGE.

This matter in reality forms part of the law of extinction of obligations, and it is thus that Westlake deals with it, (ps. 332-4.) It is, however, also connected with the law of bankruptcy and winding up and I will now discuss it. The question to be considered is: what bankruptcies or what windings up will act as a discharge of what creditors of the bankrupt or of the company?

1. BANKRUPTCY.

(a) local bankruptcy.

Section 121 of the Australian Bankruptcy Act 1924-1933 deals with the effect of an order of discharge. It provides that the order shall not release the bankrupt from certain liabilities such as certain debts to the Crown, debts incurred by fraud, liabilities under judgments in actions for seduction and breach of promise of marriage, or under affiliation or maintenance orders or judgments against him as a respondent or co-respondent in a matrimonial suit or release any partner of the bankrupt or person jointly liable with him, and then goes on to say that it shall "release the bankrupt from all other debts provable in bankruptcy". Similarly, compositions and deeds of assignment release the debtor from all provable debts (sec. 161 (g), sec. 165). We have already seen that all creditors may prove in an Australian bankruptcy and receive dividends pari passu with Australian creditors of the same class, no matter what their nationality or their domicil, or by what law their rights are governed. The debt of every creditor therefore, if it is of a kind provable in bankruptcy under Australian law, is a provable debt and by the express words of the Legislature, the order of discharge or the composition

or the deed is a release of every such debt. There are many Australian cases where the effect of a foreign bankruptcy has been considered, but I can find none where the effect of a local bankruptcy on a foreign debt has been dealt with. The English cases on the effect of an English bankruptcy proceed mainly upon the effect of an Act of the Imperial Legislature over colonial creditors and colonial contracts. But it never seems to have been doubted that an English bankruptcy will discharge a foreign debt as well as a colonial one.

"An adjudication in bankruptcy", say the Privy Council in Gill v. Barron 2 P.C. 157 at p.175, "followed by a certificate or discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world."

"An English Certificate", said Pollock C.B. in Armani v. Castrique 13 M & W 443 at p.447 during the course of the argument, "is surely a discharge as against all the world in the English Courts."

I think the plain words of the statute are decisive: a discharge in an Australian bankruptcy is a discharge against all the world in the Australian Courts, and no creditor except one of the nature specified in Section 121, will be able to sue the bankrupt in an Australian Court after he has obtained his discharge here, if the creditor's debt was provable in the bankruptcy. How far the Courts of other countries will regard the Australian discharge as a release of the rights of local creditors is of course an entirely different matter. As far as our Courts are concerned they are concluded by the words of the statute and no question of private international law can arise. It might be noted that if, after the discharge, the debtor makes a fresh contract with his creditor to pay the old debt and that contract is governed by some foreign law by

which it is valid and binding, the contract can be enforced against the debtor in an Australian Court. (See In re Bonacina 1912 2 Ch. 394).

(b) Any bankruptcy taking place under an act of the imperial legislature.

We have seen that the English, Scottish, Irish and Indian Bankruptcy Acts have been passed by the Imperial Legislature and that these Acts bind all the King's Dominions in so far as they purport to do so. It will, of course, be a question of construction of the relevant sections of the statute under consideration whether in any particular case the Imperial Legislature meant to bind British Courts outside the country the subject of consideration.

The relevant sections in each case are Section 28 of the English Act 4 & 5 Geo.V. C. 59 which provides that the order of discharge with certain exceptions shall release the bankrupt from all other debts provable in bankruptcy: sections 137 and 144 of the Scotch Act, 3 & 4 Geo. V.C. 20, which expressly provide that the deliverance of the Lord Ordinary or of the sheriff shall operate as a complete discharge and acquittance to the bankrupt in terms thereof and shall receive effect within Great Britain and Ireland and all His Majesty's other dominions, Section 145 of the Irish Act 20 & 21 Vict. C. 60, which provides that a certificate of conformity given in accordance with the provisions of the Act shall discharge the bankrupt from all debts due at the date of the petition and from all demands or claims provable under the bankruptcy and section 60 of the Indian Bankruptcy Act 11 & 12 Vict. C.21 which provides, however, that the discharge shall not affect any creditor without the limits of the Charter of the East Indian Company unless notice of the order nisi for discharge has been directed to be given in the London Gazette and twelve months have elapsed between the order nisi and the order

absolute. Thus, it will be seen that there is no express mention of the British dominions outside the country dealt with by the particular statute, except in the case of the Scotch and Indian Acts, and that the Scotch Act expressly binds all the Dominions and the Indian Act only binds creditors in the British Dominions outside India subject to certain conditions.

Nevertheless, there is no doubt as to the general rule: "The case made for the appellant" said Bankes L.J. at p. 472 in In re Nelson 1918 1 K.B. 459, "rests upon the contention that a discharge by a Court of Bankruptcy granted under an Imperial Statute is a discharge against the world in any British Court. As a proposition of law, I think that contention is sound."

The leading case is Ellis v. M'Henry 6 C.P.228 where after exhaustive consideration of the whole subject it was held that a discharge under an English bankruptcy should have been treated by a Canadian Court as a discharge of a Canadian debt, but other authority is not wanting. The decision is supported in this by Philpotts v. Reed 1 Br. & B. 294 (Bankruptcy under an Imperial Act relating to Newfoundland held to discharge a debt contracted in England) Sidaway v. Hay 3 B & C 12 (Scotch bankruptcy, a discharge of English debt), Edwards v. Ronald 1 Knapp 259 a decision of the Privy Council (English discharge a bar to an action in an Indian Court for a debt contracted at Calcutta by an Indian merchant although the creditor had no notice of the English bankruptcy) Ferguson v. Spencer 1 M & G 987 and Simpson v Mirabita L.R. 4 Q.B. 257 (Irish bankruptcy treated in an English Court as a discharge.)

A discharge, therefore, of any debt or liability under any bankruptcy taking place under an Act of the Imperial Legislature, will be regarded in an Australian Court as a discharge of such debt or liability wherever the same was

contracted or is to be paid or satisfied, by whatever law it is governed or to whomsoever it may be owed, unless on a proper construction of the particular Act, such discharge does not purport to have such effect.

The discharge owes its extra territorial effect to Imperial legislation; thus, no discharge under a bankruptcy in England, Ireland, Scotland or India which does not take place under the provisions of an Act of the Imperial Legislature will have any such effect in Australia but will be treated in the same manner as a discharge in any other bankruptcy - e.g. a discharge under the Scotch process of cessio bonorum - Phillips v. Allan 8 B & C. 477 or under an Act of the Irish Free State, or under an Irish statute passed by the Irish Parliament before the Union - Lewis v. Owen 4 B & Ald. 654.

Apparently, these Imperial Statutes will be construed so as to have a wider effect in the case of bankruptcy involving an assignment than in the case of compositions or other arrangements.with creditors. In the case of In re Nelson 1918 1 K.B. 459 the Court of Appeal held that a certificate that an arrangement with creditors made by the debtor had been duly carried out, granted by the Irish Court under Section 64 of the amending Irish Bankruptcy Act 35 & 36 Vict. C. 58, did not afford a defence to an action brought in England by an English creditor for a debt incurred in and payable in England, although Section 64 provided that the Certificate was to operate to all intents and purposes as if the same were a certificate of conformity granted under the original Act which it was admitted would have operated as a discharge of the creditors' claim. (See per Eve J. at p. 476). It was held that on the true construction of the Irish Act the provision that the certificate under Section 64 was to have the same effect as a certificate of conform-

ity, was applicable to Ireland only and did not extend to England. Now, that distinction between the effect of the two certificates was not derived from the express words of the statute because the statute clearly said that one was to operate to all intents and purposes as if it were the other. It was an implication partly derived from other provisions and partly from the difference between the nature of bankruptcy proceedings involving assignment and compositions and arrangements. Thus, in the case of the arrangement, no provisions were made for advertisements; the creditors sat in private and only those who had had notice of the proceedings (which the creditor in this case had) were bound. (See per Bankes L.J. at p. 477). But the main point on which two at least of the learned Judges (Swinfen Eady L.J. and Eve J.) grounded their decision is contained in the judgment of Eve J.

At page 477, he says:

> "The effect given in this country to the certificate of "conformity in an Irish Bankruptcy is brought about by "the construction of the Irish Bankruptcy Acts. Being Acts "of the Imperial Parliament, they are construed for this "purpose as the law of the country in which the contract "was made, and this is founded according to all the "authorities upon the necessity for avoiding the "inconsistency and indeed injustice of divesting the "debtor of all his property wherever located for division "amongst all his creditors, wherever resident, and at "the same time leaving him exposed to the claims of local "creditors outside the jurisdiction where the bankruptcy "occurs. Does the same necessity arise or do the same "grounds exist in insolvency proceedings not involving "bankruptcy? In all the cases in which the instrument "of discharge in the previous bankruptcy has been upheld "as a defence to an action in this country or a debt "provable in the bankruptcy it will be found that the "foreign bankruptcy (I am here of course using the word "foreign in a restricted sense) has involved the complete "divesting of the debtor of his whole estate for the "benefit of creditors generally. I think they (bankruptcy "involving assignment and compositions or arrangements) "are essentially different in these respects that whereas "in the one, all the property of the debtor of every "kind and wherever situate is taken from him for payment "of all his debts and creditors wherever resident may "prove their debts and receive their share of the estate, "in the other, no such consequences necessarily follow "and whereas in bankruptcy the discharge (subject to the "statutory exceptions) is a release from all debts in a "composition of the kind we are dealing with, assenting "creditors or at most only those who have had notice "are bound."

The learned Judge then lays down the following rule (p. 478).

> "Where the effect of the foreign bankruptcy is to divest "the debtor of the whole of his property wherever situate "and to vest it in the assignee for distribution amongst "all his creditors wherever resident, the Courts of this "country give the same effect to the order or instrument "discharging the debtor as is given to it in the country "where the bankruptcy occurs."

The learned Judge appears to be using the words "foreign bankruptcy" as meaning "bankruptcy occurring in a country outside England under an Act of the Imperial Legislature" since the rule above quoted does not represent the rule governing the effect of a discharge under a bankruptcy occurring in a country strictly foreign such as France or even in one whose bankruptcy law does not arise under an Act of the Imperial Parliament, e.g. New Zealand, according to most of the authorities (see later) ; moreoever, he himself says that no question of private international law is involved. (p.477).

We may therefore take it as a rule of construction that the Imperial Parliament will not be presumed to have intended that any discharge in bankruptcy arising from any of its statutes will be operative as a discharge in Australia apart from the ordinary rules of private international law (which I shall discuss later), unless the process as a result of which the discharge was obtained involved a divesting of the debtor of his Australian property for the payment of all his debts. In practice, this means that a discharge under a bankruptcy involving assignment to a trustee will be a discharge here and one under a composition or arrangement not involving assignment will not so operate. In general, this seems to be in accordance with justice. But it must be remembered that the Imperial Parliament is paramount; the rule is only a rule of construction and if on the true construction of the statute it appears that the Imperial Parliament intended, for example, that the result of an English composition should be to

discharge an Australian creditor whose debt was contracted and is payable at Adelaide, then that result will follow.

Here again, we touch no principles of private international law. In truth, the Imperial enactments are the law of this country and it is only for the Courts here to construe them. Again, I reserve consideration as to the possible effects of the Statute of Westminster, if and when it is adopted in Australia. (See Appendix B.)

(c) Any other bankruptcy.

By the rules of private international law, according to the view generally accepted in British Courts, the effect of a discharge under the law of bankruptcy is regarded as a matter for the law of contract. In other words, a contract discharged by its proper law should be regarded as discharged everywhere. I borrow the term "proper law of a contract" from Dicey, p. 591, to mean as defined by him "the law or laws by which the parties to a contract intended or may fairly be presumed to have intended the contract to be governed: or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended to submit themselves." Thus, if by the proper law of the contract, the debt is regarded as discharged, it will be regarded as discharged in Australia: if, on the other hand, it is not so regarded by that law, it will not be so regarded here, even though by the law of some other country where a bankruptcy has occurred, the contract is regarded as discharged. In other words, if we ask: "By a discharge resulting from bankruptcy occurring under what law, will a debt or liability be regarded as discharged in Australia?", we will generally have to answer: "By a discharge resulting from a bankruptcy

occurring under the proper law of the contract establishing such debt or liability".(I) This view is not the only one held and should, it is submitted, be subject to some modifications.

Many apparent discrepancies in the cases are the result of differing views as to what the proper law of a contract is. The earlier view was that the proper law of a contract was the law of the place where it was made (lex loci contractus) and it was only gradually held that, in some cases, where a contract was made in one place to be performed in another, the proper law of the contract was the law of the place where it was to be performed (lex loci solutionis.) The latter proposition is, however, now fairly well established. When, therefore, in some of the earlier cases, it is said that a discharge for a debt under the bankruptcy law of the country where the debt was contracted is a good discharge in England, and some of the later cases say that a discharge from a debt under the bankruptcy law of the country where the debt is to be paid is a good discharge in England, they can both be reconciled by saying that a discharge from a debt under the bankruptcy laws of the country whose law is the proper law of the contract is a good discharge in England. The converse proposition also holds good; i.e., when they say that a discharge from a debt under the bankruptcy law of a country where it was not contracted or is not to be paid is not a good discharge in England, they mean that a discharge from a debt under the bankruptcy law of a country whose law is not the proper law of the contract is not a good discharge

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(I) Of course, there may be obligations affected by a discharge under bankruptcy which are not obligations ex contractu: the law governing such obligations will be the proper law for the purposes of these rules: thus, the obligation of the bankrupt to pay damages for a tort will be governed by the law of the place where the tort was committed. If by that law the right to sue upon the tort is discharged no action can be brought here.

in England.

If we remember that the proper law of a contract may be either the lex loci contractus or the lex loci solutionis we can lay down the following two general propositions:

The discharge of a debt or liability under the bankruptcy law of a country whose law is the proper law of the contract by which the debt or liability arises is a good discharge to the debtor in Australia.

(Potter v. Brown 5 East 124 Quelin v. Moisson 1 Knapp 266 Gardiner v. Houghton 2 B & S 743 Ellis v. M'Henry 6 C.P. 228 at p.234).

The discharge of a debt or liability under the bankruptcy law of a country whose law is not the proper law of the contract by which the debt or liability arises is not a good discharge to the debtor in Australia.

(Smith v. Buchanan 1 East 6 Lewis v. Owen 4 B and Ald.654, Phillips v. Allen 8 B & C. 477 Bartley v. Hodges 1 B & S. 375, Ellis v. M'Henry 6 C.P. 228, p.234, Gibbs v. Societe Industrielle des Metaux 25 Q.B.D. 399).

The result was summarized by Bovill C.J. in Ellis v. M'Henry at p. 234:

> "In the first place, there is no doubt that a debt "or liability arising in any country may be dis- "charged by the laws of that country; and such a "discharge if it extinguishes the debt or liability "and does not merely interfere with the remedies or "course of procedure to enforce it will be an " effectual answer to the claim, not only in the "Courts of that country but in every other country. "That is the law of England and is a principle of "private international law adopted in other countries. "Secondly, as a general proposition it is also true "that the discharge of a debt or liability by the law "of a country other than that in which the debt "arises does not relieve the debtor in any other "country"....

This theory, however, which we may call the contract theory, is not the only one which has ever been

accepted by British Courts. There is authority for a much wider view of the effect of a discharge under a foreign bankruptcy law, based upon an entirely different line of reasoning. We have already met this view in the case of bankruptcy occurring under an Act of the Imperial Parliament in In re Nelson above.

This is best shown by the case of Odwin v. Forbes Buck 57, a decision of the Privy Council.

The headnote in this case reads:

> "To a suit instituted in the Dutch Colonial Court
> "at Demerara for the recovery of the balance of
> "an account for sugars consigned to and received
> "by the defendant and his partner in London the
> "defendant pleaded his bankruptcy in England (of
> "which the plaintiffs had notice but had not proved
> "their debt under it) and certificate."

It was held that the bankruptcy and certificate were a discharge of the debt. The contract, then, was apparently made in Demerara and performed in England but no stress was laid upon the proper law of the contract, although at the date when the case was decided this was generally assumed to be the lex loci contractus. Nor was any mention made of the effect of Imperial legislation and indeed, at that date, it was a doubtful proposition whether the bankruptcy laws of England bound the colonies.(I) The Colonial Court decided the matter purely on general principles and, indeed, examined the law of Holland which was apparently the common law of Demerara. The reason for the judgment appears at p.64 of the report:

> "On the strength of these cases and opinions and
> "others which the president noticed in the course of
> "the judgment and the principle of comity and
> "reciprocity which had been shown to exist between
> "England and Holland in matters of bankruptcy and
> "still further on the grounds that the effect of the
> "certificate ought in justice to be co-extensive
> "with the assignment and that if foreign Courts

(I) See Cleve v. Mills & Mawdsley v. Parke cited in the argument in Sill v. Worswick 1 H. Bl. 665 at p.680).

> "allowed the assignees under the English commission
> "to strip the debtor of his foreign property by
> "giving effect to the assignment in their jurisdic-
> "tion, they were bound in justice to give equal
> "effect to the certificate and not leave him liable
> "to the actions of the foreign creditors on which
> "and other grounds noticed in the judgment the
> "president pronounced the unanimous opinion of the
> "Court to admit the certificate as a discharge."

The Privy Council affirmed the judgment without giving any reasons but expressing their disapprobation of the appellant's conduct in instituting the appeal.

The same principle is expressed by Pollock C.B. in Armani v. Castrique 13 M & W. 443 at p.447 in expressing his opinion of the reason why an English bankruptcy operates as a discharge of a foreign contract:

> "The goods of the bankrupt all over the world are
> "vested in the assignees: and it would be a manifest
> "injustice to take the property of a bankrupt in a
> "foreign country and then to allow a foreign
> "creditor to come and sue him here."

It was probably the influence of this idea which led Blackburn J. in the case of Bartley v. Hodges 1 B & S 375, where a Victorian discharge was pleaded to an action upon an English contract and held to be no answer, to place emphasis upon the fact that no allegation appeared that the bankrupt was domiciled in Victoria, since as we have seen a bankruptcy in the country of domicil would effect an assignment of the English movables. Moreover, we have seen the same idea revived in In re Nelson 1918 1 K.B. 459 as a rule of construction of the enactments of the Imperial Legislature, that that legislature will only be presumed until the contrary is shown, to have enacted that a discharge under the bankruptcy law of one country of the Empire will operate as a discharge in another such country where the effect of the proceedings under which the discharge was granted was to divest the bankrupt of all his property wherever situate.

This theory is then that the effect of the discharge should be co-extensive with the effect of the assignment

and in my opinion there is much force in the argument that this is only in accordance with the requirements of justice.

It certainly does seem unjust to allow a foreign bankruptcy to effect an assignment of the bankrupt's Australian movables to the foreign trustee and yet to refuse to allow a discharge under that bankruptcy to operate as a discharge of a debt which is, for example, payable in Australia, so that the bankrupt may still be sued here, although he has been divested of the property by which that debt could have been satisfied. It is true that the Australian immovables would not pass to the foreign trustee, so that the case is not so strong as that of a bankruptcy under an Act of the Imperial Parliament when those too would be gone. We cannot shut our eyes to the fact that the "contract" theory of the effect of a discharge may cause grave injustice, which the other theory which I have enunciated (which I may call the "assignment" theory) would avoid. Why should full effect be given to the assignment at any rate as regards movables and not to the discharge? Perhaps, just as we have seen a distinction between the way in which private international law treats universal as opposed to individual assignments so there should be a distinction between a universal discharge of all liabilities (with the usual exceptions of most systems of bankruptcy law), and an individual discharge of a particular obligation. Thus, a discharge under a foreign bankruptcy which was recognized as effecting an assignment of the Australian movables would be regarded here as a discharge against the world, no matter where the debts were contracted or where payable, while a discharge under any other foreign bankruptcy (excluding, of course, one under Imperial enactments) would only be regarded here as a discharge of those debts of which the law of the country of bankruptcy was the proper law.

Nevertheless, the "contract" theory as contained in the two propositions above enumerated seems to have won the day. In the case of Gibbs v. Societe Industrielle des Metaux 25 Q.B.D. 399, a decision of the Court of Appeal, the defendant company was in liquidation in France, the country of its incorporation, and it was assumed that its debts were by the law of France discharged thereby. The plaintiffs, creditors of the company under a contract to be performed in England, sued the company in England. It was held that the discharge under the French law was no answer to the action; the contention for the defendant company was that a discharge under the law of the domicil (in this case, of course, France, the country of incorporation) was a discharge everywhere. This was rejected by the Court, and it is important to note that the possibility that the English movables might have vested in the French liquidator, by reason of an assignment effected by French law, was expressly adverted to by Lindley L.J. at ps. 410-11, so that no distinction can be founded on the difference between bankruptcy and winding up under British systems of law.

The classic judgment of Lord Esher at ps. 405-6 which is quoted by many of the text-book writers, gives a clear exposition of the contract theory:

> "The general rule as to the law which governs a
> "contract is that the law of the country either where
> "the contract was made or where it is to be so performed
> "that it must be considered to be a contract of that
> "country is the law which governs such contract ....
> "The parties are taken to have agreed that the law
> "of such country shall be the law which is applic-
> "able to the contract. Therefore, if there be a
> "bankruptcy law or any other law of such country by
> "which a person who would otherwise be liable under
> "the contract would be discharged if the facts be
> "such as to bring that law into operation, such
> "law would be a law affecting the contract and
> "would be applicable to it in the country where the
> "action is brought. That, at any rate, is the law
> "of England on the subject. So where a contract
> "is made or is to be performed in a foreign country
> "so as to be a contract of that country and there is a

"bankruptcy law, or the equivalent of a bankruptcy law "of that country by which under the circumstances which "have occurred a party to the contract is discharged "from liability, he will be discharged from liability "in this country. But it is only in virtue of the "principle which I have mentioned that such a dis- "charge from a contract takes place. It is now, "however, suggested that where, by the law of the "country in which the defendants are domiciled the "defendants would under the circumstances which have "arisen be discharged from liability under a contract "although the contract was not made or to be performed "in such country, it ought to be held that they are "discharged in this country. It seems to me obvious "that such a proposition is not in accordance with the "principle which I have stated. The law invoked is "not a law of the country to which the contract belongs "or one by which the contracting parties can be taken "to have agreed to be bound: it is the law of another "country by which theyhave not agreed to be bound. As "Lord Kenyon said in Smith v. Buchanan, it is sought "to bind the plaintiffs by a law with which they have "nothing to do and to which they have not given any "assent either express or implied".

I have endeavoured to summarize the result of the opinions expressed in this quotation in the two propositions set out above, and I will proceed to discuss the question on their basis. These principles are adopted by the text-writers (Dicey pps. 483-8, Westlake p. 332) and must be taken to express the law unless and until a different opinion is expressed by the Privy Council or the House of Lords. Such an occurrence is, in my opinion, in view of the authorities I have cited in connection with what I have called the assignment theory, possible, though perhaps unlikely.

Assuming, then, that those two propositions correctly state the law, let us consider some of the consequences and modifications thereof.

I will first consider the first proposition, the positive one:

To begin with, in order for the discharge under the foreign bankruptcy law to operate as a discharge here, it must be a discharge and extinguishment of the creditor's right, not a mere barring or suspension of his remedy. If

the foreign law merely forbids the bringing of an action against the bankrupt, for example, it will not be a defence to an action brought here. The distinction is the familiar one between a matter of substantive law and one of mere procedure which is always governed by the lex fori.(I) The decision to the contrary in Spalding v. Bailey 17 V.L.R. 478 is in my opinion opposed to the weight of authority and can only be supported on the ground that the plaintiff creditor in that case had proved in the foreign bankruptcy and had therefore impliedly consented to be bound by all the provisions of the foreign bankruptcy law, including the suspension or the deprivation of the right to sue the bankrupt. (See later.) This proposition will apply to a discharge arising from bankruptcy created by Imperial legislation as well as to any other.

Dicey raises the question (p.489) whether a discharge under a foreign bankruptcy law is impeachable here on the ground that the foreign Court had no jurisdiction to make the debtor a bankrupt. I respectfully agree with his conclusion. If the contract is discharged by its proper law, it is discharged here, and it is irrelevant to enquire how the discharge arose. I have already expressed the opinion that it is not competent for an Australian Court to enquire into the jurisdiction of an English, Scotch, Irish or Indian Court to adjudicate a man bankrupt, so that

(I) See Frith v. Wollaston 7 Ex.194 21 L.J. Ex 108 and Fleetwood v. Benjamin 9 N.S.W. S.C.R.162 - though it will be suggested later that the latter case is wrong on other grounds. The former case seems to have been treated in Bank of New Zealand v Proudfoot 6 N.S.W. L.R. 177 as an authority for the proposition that bankruptcy under the foreign law is no answer to an action on a foreign judgment. It is submitted with respect that this is wrong, if a discharge arises under the foreign bankruptcy. The law governing the obligation which our law regards as arising from a foreign judgment is surely the law of the country in which the judgment was obtained: and if by that law the obligation to satisfy the judgment is discharged the obligation to satisfy it must be regarded as discharged in Australia also. The original cause of action need not necessarily be discharged and a fresh action might possibly be brought here if the law of the bankruptcy is not the law governing such cause of action.

in these cases the point does not arise.

Next, I will consider the second proposition, the negative one.

There is one case in which on the analogy of many other branches of private international law a discharge under a foreign bankruptcy law should be recognized here as a discharge of a liability which is not governed by the law of the country of the bankruptcy. This is where the law which governs the obligation or, to use our phrase, its proper law recognizes the obligation as discharged by a discharge arising under the bankruptcylaw of some other country. Thus, for example, a discharge under a bankruptcy occurring in France should be recognized here as a discharge of a debt incurred and payable in Italy if the Italian law recognizes the French discharge as having such effect. In truth, the obligation is discharged by its proper law: only not by a discharge arising from a bankruptcy occurring in the country of its proper law (see for an analogous case on the jurisdiction of foreign courts to grant a divorce, Armitage v. Attorney General 1906 p.135).

But there is in my opinion another and more important exception to the rule contained in the negative proposition. What is the effect of proof by the creditor in the foreign bankruptcy if that bankruptcy does not take place in the country whose law governs the creditor's rights? If a man enters into a contract which is governed by the law of one country and afterwards enters into another contract which is governed by the law of another country, and one of the terms of the latter contract express or implied by the law of the latter country is that the rights acquired by him under the first contract shall be discharged or otherwise affected, why should not these rights be treated as so discharged or

affected everywhere? In other words, if the effect of a contract by its proper law is to discharge a right acquired under a previous contract governed by some other law, should not that right be treated as discharged in Australia? Now we have already seen the effect of proof in an Australian bankruptcy: it amounts to a contract between the creditors that the estate of the bankrupt shall be administered according to the Australian law. Similarly, any other voluntary submission to the jurisdiction of the Australian Bankruptcy Courts - e.g. by filing a petition in bankruptcy - will amount to an undertaking to abide by the Australian law. In my opinion, our Courts should treat proof in a foreign bankruptcy Court in the same manner. A creditor is put to his election: if he chooses to take the remedies offered by a foreign bankruptcy law, he should not afterwards be allowed to assert any rights against the bankrupt here which the law of the bankruptcy would not allow him to assert there. If he submits himself to the foreign law or expressly or impliedly agrees to be bound by it, he should not be allowed to do anything here inconsistent with that law. There is authority in support of this view.

Thus, in Phillips v. Allan 8 B & C. 477 the debt was contracted in England and the proper law of the contract was English: the debtor had obtained his discharge under a cessio bonorum in Scotland and the creditor, the plaintiff, had appeared in the Scotch Courts to oppose the defendant's discharge.

> "The plaintiff", said Bayley J. at p. 482 "is an "English subject and sues in respect of a debt "contracted in England. Prima facie, therefore, he "is not bound by the judgment of a Court in "Scotland. But it is insisted that he sought "relief from the Scotch Court; that he therefore "by implication consented to be bound by the law "of Scotland and consequently that he is barred by "a judgment in that Court pronounced according "to that law. But I think it does not appear upon

"this record that the plaintiff did seek relief from "the Scotch Court".

"If", said Holroyd J. at p.434, "he had asked relief "from the Scotch Court and sought to have the benefit "of the law of Scotland by taking a share of the "defendant's property, that might have made a "difference."

In Glass v. Keogh 4 W.W.& A. B. (L) 189, the Full Court of Victoria held that a plea that the plaintiff had obtained the sequestration of the defendant's estate under the insolvent laws of New South Wales valued his security and proved and received a dividend on his proof and that the defendant had obtained his discharge in New South Wales was a good answer to an action in Victoria. It did not appear where the debt was contracted and the Court held that they could not presume that it was contracted in New South Wales.

"We think" said Stawell C.J. delivering the judgment of the Court at p.195, "the plaintiff voluntarily "submitted himself to the law of New South Wales, and "must now abide by the necessary results of his own "conduct."

This case is a direct authority for the proposition that a discharge under the bankruptcy law of a country whose law is not the proper law of a contract is nevertheless a discharge of the creditor's rights under the contract, if he has submitted himself to the law of the country of bankruptcy.

Opposed to this view, there is the dictum of Jelf J. in Taylor v. Hollard 1902 1 K.B. 676 at p. 682. This remark, however, was not necessary for the decision and the point does not appear to have been argued. There is also the decision of the Full Court of New South Wales in the two cases of Fleetwood v. Benjamin and Newman v. Fleetwood 9 N.S.W. S.C.R. 162 and 166. There, the bankruptcy was in Victoria and the proper law of the contract was Victorian: the creditor had proved in one case and proved and received

dividends in the other in the Victorian bankruptcy. By the law of Victoria no action could be brought against the bankrupt pending sequestration for the recovery of previous debts. The Court held that the Victorian bankruptcy merely barred the remedy and did not extinguish the right and was therefore no answer to an action against the bankruptcy in New South Wales for the full amount in one case, for the balance after receipt of dividends in the other. If the creditor had not proved in Victoria the decision would have been obviously right: but the question was not considered whether it might not have been that by the law of Victoria the creditor had entered into a contract by proving that the whole estate should be administered by the law of Victoria, that he would abandon his independent rights against the debtor in exchange for his rateable share of the estate and that he would not bring any action against the debtor anywhere. It is submitted that if this question had been asked and answered in the affirmative it should have been held that the creditor had no right to sue the debtor in New South Wales.

It is, therefore, my submission that a discharge under the bankruptcy law of any country will operate here as a discharge of any debt or liability whether the law of the country of bankruptcy is the proper law of the contract by which the debt or liability in question arises or not if the creditor in question has voluntarily submitted himself to or consented to be bound by the law of the country of the bankruptcy. The proposition may be stated more shortly and more widely, so as to cover cases other than that of an absolute discharge, that where a creditor voluntarily submits himself to or consents to be bound by a foreign bankruptcy law he will not be allowed in Australia to assert any right against the debtor inconsistent with the foreign bankruptcy law. (See Spalding v. Bailey 17 V.L.R.

478). It is difficult to define exactly what amounts to a voluntary submission to or consent to be bound by the foreign bankruptcy law. We have seen that a mere appearance in the foreign Court to oppose the discharge or other application does not amount to such a submission or consent. (Phillips v. Allan 8 B & C. 477). There is, however, I submit little doubt that invoking the jurisdiction of the foreign Court or proof in the foreign bankruptcy, a fortiori a receipt of dividends would be such a submission or consent.

If, after the discharge in bankruptcy by the proper law of the contract, the debtor makes a fresh contract to pay the old debt and that contract is good by its proper law, it will be enforceable against him here. (Proudfoot v. Drake 3 N.S.W. L.R. 381).

There is no reason why the two main propositions which I have discussed should not apply to discharges under foreign bankruptcy or insolvency proceedings not involving an assignment as well as to those which do. The theory which was applied in In re Nelson 1918 1 K.B. 459 above has no relation to the contract theory of discharge. If a contract is discharged by its proper law, it is immaterial how the discharge arose.

It is hardly necessary to state that whenever any foreign discharge does operate as a discharge here, it will operate as a discharge of all debts and liabilities which are discharged by the foreign law and only such debts and liabilities. Thus, it is quite possible for a discharge under a foreign bankruptcy to discharge debts and liabilities here which a discharge under an Australian bankruptcy would not and vice versa.

(2) WINDING UP.

There are no provisions in the South Australian Companies Act giving a general discharge of the debts of the company at all comparable with Section 121 of the Bankruptcy Act, because it is contemplated, at any rate in the case of a company incorporated in South Australia that dissolution will follow the winding up, so that there will in any event be no person to sue after the completion of the winding up. No question will normally arise as to the right of any creditor, South Australian or foreign, to sue the company in South Australia after the winding up.

Cognate questions might possibly arise: presumably, for example, a compromise duly agreed to and sanctioned according to the provisions of Section 171 would be regarded as binding in a South Australian Court on all the creditors no matter where their debts were contracted or where payable or what their domicil or nationality. There seems no reason to restrict the words of the Statute.(I)

The various Companies Acts passed under the authority of the Imperial Parliament do not purport to bind the colonies: a creditor can still sue the company in spite of any proceedings taking place under those Acts wherever he could sue a strictly foreign, e.g. French company. (See New Zealand Loan & Mercantile Agency Co. v. Morrison 1898 A.C. 349).

The contract theory of discharge in bankruptcy applies, however, equally to companies. The discharge of a debt or liability of a company by the proper law governing

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(I) This does not say of course that the compromise would be regarded in foreign courts as binding on all creditors. See New Zealand Loan & Mercantile Agency Co. v. Morrison 1898 A.C. 349 at ps. 357-8.

such debt or liability will operate as a discharge here none the less so if the discharge arose as a result of some liquidation proceedings in the country of that law. Similarly, the debt or liability will not be regarded as discharged here if it is not discharged by that law, none the less so that it is discharged by the law of some country, not the country of that law, as a result of some liquidation proceedings. (See Gibbs v. Societe Industrielle 25 Q.B.D. 399).

The rules I have suggested with regard to the effect of proof in a foreign bankruptcy or otherwise submitting to its law are equally applicable to proof in a foreign winding up. (Note that in New Zealand Loan and Mercantile Agency Co. v. Morrison above, the plaintiff creditor was not an assenting party to the English scheme of arrangement.)

APPENDIX A.

DOMICIL AND PERSONAL LAW OF CORPORATIONS AND THEORETICAL REASONS FOR RECOGNITION OF FOREIGN CORPORATIONS.

It will be noticed that throughout this thesis I have assumed that a company is domiciled in the country of its incorporation. The use of the word "domicil" in relation to a corporation involves, as we shall see, a dangerous ambiguity. There is, however, authority for saying that a company is domiciled in the place of its administrative centre. In order to discover the exact truth on this difficult question, it is necessary to undertake an analysis of the nature of juristic personality and of the position of juristic persons in private international law.

Mr. Young, in his book on Foreign Companies and other Corporations, has introduced to English law the theories of the continental jurists on this topic. His is the first work in our law to discuss the problems raised by it in a detailed and scientific fashion. The divergence of opinion amongst the jurists on this point is very largely due to the differing views held as to the nature of corporate personality. This is the fundamental question which must be answered before any useful discussion can take place. Is the personality of a corporation fictitious or real? The learned author himself inclines to the realist theory (see pps. 50-3). He thinks that it is fallacious to attempt to distinguish between the personality of natural and juristic persons on the ground that one is a natural creature and the other the artificial creation of some sovereign power. Law, he says, is only concerned with the legal aspect of personality and in this sense personality is always created by law. "Nature produces a body but the law clothes it with rights". It may refuse to confer legal

personality on the human being or may deprive him of personality formerly conferred upon him as in the case of the slave or of the civiliter mortuus who is therefore no person in the eyes of the law. Nor, in his opinion, is it correct to make the distinction turn on the nature of the substratum upon which the law confers personality. If that substratum is flesh and blood in the case of the human being, so the members are a sufficient substratum of flesh and blood in the case of a corporation. This is not the place to enter into these deep matters, but to my mind it does seem an answer to say that the collection of members is not the substratum upon which juristic personality is conferred. The corporation is a person apart from its members. This is true of the corporation aggregate: still more must it be true of the corporation sole, as for example, the King. There, the holder of the office for the time being has two capacities in him - "one a natural body .... of the creation of Almighty God .... the other .... a politic body or capacity ..... framed by the policy of man". (Calvin's Case 2 St. Tr. at p. 624). The substratum on which the law confers the gift of natural personality is not the same as the substratum on which the law confers the gift of artificial personality. What is the substratum of the personality of a corporation sole where succession goes by appointment, not by inheritance, in the interval between the death of one holder of the office and the appointment of another? Still less can the realist theory apply to those artificial persons known to some systems of law which are not corporations. What is the substratum of flesh and blood underlying the Roman law hereditas before the entry of the heir upon the inheritance or the pia causa, the charitable fund? It is true that there is a substratum of property but how can this, except by a fiction, be capable of rights and obligations? And even

with regard to corporations aggregate the realist theory falls to the ground if we admit, as was held for example in Roman law, (See Giraud Droit Romain p. 231 Savigny Droit Romain Vol. 2. p. 274), that a corporation may survive the last of its members. In truth, we may say with Salmond that a "group or society of men is a very real thing but it is only a fictitious person". (Jurisprudence 342.)

Whatever may be the correct metaphysical answer to these questions it is submitted to be clear that English law has adopted the fiction theory. It is true now, as it was in 1612, that "a corporation aggregate of many is invisible, immortal and rests only in intendment and consideration of the law". (Sutton's Hospital Case 10 Co. Rep. 1a. at 32 b). There is, as we have seen, even less doubt that this statement applies to a corporation sole also. So also a company registered under the Companies Act which is a "mere abstraction of law". (Great Eastern Railway Co. v. Turner 8 Ch. App. 149 per Lord Selborne at p. 152). It is an "artificial creation of the Legislature" (Salomon v. Salomon & Co. 1897 A.C. 22 per Lord Halsbury L.C. at 29). It is "not a mere aggregate of shareholders" (Flitcroft's Case 21 Ch. D. 519 per Cotton L.J. at p. 536) but "a different person altogether from the subscribers to the memorandum". (Salomon v. Salomon & Co. 1897 A.C. per Lord Macnaghten p. 51).

If then a corporation is a fictitious person it follows that it must be created by some system of law. It need not be expressly authorized by the State by a particular act: but the fiction must be feigned by some system of law. There must be some point of time at which a new legal person springs into existence by reason of a grant of personality conferred by the law of some country. Generally, this creation will be manifested by some overt

act on the part of the State, such as a Royal Charter or the issue of a certificate of incorporation: but, in my opinion, if at any point of time the law of some country recognizes a new legal person as in existence, that person is just as truly created by that law as if the sovereign of that country had issued a charter of incorporation. In this sense, it is true to say that juristic personality can only be acquired by the authorization of the State: the recognition of the law is the recognition of the State. It is not in my opinion less true to say of an ordinary limited company than of a chartered one that it only exists by the authorization of the State, merely because the State has given its authorization in futuro by a general statute. (Contrast Young p.119). But in order to avoid the difficulties which may arise in this connection, it is, perhaps, more accurate simply to say that the fiction of juristic personality must be the creation of some system of law. The exponents of the realist theory would, however, maintain that a juristic person may have an objective existence entirely apart from its recognition or non-recognition by the State. What is the theoretical justification for the rule of some systems of law (but not of English law) that the State itself is a corporation? The personality of the State is as much or as little fictitious as the personality of any other juristic person. It can hardly be said to have authorized its own fictitious existence. The law derives its validity from the State, and the State must be pripr to it. Once it comes into existence, however, it develops for itself a theory of the nature of the State. (See Salmond on Jurisprudence. p. 153-5). Here we touch the boundaries of jurisprudence. The continental jurists are forced to ascribe the corporate personality of the State to necessity itself, (see Young, Appendix p. 310-11). The analysis of the theory that the State is a corporation like that of all constitutional law, brings us at last to the self-existent

first cause of the law: if we are to carry it further we must leave the realms of jurisprudence and enter those of history and political theory.

If our Courts regard a domestic corporation as a fiction they are hardly likely to regard a foreign one as a reality. The question naturally arises then, how can the fiction of one system of law be recognized in the Courts of another? How can the fiction cross the border? Foreign corporations, however, as we have seen, have been tacitly recognized since 1730 as having a legal existence in England. (Dutch West India Co. v. Henriques 2 Lord Raymond 1532). The theoretical justification of this recognition has never been explained by the Courts but it would seem that if the matter becomes material the recognition will be explained on the ground of "comity" in the same manner as has been done by the American Courts. (See Bateman v. Service 6 A.C. 386 per Sir Richard Couch at p. 389 quoting Story "Conflict of Laws" 2nd Ed. sec. 38). The American doctrine was expounded in the great case of Bank of Augusta v. Earle 13 Pet. 517. There, the same section of Story is cited (p. 589):

> "In the silence of any positive rule affirming or "denying or restraining the operation of foreign laws "courts of justice presume the tacit adoption of "them by their own government unless they are "repugnant to its policy or prejudicial to its interests "It is not the comity of the Courts but the comity "of the nation which is administered and ascertained "in the same way and guided by the same reasoning by "which all other principles of municipal law are "ascertained or guided".
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> "Adopting as we do" said Taney C.J. at p. 589 "the "principle here stated we proceed to enquire whether "by the comity of nations foreign corporations are "permitted to make contracts within their jurisdic- "tion: and we can perceive no sufficient reason for "excluding them when they are not contrary to the "known policy of the state or injurious to its "interests. It is nothing more than the admission "of the existence of an artificial person created by "the law of another State and clothed with the power "of making certain contracts: it is but the usual "comity of recognizing the law of another state."

While I think it desirable to avoid the use of the term "comity"(I) I think that this judgment contains the true principle of recognition. Just as our law recognizes and enforces a right duly acquired under a foreign law so it recognizes a person duly created by a foreign law. And this word "duly" is important because it enables our Courts to refuse to recognize the creation of a corporation when the state creating it has exceeded what in international law are the territorial limits of its legislative power. Just as our Courts will refuse to enforce the judgment of a foreign Court if, according to our law, the foreign Court had no jurisdiction over the defendant, so it is submitted it will refuse to recognize a corporation created by a foreign state if the foreign state has, for example, incorporated a body of persons residing in South Australia to do business here or has created a corporation to do business anywhere except within the foreign state itself. This would solve the problem of the so-called "tramp" corporations and has been the course

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(I) It is difficult to ascribe a definite meaning to this much-abused phrase. If it means that the law of no country can have effect in another state except by permission of the second state, it, as Dicey says (p. 9) "expresses though obscurely, a real and important fact". If it means that the Courts of one country enforce foreign laws only as a matter of courtesy and have a discretion to refuse to enforce them fpr reasons of expediency and policy then it is submitted to be unfounded in English law. This, or something like it, is the idea running through the American cases which I have frequently attacked and at the risk of repetition I desire to make myself clear on this point. The rules of private international law are part of the law of South Australia and are enforced here exactly like any other part of that law. Admittedly, our Courts will refuse to enforce rights acquired under a foreign law if their enforcement would be opposed to what is vaguely called the policy of our law or the moral rules of our law or to a statute relevant to the case. But the Courts cannot create new heads of public policy. They cannot refuse to enforce such a right merely because they think that it would be inexpedient to do so. The acts which are against the policy of English law are so "because these things have been either enacted or assumed to be by the common law unlawful: and not because a judge or a court have a right to declare that such and such things are in his or their view contrary to public policy". (Janson v. Driefontein Consolidated Mines 1902 A.C. 485 See per Lord Halsbury L.C. at p. 492. See also Simpson v. Fogo 1 H & M 195 at p. 236). The heads of public policy are fixed by these principles and it is for the Legislature, not for the Courts to add to their number. Thus, I do not think that an English or Australian Judge could follow the course indicated by Taney C.J. in Bank of Augusta v. Earle above at p. 596-7

(see next page)

RIDER TO FOOTNOTE.

I submit the following principles apply to the refusal to apply the ordinary principles of private international law on the ground of repugnance to the public policy of the forum:

(i) Public policy in this sense is no wider than public policy in its ordinary application in municipal law.

(ii) If the transaction in question is governed by a foreign law and is valid by that law effect will not be refused it in every case when a similar transaction under the municipal law would be held invalid: there must be a conflict with the essential principles of public order or good morals of the forum. In re Fitzgerald 1904 1 Ch. 573 - "something "contrary to the morality of civilized nations". Saxby v. Fulton 1909 2 K.B. 208 per Kennedy L.J. at p. 232.

(iii) Apart from statute and from the case of a peculiar status unknown to the lex fori, where no act has been done or is to be done in the country of the forum and no property there affected or interests of State involved (compare Hope v. Hope 8 De G M & G 731, Grell v. Levy 16 C.B. (N.S.) 173 Dynamit Actiengesellschaft v. Rio Tinto 1918 A.C. 260,) it will only be in very rare instances that this rule can ever be applied. It is a grave thing to postulate of the legislation of a friendly state, still more of another part of the Empire, that it is in conflict with essential principles of morality. Kaufman v. Gerson 1904 1 K.B. 591 must be regarded as of doubtful authority. Its validity has been questioned by Dicey p. 828-30 and by Scrutton L.J. in Luther v. Sagor & Co. 1921 3 K.B. 532 at pps. 558-9 and it is hard to reconcile with Santos v. Illidge 8 C.B. (N.S.) 861.

adopted in America though possibly not for the same reasons. (See Land Grant Railroad Co. v. Coffey County 6 Kan. 245).(I)

Once, then, we recognize the foreign corporation what law is to regulate its status and capacity? Mr. Young holds, both generally and in relation to English law in particular, that what he calls the personal or domestic law of a corporation governs the questions of whether it has a personality at all, its organization and internal constitution and the manner in which it must express its will and perform its functions, the legal relation of its members inter se and with the corporation itself and their liability for its acts, its internal disputes, the authorities and responsibilities of its officers and its dissolution or forfeiture and the adjustment of the rights and liabilities of the members thereupon. (See p. 98 et. seq. p. 178 et.seq). On the other hand, he ascribes to the territorial law, the law of any place where the company is carrying on business or where it enters into any transaction, power over procedure, the criminal and penal law, revenue, and the negotiability and sale of its shares as between vendor and purchaser or pledgor and pledgee as distinct from the effect of a transfer of shares as between

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Footnote continued from previous page:-
and refuse to recognize a corporationduly created or enforce a right duly acquired under a foreign law if, in his opinion, to do so would be contrary to a policy to be deduced from the nature of the institutions of the state and the general scope of its legislation. SEE RIDER.

(I) If by the foreign law the foreign State is a corporation then its existence as such must be recognized here on the same principles. If our law recognizes the creation, it must recognize the creator. (See U.S.A. v. Wagner 2 Ch. App.582 per Turner L.J. at p. 592. The existence of a foreign sovereign as a corporation sole like the King of England was recognized before this . See King of Spain v. Hullet 1 Cl.& F. 333; see also King of the Two Sicilies v. Wilcox 20 L.J. Ch. 417.)

the transferee and the company. (See Colonial Bank v. Cady 15 A.C. 267 per Lord Watson at p. 276). While he considers that the limitations on capacity imposed by the personal law which affect the character and constitution of the company should be recognized everywhere, he considers that limitations imposed to protect the public in any particular State should be applied only as regards property there situated or transactions taking place there, e.g. statutes of mortmain (p. 92 et. seq.) (Compare Dicey p. 521, Lindley on Company Law 6th Ed. p. 1226:

> "The capacity of a corporation to enter into any legal "transaction is governed both by the constitution of "the corporation and by the law of the country where "the transaction occurs",

and see Bank of Augusta v. Earle above cited per Taney C.J. pps. 588-9). He considers that the jurisdiction to wind up should belong to the country of the personal law but allows local windings up in the courts of other countries for the sake of convenience.

I consider in general that these theories are correct. Mr. Young cites such authorities as Bateman v. Service 6 A.C. 386 Spiller v. Turner 1897 1 Ch. 911, Risdon Iron & Locomotive Co. v. Furness 1906 1 K.B. 49, Sudlow v. Dutch Rhenish Railway Co. 21 Beav. 43, General Steam Navigation Co. v. Guillou 11 M & W. 877 which I have cited elsewhere.

This brings us to the question; what is the personal law of a corporation?(I) Here, it is necessary to examine the conceptions of the nationality, domicil and residence of a corporation. Now, applying the analogy of a human being, the phrase "domicil" in relation to a corporation may mean one of

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(I) When Mr. Young discusses this question he has of necessity to enquire into both the nationality and the domicil of a corporation since the various systems of law are not agreed as to which of these shall be the test of personal law in the case of a human being. In truth, the two conceptions as applied to a corporation are closely united and the conclusion at which I arrive is, as we shall see, that the nationality and domicil of a corporation are the same.

two things. It may mean the place where a corporation has its permanent home so far as it can be said to have one. It may, on the other hand, mean the place whose law is its personal law, i.e. the place whose law has the same effect on a corporation as the law of his domicil has on a human being. It has been used by the Courts in both senses and it is easy to see that neither is strictly accurate. If we use the first meaning, then, the domicil of a corporation is merely its principal residence and the term has no real legal significance. The use of the second meaning, if the personal law of a corporation may be the law of a country other than that in which it has its permanent home, has been attacked as "artificial and misleading" (Young p. 207). One meaning arises from an analogy to the facts creating the domicil of a human being, the other from an analogy to the legal effect of the domicil of a human being. But I do not agree with Mr. Young that the use of the word in its second sense is necessarily unsound. There are many natural persons whose domicil is not, necessarily, their permanent home in fact, e.g. the married woman, the infant. I think that as a mere matter of verbiage it is better to use the word in its second sense, placing if necessary corporations with married women and infants as persons of a peculiar status, to whom the ordinary rules as to the acquisition and change of domicil do not apply, that is, of course, if we decide that the personal law of a corporation is not necessarily the law of the country which is its "permanent home". I think that this is preferable to using different terms to describe the personal law of a human being and of a corporation. There is authority for this use of the word: see In re Alfred Shaw & Co. 8 Q.L.J. 93, Attorney General v. Jewish Colonization Association 1900 2 Q.B. 556 at p. 570 and 572. (affirmed in 1901 1 K.B. 123), In re Union Theatres Ltd. 35 W.A.L.R. 89). I therefore use the term "domicil" of a corporation to mean the country whose law is

its personal law: but the double use of the term must not be forgotten when the writers and the authorities are being examined. Our task then is to find what is the domicil of a corporation, meaning thereby what is its personal law. If we agree that the corporation is itself only a fiction of law, then we must bear in mind that it is only by the use of other fictions that it can be said to have a nationality, a domicil or residence. These are primarily the attributes of human beings.

In its natural sense, when we speak of a man's residence we mean the place where he eats and sleeps, but a company cannot eat or sleep though it can keep house and do business, (see De Beers Consolidated Mines Ltd. v. Howe 1906 A.C. 455 per Lord Loreburn L.C. at p. 458).

Similarly, a human being has a mind and a conscience and can be charged with the duties of allegiance and loyalty but the corporation except in legal theory can be neither loyal nor disloyal, neither friend nor foe. (See Daimler Co. v. Continental Tyre and Rubber Co. 1916 2 A.C. 307 per Lord Halsbury at p. 316, Lord Parker at p. 345). And similarly, also, a corporation cannot in strict truth be said to have the animus manendi or the animus revertendi one of which must exist or be implied in order that any country can be said to be the permanent home, and therefore the domicil of an ordinary natural person of full capacity.

Dicey (p. 151) lays down the rule that a corporation is domiciled at the place which is considered by law to be the centre of its affairs which, in the case of a trading corporation, is its principal place of business, i.e., the place where the administrative business of the corporation is carried on and in the case of any other corporation is the place where its functions are discharged. Westlake (p. 380-3) (though with some doubt as to whether

this domicil is also the country of the personal law) adopts a similar view and so do Lindley (Companies 6th Ed. p. 1223, Buckley "The Companies Act 11th Ed. p. 205-6 and Foote Private International Law 5th Ed. (though with some doubt) p. 173-5). Now this definition seems to be mainly the result of a long series of taxation cases in which the courts had to consider whether a company was or was not resident within the United Kingdom for the purposes of the Income Tax Acts together with some of the cases on jurisdiction and the celebrated Daimler Case (Daimler Co. v. Continental Tyre & Rubber Co. 1916 2 A.C. 307). These authorities should therefore be considered carefully.

It has been held in many cases that a company resides for the purposes of income tax where its real business is carried on and that its real business is carried on where the central control and management abides (De Beers Consolidated Mines v. Howe 1906 A.C. 455). Incorporation either in England or elsewhere is not decisive for this purpose: it is only one factor to be considered in determining where the real business of the company is carried on. (Cesena Co. v. Nicholson Calcutta Jute Co. v. Nicholson 1 Ex. D. 428 per Huddleston B. at p. 453, Egyptian Delta Land Investment Co. v. Todd 1929 A.C. 1.) A company can have more than one residence for income tax purposes (Swedish Central Railway Co. v. Thompson 1925 A.C. 495). A company then need not necessarily reside in the country where it is incorporated and that country need not even contain one of its residences. (see Egyptian Delta Co. v. Todd above).

On the other hand, very much less is needed to make a foreign company resident within the jurisdiction for the purposes of service of process. The point seems to have been first considered in Newby v. Van Oppen L.R. 7 Q.B. 293

and it was there held that a corporation incorporated in America with a branch office in England "does for many purposes reside both in England and in its own country" (per Blackburn J. at p. 295).

"In order to see" says Collins M.R. in Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft 1902 1 K.B. 346-7 "whether they (the corporation) were liable to be so served it is necessary to consider whether upon the facts they can be said to have been resident in England when the service was effected. It has been held in a number of cases ..... that the true test in such cases is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction, that being the only way in which a corporation can reside in this country". (See also Saccharin Corporation v. Chemische Fabrik 1911 2 K.B. 516). In the words of Atkin L.J. in New York Life Insurance Co. v. Public Trustee 1924 2 Ch. 101 at p. 120, "a corporation resides for the purposes of suit in as many places as it carries on business". I have discussed the meaning of "carrying on business" elsewhere. This sort of residence is obviously very different from the sort of residence demanded by the taxation cases, the place where the real business of the company is carried on. Evidence of a very much slighter kind will be needed to establish the first than to establish the second.

But neither of these classes of case deals with domicil in the sense of country of the personal law at all. It is true that the word is sometimes used in the loose sense in which it means residence for certain purposes as in the terms forensic domicil or commercial domicil. The word is used in this sense for example in the dissenting judgment of Lord St. Leonards in Carron Iron Co. v. Maclaren (5 H.L.C. 416 at p. 449-50) when he refers to the possibility of a corporation having "for

the purposes of jurisdiction" two domicils. (See also Bowden Bros. v. Imperial Marine & Transport Co. 2 S.R. (N.S.W) 257 per Owen J. at p. 265). This is strictly inaccurate and really means two residences as pointed out by Farwell L.J. in the Saccharin Corporation case (cited above) at p. 527 and by Warrington L.J. in New York Life Insurance Co. v. Public Trustee (cited above) at p. 114.

Besides the taxation and jurisdiction cases the text writers rely on the Daimler case (Daimler Co. v. Continental Tyre & Rubber Co. 1916 2 A.C. 307). Westlake (p.382) is of opinion that this case decided that a company is domiciled in the country where its administrative centre is. But after careful consideration of this case I am utterly unable to understand this opinion if the learned author is using the word "domicil" in the second of my meanings.

With all respect the case decided nothing of the kind. It was not directed to domicil at all - except commercial domicil in time of war which is not true domicil - and it carefully avoided deciding anything as to the nationality of the company. The opinion actually expressed by the majority - for the case was decided upon another point and this expression of opinion is really obiter - was that a company incorporated in England may in certain cases assume enemy character. This is a very different thing from saying that it can change its English nationality or English domicil (assuming that it acquired such a nationality and domicil on incorporation). It is a well known and ancient principle of law that a natural born British subject who resides or carries on business in an enemy country may be fixed with enemy character and treated as an alien enemy. (See for example Porter v. Freudenberg 1915 1 K.B. 857). So, too, a British company if it resides in an enemy country

(that is, if in accordance with the rules in the taxation cases I have mentioned its administrative centre is situated in an enemy country) or carries on business there, may be treated as an alien enemy. This and no more was evidently the view of Lord Atkinson p. 327 and Lord Parmoor p. 351. Even the opinion of Lord Parker, whose judgment was concurred in by Lords Sumner, Mersey and Kinnear, and who carried the matter to its furthest extent, does not go so far as to suggest that the nationality of a company can depend upon anything other than the place of its incorporation. He says at p. 339:

> "In the case of an artificial person what is the "analogue to voluntary residence among the King's "enemies? Its impersonality can hardly put it in a "better position than a natural person and lead to "its being unaffected by anything equivalent to "residence. It is only by a figure of speech that a "company can be said to have a nationality or residence "at all. If its place of incorporation under municipal "law fixes its residence then its residence cannot be "changed which is almost a contradiction in terms and "in the case of a company residence must correspond "to the birthplace and country of natural allegiance "in the case of a living person and not the residence "or commercial domicil. Nevertheless, enemy character "depends on the last. It would seem, therefore, "logically to follow that in transferring the application "of the rule against trading with the enemy from natural "to artificial persons something more than the mere "place or country of registration or incorporation must "be looked at."

This certainly does not suggest that Lord Parker was of opinion that a company is a national of the country where it resides. All that his opinion declares on this point, it is submitted, is that it does not necessarily reside in the country of which it is a national and therefore that enemy character may under certain conditions, attach to a company incorporated in and therefore a subject of Great Britain.(I)

(I) (and also according to the noble and learned Lord if the persons de facto in control of its affairs are adhering to the enemy no matter where they reside.(p.345). This manner of acquiring enemy character has obviously nothing to do with the personal law of the corporation and shows, it is submitted, that the reasoning which led Lord Parker, at any rate, to his conclusion was not directed to an enquiry into the question of the personal law. If the company were incorporated in England and its administrative centre were there also and it only carried on business there it could not be suggested that the acts of the persons in control in assisting the enemy could affect its personal law.

I respectfully agree with the judgment of Lord Cozens-Hardy M.R. in In re Hilckes 1917 1 K.B. 48 at p.55 where he says:

> "I think that the majority of the learned Lords (in "the Daimler case) undoubtedly took the view that "the doctrine which has been applied for many years "by this Court and also by the House of Lords in "revenue cases ought to be applied to a case of this "kind and that the judgment in De Beer's Consolidated "Mines v. Howe applies to a case of this kind".

In other words, what the Daimler case decided was that a company resides in the place where its administrative centre is, for the purpose of deciding whether it bears an enemy character as well as for the purposes of taxation. It has no bearing on the abstract questions of nationality or domicil. My opinion is that the nationality of a company depends solely upon the place of its incorporation and I think that this is borne out by the authorities. In Janson v. Driefontein Consolidated Mines 1902 A.C. 484 most of their Lordships were clearly of opinion that a company incorporated under the law of the Transvaal was a subject of the Transvaal even although the majority of the shareholders were British subjects resident in the United Kingdom (See per Lord Macnaghten at p. 497, Lord Brampton at p. 501, Lord Lindley at p. 505) though the point was not necessary for the purposes of the decision. (See also The Queen v. Arnaud & Powell 16 L.J.Q.B. 50, Bradley v. English Sewing Cotton Co. 1923 A.C. 744 at p. 765, per Lord Wrenbury).

If these opinions are correct then the cases cited by the text writers are of little assistance to us in determining what is the domicil of a corporation in the sense of country of the personal law.(I) If these learned authors mean by "domicil" the country of the personal law then I submit, with

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(I) I have not dealt with all the cases cited by Dicey at p.151 et seq.; these are either jurisdiction or taxation cases except The Polzeath 1916 P.117 241 which decides where the principal place of business of a company is: this is obviously irrelevant for our purposes.

all respect that they have fallen into the fallacy of taking the test of residence used in the taxation cases and in the Daimler case as the test of domicil. But the judges were not attempting in any of these cases to discover the domicil in this sense. They are careful to restrict their definitions to the particular purpose for which they are being used in the particular case. They have been attempting to determine whether a corporation is liable to taxation in England or whether it can be served with the process of the English Court, or whether it has assumed enemy character, and these problems have been solved by analogy to the case of natural persons. But it is not necessary for a man to be domiciled in England in order to make him liable to taxation in England or to subject him to the jurisdiction of the English Courts or for him to be domiciled in or a national of an enemy country in order for him to assume enemy character, and I cannot think that these decisions are useful in order to arrive at an answer to the abstract questions: What is the domicil or nationality of a corporation? The terms residence and domicil are not synonymous in the case of the natural person and I cannot understand why they should be taken necessarily to be so in the case of a corporation. Dicey indeed (p/ 151) boldly states there is in general no difference between the domicil and the residence of a corporation but as we have seen, and as he himself admits (p. 151 (n)) residence means different things for different purposes and I can see no reason on principle or authority for making one of the tests of residence the test of domicil in our sense also. We must therefore turn back to theory.

Mr. Young gives the various laws which may be chosen for the personal law of a corporation at p. 110-168. First he instances the law of the country where the members or the majority of members are nationals or domiciled

according as the particular system accepts nationality or domicil as the test of personal law. Mr. Young points out the great practical difficulties which would result from the adoption of this theory where the shares of a company are continually changing hands. The personal law might fluctuate from day to day. For us, however, this theory is obviously untenable. It is not even the test of residence. It identifies the corporation with the members whereas according to our basic principle it is anentirely separate person.

Then comes the law of the place where the acts by which it came into existence were performed, which he says may be either the place where the contract of association was concluded, where the capital was subscribed or where the public formalities attendant upon its constitution were performed. This cannot, of course, include any corporation expressly authorized by the State, as by charter, where there would be no doubt as to the place where it came into existence. These three alternatives only apply to an ordinary commercial limited company. Now, if my previous arguments are correct there can be no doubt as to what the place where the company came into existence is. It is the place the law of which creates the fictitious personality. Even if the contract of association is signed in France the capital subscribed in Italy and the company registered here there is I conceive no doubt that it came into existence in South Australia. We must look for the law which confers the gift of personality. That is the law which created the new juristic person, and if such a person is to exist at all there must be some point of time when some system of law recognized it as such a new juristic person, even if the point of time is not expressly fixed by registration or the issue of a certificate of incorporation. For supporters of

the fiction theory that law, the law which first implies the fiction, is the law of the company's creation. Exponents of the realist theory may be in more difficulty. Then, as other alternatives, Mr. Young suggests the place where the corporation discharges its functions (p.144) the place where its constitution fixes its seat (p. 148) and the place of its administrative centre (p. 149) which as we have seen is the place of its principal residence. Mr. Young points out that a company may discharge its functions in many countries or, e.g. a mining company, in an uncivilized country and that it would be extremely difficult to fix on that country or any one of those countries as the country of its personal law. He objects to the law of the country of creation or of the country fixed by the constitution because to choose either of those laws would be to enable the founders of the corporation to choose its personal law for it instead of making that law the law with which it has in fact the greatest connection, the law of the place of its administrative centre, or, as we may call it, of its principal residence. This is the law that on theory he selects as the personal law. The result of this is that the company can change its personal law by changing its administrative centre. However natural a consequence this view may be to supporters of the realist view of a corporation, it is, as Mr. Young himself admits, (p. 167) untenable by these who hold the fiction theory of corporate personality. The taxation cases and the Daimler case have not, I think, overturned the basic theory which has been held by English law for over three centuries. For the purposes of taxation and of the assumption of enemy character, the courts have had to apply the analogy of a human being as best they can to decide what are at bottom pure questions of facts, the facts of residence or carrying on business

These, in themselves, have no significance upon the question of status. The decisions relate to the corporation's external relations with the State and third persons and not to the law governing its internal character and the nature and extent of its inherent powers. But whatever theoretical reasons we may ascribe for the decisions in those cases in attributing to a corporation for certain limited purposes an ability to change its residence and to have a residence apart from the place of its incorporation I submit that it is clear that the personal law of a corporation is the law of the place of its creation and that it cannot change this personal law. In the cases I have cited above as to the effect of the personal law the country of incorporation has always been treated as the country of the personal law. The law of that country has been held to govern the questions of the internal constitution, the rights and liabilities of the members inter se, their liability to third persons for the debts of the corporation. It is true, however, that in these cases the possibility of a change of personal law was not present to the minds of the judges. But to begin with, as Mr. Young himself admits (p. 162) owing to the manner in which most countries have framed their legislation on the subject, especially of ordinary trading companies with limited liability, there are practical difficulties of an almost insuperable nature in holding that a company can change its personal law. The South Australian Companies Act, for example, as we have seen before, only applies to companies formed and registered in South Australia. If, therefore, a company incorporated elsewhere were to move its administrative centre to South Australia and we were to hold that it could change its personal law by so doing, it could not be affected by the Companies Act. If we had to hold that henceforward its personal law was South Australian then it would have to be governed by the rules as to common law

corporations which would produce most extraordinary results. It is clear law that a foreign company cannot be registered under the Companies Act here (See Butt v. Monteaux 1 K & J 98 at p. 122, Bulkeley v. Schutz 3 P.C. 764, Bateman v. Service 6 A.C. 386).

Conversely, we have seen that no amount of substantial connection with a foreign country will enable a company registered under our Companies Act to escape the provisions relating to winding up - the provisions relating to winding up of a company registered here, not those relating to the winding up of unregistered companies (Princess of Reuss v. Bos L.R. 5 H.L. 176). Can it be seriously contended that our Courts would recognize an order of the Court of a foreign country altering the constitution or increasing the capital of a company incorporated and registered here even though its administrative centre were situated in that country or that our Courts would entertain such an application on behalf of a country incorporated elsewhere even though its administrative centre were here? The recent Australian cases on principal and ancillary windings up which I have dealt with elsewhere all assume that a company is domiciled in the country of incorporation,or in other words, that the law of that country is its personal law. The cases on dissolution point in the same direction. "I cannot conceive" says Scrutton L.J. in Banque Internationale de Commerce de Petrograd v. Goukassow 1923 2 K.B. 682 at p. 691 "a company whose existence and attributes arise solely from the law of Russia continuing to exist when the law of Russia says that it is dissolved." Yet, if it can change its personal law, it can still continue to exist if only before the time when the law of Russia purported to dissolve it, it had set up its administrative centre elsewhere. In truth, if we accept the fiction theory of corporate personality it is plain that

the personal law of a corporation can never be any other law than that of the country of incorporation. The fiction cannot change the inherent nature conferred by the law which feigned it and still be the same fiction. A natural person can escape from the law of his domicil of origin by acquiring a new domicil of choice elsewhere. But a corporation can never escape from its instrument of incorporation and its constitution or if it has none, from the law which created it and supplied their equivalent. Its powers, its attributes, its very existence depend upon a juristic act of some system of law and it appears to me that to hold that it can nevertheless cast off that system of law by which alone it exists at all and acquire a new set of capacities and powers from time to time by changing its administrative centre from country to country would involve consequences too disastrous and anomalous to be accepted in the absence of binding authority.

Mr. Young himself (p. 207) admits that so far as English law is concerned the personal law of a corporation is the law of the place of its creation and that it cannot change that law. "It is clear law" he says "that in English courts once an English registered company always an English registered company; and we may say although the matter has never been decided that a fortiori once an English corporation always an English corporation and vice versa, once a foreign corporation always a foreign corporation". If the matter still stood as it did in 1912 when Mr. Young wrote I needed not to have discussed the matter at this length. But since then, there have been a great number of taxation cases and the decision in the Daimler case which have enabled the text writers to propound the definition cited above. Mr. Young's conclusions are, however, in my opinion borne out by direct authority. The case on which he relied - Attorney General v. Jewish Colonization Association 1901 1 K.B. 123 decided that a company registered

in England with its administrative centre in France was still an English corporation, domiciled according to the judges in the lower court (1900 2 Q.B. 556 at p. 570 and 572) whose decision was affirmed ,in England. "That it is an English company" said A.L.Smith M.R. at p. 130 "I do not doubt subject to English law and the fact that there was a council of administration which carried on the business of the company outside of England does not in my judgment render the company any the less an English company subject to English law". Since then - and be it noted since the Daimler case also - has come the decision of Eve J. in Baelz vl Public Trustee 1926 Ch. 863 where a company incorporated in England had its administrative centre in Holland. Eve J. had to decide whether the interest of a German shareholder in the company was "property right or interest of a German national within the King's dominions". He held expressly that the company was domiciled in England and that the income tax decisions were only relevant for income tax purposes.

> "There is nothing" he said at p. 868-9 "to support "the view that a change of residence by the company "will operate to transplant the interest of the "individual as a shareholder to the locality of "the new residence. For the contributory's title to "his shares his status as a shareholder and the "enforcement of his rights recourse must be had to the "statutory register which remains localized at the "registered office and to the Court with which alone "under S. 32 of the Companies (Consolidation) Act "1908 abides the power to rectify the register".

In Egyptian Delta Land Investment Co. v. Todd 1929 A.C. 1 Lord Sumner draws a direct parallel between the effect of the law of the country of incorporation in the case of a corporation and the law of his domicil in the case of a human being. He says at p. 13:

> "The first effect of the incorporation is to make "the new company amenable to English law and "English law courts and to give it the status of an "English company but these things only place it in "the same category as a British subject born or "domiciled here or as a natural person who "resident" "or not is within reach of English legal process.

"Then the company is to be wound up or to get leave
"to alter its memorandum or to reduce its capital
"in an English court of law. The domiciled English-
"man is similarly under the personal law as to
"marriage and divorce, intestate administration and
"bankruptcy".

Finally, we have in Australia the direct authority of Griffith C.J. (In re Alfred Shaw & Co. 8 Q.L.J. 93) and Dwyer J. (In re Union Theatres 35 W.A.L.R. 89) for holding that a corporation is domiciled in the country of its incorporation.

I therefore hold that the personal law of a corporation is the law of the country of its incorporation and that it cannot change that personal law.

We are now in a position to examine the truth of Dicey's rule 19 (p. 151). We have seen the ambiguous use of the term domicil in connection with a corporation. If by this rule the learned author means to say that the principal residence of a trading corporation is the place of its administrative centre then we may agree with his rule so far as sub-section (1) is concerned. I cannot agree with subsection (2) even in the sense that a non-trading corporation resides in the place where its functions are discharged. An incorporated missionary society, for example, might discharge its functions in Central Africa, but I should hesitate to say that it had its principal residence or permanent home there. I think that the test for this class of juristic person must be the same as that of a trading corporation, i.e. that it has its principal residence in the place of its administrative centre. If, however, the learned author means to say that the law of the country where a trading corporation has its administrative centre or where a non-trading corporation discharges its functions is the law which has the same legal effect upon the corporation as the law of his domicil has upon a human being i.e. is its personal law, then I respectfully disagree for the reasons stated above. I have already defended the use of the term "domicil of a corporation" to mean the country whose law is the personal law

of the corporation, i.e. the place of incorporation and in that sense I have used it in this thesis in accordance with the use of the term in the Australian cases cited above.

APPENDIX B.

THE STATUTE OF WESTMINSTER.

If the Statute of Westminster were adopted by the Commonwealth the views set out in this thesis might, it is submitted, be affected in two ways, by section 2 and by section 3 of the Act.

(1) The effect of section 2 is that the Colonial Laws Validity Act of 1865 shall not apply to any law passed by the Parliament of a Dominion adopting the Statute of Westminster after the commencement of the Statute and what is a necessary consequence of this, that no law or provision of any law of such a Dominion made after that commencement shall be void or inoperative on the ground of repugnancy to the law of England or to the provisions of any future or existing Act of the Imperial Parliament but that the powers of such Dominion shall include the power to repeal or amend any such Act in so far as the same is part of the law of such Dominion. As a result of this section, therefore, the Commonwealth Parliament could, if it saw fit, repeal those provisions of the bankruptcy statutes passed under the authority of the Imperial Parliament referred to by me which provide that property whether movable or immovable situate in Australia shall vest in the trustee in bankruptcy appointed under such statutes or that a discharge arising under a bankruptcy occurring under any of those statues shall be regarded as a discharge in the Australian Courts. Such legislation on the part of the Commonwealth Parliament would no longer be open to the objection that it was repugnant to an Act of the Imperial Parliament intended to apply to Australia but the Parliament would be free to repeal or amend those statutes in so far as they form part of the law of Australia, and would therefore be free to legislate at its unrestricted pleasure on these topics which are, in my opinion, within its powers

under Section 51 (xvii) of the Commonwealth Constitution. But if the effect of a foreign bankruptcy as an assignment of property or a discharge of a contract here is not properly included within the term "bankruptcy" in sec. 51 (xvii) of the Constitution, so that legislation on these matters is not within the power of the Commonwealth Parliament but remains within the province of the States the present position is unaltered as the Statute of Westminster does not apply to them.

(2) Section 3 provides as follows:

> "It is hereby declared and enacted that the "Parliament of a Dominion has full power to "make laws having extra territorial operation".

This section has probably no retrospective effect; therefore if the Commonwealth adopted the Statute the adoption would not automatically validate those provisions of the Bankruptcy Act (if any) which are now ultra vires. (See Wynes Legislative & Executive Powers in Australia p. 78). If, however, the Statute is adopted it will be open to the Commonwealth Parliament to pass extra-territorial legislation in the future in defiance of the principles of private international law, e.g. to enact that on the making of a sequestration order land, in Italy for example, shall pass to the Australian trustee. This, of course, will not actually pass the property in defiance of the Italian law but will only mean that the land must be regarded in our Courts as having so passed. If the Commonwealth Parliament were to adopt the Statute and then re-enact the Bankruptcy Act as it is today I do not think that the principles which I have expressed will be materially altered. The property of the bankrupt outside Australia will still be regarded here as vesting in the Australian trustee only subject to the lex situs. Extra territorium jus dicenti impune non paretur. The difference is that the question will be now merely a question of construction as with the Imperial Parliament instead of being a question of power as well. I have already expressed my opinion on the question of construction.

The power of the Commonwealth Parliament must still be less than that of the Imperial Parliament in that it cannot of its own force bind persons or property outside Australia while the Imperial Parliament can so bind persons or property all over the British Empire even in spite of the Statute of Westminster, for that Parliament cannot limit its own sovereignty or bind its successors.

It cannot be contended that the effect of section 3 of the Statute is to make the laws of one Dominion of their own force binding in another: the purpose of that section is only to prevent the law of a Dominion being held invalid in her own Courts on the ground of extra territoriality. (See Wheare Statute of Westminster p. 82 and see generally on the Statute. Moore v. Attorney General for the Irish Free State 1935 A.C. 484, British Coal Corporation v. The King 1935 A.C. 500).

A P P E N D I X C.

THE EFFECT OF THE CONSTITUTION ON THE PRINCIPLES OF PRIVATE INTERNATIONAL LAW AS BETWEEN THE STATES.

The general rule undoubtedly is that for the purposes of private international law the States of Australia are to be regarded as separate countries with respect to any matters the subject of State legislative power.

> "Although it may not be quite accurate" said Barton J. "to call the States of the Commonwealth sovereign in the "literal and extensive meaning of that term, still they "may justly be so termed as to the entire ambit of the "legislative powers conferred on them and of the "executive powers either expressly conferred or necessary "for the complete enjoyment of their legislative rights "or of the complete effect and execution of their laws. "In the exercize of that defined sovereignty apart from "the powers and lawsof the Imperial Government and Parliament "on the one hand and those of the Australian people in their "federal or national capacity on the other, they are as "independent of each other and as much entitled to freedom "from interference as any nations in Europe". (Potter v. Broken Hill Proprietary Co. Ltd. 3 C.L.R. 479 at p.502).

Nevertheless, there are some provisions of the Constitution which may affect the application of the ordinary principles of private international law as between the States and Territories of the Commonwealth. These provisions are Section 51 (xxiv) and (xxv)

> "The Parliament shall subject to this Constitution have "power to make laws for the peace, order and good government "of the Commonwealth with respect to:
>
> "(xxiv) The service and execution throughout the "Commonwealth of the civil and criminal "process and the judgments of the Courts of "the States.
>
> "(xxv) The recognition throughout the Commonwealth "of the laws, the public Acts and records and "the judicial proceedings of the States."

and Sec. 118:

> "Full faith and credit shall be given throughout the "Commonwealth to the laws the public Acts and records and "the judicial proceedings of every State."

The powers of the Commonwealth under Section 51 (xxiv) and 51 (xxv) have been exercised by the passing of the Service & Execution of Process Act 1901-1931 and the State and Territorial Laws and Records Recognition Act 1901-1928 respectively. The latter Act, after making various evidentiary provisions provides as follows (sect. 18):

> "All public acts records and judicial proceedings of
> "any State or Territory if proved or authenticated as
> "required by this Act shall have such faith and credit
> "given to them in every Court and public office as they
> "have by law or usage in the Courts and public offices
> "of the State or Territory from whence they are taken".

Art.IV section 1 of the Constitution of the United States contains a similar provision to our Section 118 and 51 (xxv).

> "Full faith and credit shall be given in each State
> "to the public acts records and judicial proceedings
> "of every other State. And the Congress may by general
> "laws prescribe the manner in which such acts records
> "and proceedings shall be proved and the effect
> "thereof."

Congress has exercised this power in terms similar to those of Sec. 18 of our State Laws and Records Recognition Act. (See U.S. Stat. II 1790 C.11. Stat. I 1804 C. 56).

In fact, the provisions in our Constitution and our legislation were copied from the United States.

There is, however, no corresponding provision to Sec. 51 (xxiv) in the American Constitution.

It will be best to consider first the effect of sec. 118 and sec. 51 (xxv) together with the Recognition Act where the American authorities may be of assistance: then we will consider the further effect of sec. 51 (xxiv).

What is the effect of Section 118 and of the legislative power of the Commonwealth given by Section 51 (xxv)? Are they merely evidentary and procedural or have they the effect of substantive law so as to compel the acceptance and enforcement of the laws and judicial proceedings of one State in the Courts of another as a matter of constitutional law, even perhaps in defiance of the law of the second State, either the rules of private international law adopted there or the statute law itself?

If the rules of private international law were the same all over the world and were not subject to statutory alteration the difficulty would be greatly lessened, since in general the Courts of each State would only give effect to its laws and exercize their jurisdiction in the same

circumstances when those laws would be given effect to and the exercize of the jurisdiction recognized everywhere else. Even if this were so, however, we would still be faced with the principles that no country will enforce the penal or revenue law of another or will enforce any rights acquired under a foreign law contrary to its own public policy. But in fact although the private international law of every State in so far as it forms part of the common law is the same the statute law of each State has extended the jurisdiction of its Courts beyond the point at which that jurisdiction would, apart from the Constitution, be recognized in the others. Moreover, again, apart from the Constitution, any State could exercize its legislative power over persons, things or events within its territory in derogation of the principles of private international law so as to exclude or decrease the recognition here of foreign laws or judgments. There can be no question that these sections of the Constitution do not affect the validity of State legislation increasing the jurisdiction of its own Courts so far as the internal law of that State is concerned. (Contrast the due process of law amendment in America). The two points which we have to consider are firstly, do they compel the application or the recognition or the enforcement of the laws and judgments of one State in another further than they are applied, recognized or enforced there according to the rules of private international law and secondly, do they forbid legislation by one State decreasing the extent to which the laws and judgments of another are applied, recognized or enforced according to those rules? We have to consider whether these sections either in effect increase the application of the laws and the jurisdiction of the Courts of the State to whose proceedings faith and credit are to be given or decrease the legislative powers of the State which is to give the

faith and credit.

Section 118 is practically an unknown quantity in Australian law and it is unsafe to predict what its construction will be. The effect of the section seems to have examined in only three cases, and then only in passing.

One of these cases is In re Commonwealth Agricultural Service Engineers Limited 1928 S.A.S.R. 342 which has already been discussed. It will be remembered that in that case a company which was being wound up in South Australia had given a debenture over its assets including property in Queensland which debenture was invalid as against the liquidator and any creditor by the law of Queensland for lack of registration. The proceeds of the Queensland assets were being administered in South Australia and it was contended that by reason of Section 118 the South Australian Court was bound to distribute the Queensland assets so as to pay the claims of Queensland creditors in full in priority to the claims of any other creditors and regardless of the debenture. The Full Court rejected this contention. Napier J. said at p. 346: "The effect of sec. 118 has yet to be determined. It may well be that this Court is required to take judicial notice of the statute law of Queensland and that the principles upon which that law is to be recognized and applied are to be regarded as binding, not merely as a matter of comity, but as the law of this State prescribed for that purpose by the Constitution. But the section has no further application for the purposes of this case."

The Court held that since the Queensland statute created no substantive right or interest in the property while it was in Queensland but affected the remedy only it was irrelevant for the purposes of the case before it.

In Jones v. Jones 40 C.L.R. 315 the High Court refused to entertain an application for leave to execute

In Victoria a writ of attachment issued out of the Supreme Court of New South Wales, the Victorian Court having refused a similar application. Higgins J. who dissented, said at p. 320;

> "Sec. 118 of the Constitution is based upon an article "of the United States Constitution under which it has "been held that the words do not relate to evidence "merely but make the findings of the earlier Court "conclusive as to rights ..... Sec. 51 (xxv) of our "Constitution allows provision to be made as to evidence. "and (xxiv) allows provision to be made for execution "throughout the Commonwealth of the State processes and "judgments. I think that under sec. 19 of this Act (the "Service and Execution of Process Act) taken with sec. "118 of the Constitution, we ought to give effect to the "laws of the States whether we approve of them or not "and that the granting of leave should be the rule, the "refusal the exception. The order made ex parte for the "writ of attachment, can, admittedly, be set aside by "the New South Wales Court if made wrongly. If indeed "we should find that the order for the writ was made "without due authority of the State Legislature, the "leave should be withheld; and there may be other "reasons for withholding leave. Unless due cause be "shown to the contrary, we should endeavour to render "the judicial process of any State effectual in other "States as against persons who, as here, are evading "the State's process by leaving the State."

In the third case, Merwin Pastoral Co. v. Moolpa Pastoral Co. 48 C.L.R. 565 the Moratorium Act of New South Wales had been pleaded in the Supreme Court of Victoria as a defence to an action of contract brought there. That Court refused to entertainthe defence on various grounds and indicated that even if the law of New South Wales was the proper law of the contract the defence would have failed because the Moratorium Act was opposed to the public policy of Victoria. The High Court reversed the decision holding that the proper law of the contract was the law of New South Wales, that the Moratorium Act related to rights and not to remedies, and that it was not repugnant to the public policy of Victoria and three of the learned Judges (Rich and Dixon J.J. p. 577, Evatt J. at 587) held that section 118 prohibited the State Court from refusing "to give effect to a substantive defence under the applicable law of another State"(per Evatt J. at p. 588 quoting Bradford Electric Light Co. v. Clapper 286 U.S. 145 which I shall discuss later.)

The provisions of the American Constitution have been frequently the subject of litigation in the Supreme Court of the United States. The construction placed on like words by the American Courts affords a guide to the probable construction of Section 118 and we have seen that Higgins J. in Jones. v. Jones and Evatt J. in Merwin Pastoral Co. v. Moolpa Pastoral Co. both cited above referred to American authorities. The general effect of the American decisions is not unlike the theory foreshadowed by Napier J. in In re C.A.S.E. Ltd. above.

The American constitutional provision differs from ours in two respects. Firstly, section 118 refers to the "laws" of every State as well as to the "public acts records and judicial proceedings". If this difference has any effect, it can only be that it takes the matter beyond the Statute law and commands the Courts of every State to give full faith and credit in a proper case to the interpretation of the common law adopted in one State, if that differs from the interpretation held in the State, where the faith and credit is to be given, as well as to the Statutes of the first-mentioned State. Secondly, the American Constitution allows Congress to legislate with regard to the effect in one State of the acts records and judicial proceedings of another, but the power of the Commonwealth is only to make laws with respect to the recognition of such laws etc. Whether this includes the effect of recognition or not, it certainly cannot be construed as giving greater power than that conferred by the wider words of the American Constitution (that is, assuming the American authorities are to be followed). I do not think that the legislation of the Commonwealth can give a wider effect to such recognition that sec. 118 on its proper construction gives. As for sec. 18 of the Recognition Act, that will be construed so as not to exceed the legislative power of the Commonwealth.

(See Wynes Legislative & Executive Powers in Australia, p.292 Quick & Garran Annotated Constitution pps. 620-1.)

Subject to these distinctions the American decisions, may, I think, be taken as at least persuasive precedents in this matter in the absence of authority in Australia. The brief review of these that I am about to give is not in any way exhaustive.

It has been said generally that the public acts of every State must be given the same effect by the Courts of another State that they have by law and usage at home, (Chicago & Alton RailRoad Co. v. Wiggins Ferry Co. 119 U.S. 615) and also that a judgment of a State Court has the same credit, validity and effect in every other Court within the United States which it had in the State where it was rendered and that whatever pleas would be good to a suit thereon in such State and none others can be pleaded in any other Court in the United States, (Hampton v. McConnell 3 Wheat 232) but statements like this must be taken in a very limited sense.

On the other hand, the Supreme Court has said that the section of the Constitution and the legislation thereunder "establish a rule of evidence rather than of jurisdiction. "While they make the record of a judgment rendered after due "notice in a State conclusive evidence in the Courts of "another State or of the United States of the matters adjudged "they do not affect the jurisdiction either of the Court in "which the judgment is rendered or of the Court in which it "is offered in evidence. Judgments recovered in one State of "the Union when proved in the Courts of another government "within the United States differ from judgments recovered in a "foreign country in no other respect than in not being re-"examinable on their merits nor impeachable for fraud in "obtaining them if rendered by a Court having jurisdiction of "the cause and of the parties". (Wisconsin v. Pelican

Insurance Co. 127 U.S. 265 at p. 291-2. Hanley v. Donoghue 116 U.S. 1 at p. 4) while Story's statement of the law with regard to judgments (Conflict of Laws Sec. 609) has twice received judicial approval. (Thompson v. Whitman 18 Wall. 457 at p. 462-3 Wisconsin v. Pelican Insurance Co. above at p. 292).

> "The Constitution did not mean to confer any new "power upon the States but simply to regulate the "effect of their acknowledged jurisdiction over "persons or things within their territory. It did "not make the judgments of other States domestic "judgments to all intents and purposes but only gave "a general validity faith and credit to them as "evidence. No execution can issue upon such judgments "without a new suit in the tribunals of other States. "And they enjoy not the right of priority or lien "which they have in the State where they are pronounced "but that only which the lex fori gives them by its own "laws in their character of foreign judgments."

It is, therefore, not in every case that the laws or judgments of one State will be given the same effect in another State as they have in her own Courts. A judgment of one State can always be impeached in another on the grounds of lack of jurisdiction and will not be enforced there if the defendant was neither served with the process of the Court of the judgment within the State to which it belongs, nor voluntarily appeared therein (nor presumably, contracted to submit to the jurisdiction of that State.) (See D'Arcy v. Ketchum 11 How 165, Pennoyer v. Neff 95 U.S. 714.)(I) The period of limitation applicable to such a judgment is the period laid down by the law of the enforcing, not of the recording State and in the administration of the assets of a deceased person

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(I) It would appear from this last case, however, that in such a case by reason of the due process of law amendment to the United States Constitution such a judgment would be also invalid in the pronouncing State in personam and only valid there if at all as against property of the defendant there, i.e. in rem. There is, I submit, no doubt that in Australia a judgment of one State where the process has been duly served according to the law of that State must be held to be good within that State. (Ashbury v. Ellis 1893 A.C. 329). Even in America this principle only applies to judgments in personam, not to a judgment for example of divorce which in certain circumstances may be good within the pronouncing State but not entitled to recognition elsewhere in spite of the faith and credit clause. (Haddock v. Haddock 201 U.S. 562).

in one State, a judgment given against him in the Courts of another will only rank, if such as the law of the first State, as a simple contract debt, not with the priority given to it by the law of the second State. (McElmoyle v. Cohen 13 Pet. 311).

The true rule would seem to be that laid down by Cooley "Principles of Constitutional Law" p. 203. (cited by Moore - Commonwealth of Australia p. 479).

> "By this provision a rule of comity becomes "a rule of constitutional obligation".

In other words, the principles upon which the Courts of one State should act in giving effect to the laws and judgments of another are transformed from rules of private international law into rules imposed by the Constitution and therefore beyond the alteration even of the legislature of any State. (See Christmas v. Russell 5 Wall. 290). In the quotations and decisions referred to above we have seen that the Supreme Court of the United States is really, with one or two exceptions, enforcing the ordinary rules of private international law, only it is enforcing them not as part of the law of any single State but as the law of the Constitution, binding on all States alike. This impression of the true meaning of the faith and credit clause is deepened when we examine some of the cases not upon the effect of the judgments but of the laws of one State in the Courts of another. Thus, it has been held that the probate of a will in one State does not establish the validity of the will as devising real estate in another unless the law of the latter State permits it, but that the validity of the will for that purpose must be determined by the lex situs. (Robertson v. Pickrell 109 U.S. 608). Similarly, the law of one State legitimating children born per subsequens matrimonium, will not affect the devolution of land in another State. (Olmsted v. Olmsted 216 U.S. 386) and a State may by a statute of descent exclude from inheritance children adopted pursuant to the law of another State without violating the full faith and credit clause. (Hood v. McGehee 237 U.S. 611). Nor does this clause

prevent a Court of equity in one State from restraining persons subject to its jurisdiction in personam from taking or continuing proceedings in other States. (Cole v. Cunningham 133 U.S. 107.) Where a corporation does business in one State and as a condition of so doing accepts its laws it cannot contract out of them by a provision that the proper law of the contract shall be the law of some other State. (National Mutual Loan & Building Association v. Brahan 193 U.S. 635). The Courts of the State where a woman is domiciled need not give effect to a guarantee of her husband's debt, executed by her in another State and good by its laws, if by the law of the first State, such guarantees are not binding upon married women. (Union Trust Co. v. Grosman 245 U.S. 412). One State will not enforce the penal laws of another. (Wisconsin v. Pelican Insurance Co. 127 U.S. 265) or enforce any contract governed by the law of another State which would be repugnant to good morals, lead to disturbance or disorganization of its municipal laws or otherwise violate its public policy. (Bond v. Hume 243 U.S. 15). Where the statute law of one State gives a cause of action but says that all proceedings to enforce it shall be brought before its own tribunals, the cause of action, if the proper law to govern it is the law of the first State, may be enforced in the Courts of another State "if the right and/remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal". (Tennessee Coal Co. v. George 233 U.S. 354).

On the other hand, if a transfer of individual chattels is valid according to the law of the State of the transferor's domicil, but invalid according to the law of the State where they are situated and they are attached and sold according to that law by a creditor of the transferor, the laws and judicial proceedings of the second State are a good defence to an action for conversion brought by the transferee against the attaching creditor in the Courts of the first. (Green v. Van Buskirk 7 Wall

139). Where by the law of the State of its incorporation a receiver,"a quasi-assignee", of a corporation is appointed and the stockholders thereof are subject to a double liability they may be sued by the receiver for that liability in another State which must give full faith and credit to the laws and the judicial proceedings of the State of incorporation imposing the double liability and appointing the receiver, (Converse v. Hamilton 224 U.S. 243) and the judgments of the Courts of the State of incorporation allowing amendments to the constitution of a corporation or deciding the liability of members must be regarded as binding in an action in another State between the corporation and a different member. (Royal Arcanum v. Green 237 U.S. 531, Modern Woodmen v. Mixer 267 U.S. 544).

But these rules, though sometimes enforced as constitutional obligations, are in themselves nothing more than applications of familiar rules of private international law, namely, that the devolution of immovables is governed by the lex situs, that courts of equity may restrain persons subject to their jurisdiction in personam from taking proceedings in a foreign court, that the proper law of a contract is to be ascertained by the real, not the feigned, intention of the parties, that capacity to contract is governed by the lex domicilii, not by the lex loci contractus, that no country enforces the penal laws of another or enforces any rights repugnant to its own policy,(I) that the lex fori governs the remedy as opposed to the right, that the transfer of individual chattels in certaincases is to be governed by the lex situs, that the law of the country of incorporation has sole jurisdiction to amend the constitution of a

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(I) As I have frequently had occasion to point out, my opinion is that the refusal of one State to give effect to the laws of another on the ground of repugnance to its public policy will be less frequent in Australia than in America as in my opinion the extended meaning given to the term in America is not permissible here.

corporation and that that law must govern the liability of the members. The language of the judges in many of these cases shows that they were considering questions of private international law (see especially Green v. Van Buskirk above). The fact that some of the decisions and some of the reasons given for them (see Haddock v. Haddock 201 U.S. 562) are not in accordance with the English rules on the subject does not make it any the less true that the cases were decided on questions of private international law.

It is true that in one or two instances the ordinary rules of private international law are departed from as between the States. Thus, in the quotation from Hanley v. Donoghue cited above, it is stated that a judgment of one State is not impeachable in another on the ground of fraud, though this exception is somewhat doubtful (see Hampton v. McConnell 3 Wheat 232 at p. 234 n 1.) Similarly, it has been said, the judgment is final and conclusive on the merits and cannot be impeached on the ground of a mistake of law, even of the enforcing State. (See Fauntleroy v. Lum 210 U.S. 230). But this is the general rule of private international law. (See Godard v. Grey L.R. 6 Q.B. 139). Also in Bradford Electric Light Co. v. Clapper 286. U.S. 145 it was held while the Courts of one State may refuse to enforce an obligation governed by the law of another State whenthe enforcement would be contrary to the public policy of the first State it cannot refuse to give effect to a defence under the applicable law of another State. "A State" said Brandeis J. at p. 160 "may on occasions decline to enforce a foreign cause of action. In so doing it merely denies a remedy leaving unimpaired the plaintiff's substantive right so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defence under the applicable law of another State as under the circumstances here presented, subjects the

defendant to irremediable liability. This may not be done". But the case was decided upon other points also, especially that to allow the defence in question would not be obnoxious to the public policy of the forum concerned. Stone J. who concurred generally doubted the application of the faith and credit clause, (pps. 163-4). Even, however, granting these two exceptions which do not really relate in strictness to matters of private international law, but only to the refusal of one country to recognize rights duly acquired under the law of another on the ground of the overriding public policy or moral rules of the forum, it is still true to say generally that the effect of the section and the consequential federal legislation is to turn a rule of private international law into a rule of constitutional obligation and I think it is correct to say generally that this is the effect in Australia also. This is only a paraphrase of the words of Napier J. in In re C.A.S.E. Ltd. when he said that it might well be that the principles upon which a foreign law is to be recognised and applied in South Australia are to be regarded as binding, not merely as a matter of comity but as the law of this State prescribed for that purpose by the Constitution (see the quotation above.) c I submit that this is the true rule. We still have to enquire in any matter where the laws or judgments of another State are concerned, what the proper rule of private international law is: when we find it, we must apply it as a rule of law imposed by the Constitution remembering that the Constitution has placed it beyond the power of the Legislature of this State to alter the rules of private international law so as to restrict but not so as to enlarge them,(I) so far as they have regard to the application here of the laws or judgments of another State: it may be, however, that the application

(I) A State Legislature may of course give a wider effect to the laws etc. of another State than is given to them by sec. 118: it cannot, however, give a lesser one.

of those rules to such a matter is altered in this respect - that the judgments of the Courts of another State are not impeachable here for fraud and that our Courts cannot refuse to give effect on the grounds of public policy to a substantive defence under the law of another State when that law is applicable under those rules: there are possibly other exceptions

If then, in spite of sec. 118, a lesser effect may be given here in accordance with the rules of private international law, to the laws etc. of another State than they have at home, so also, in spite of that section, a wider effect may be given to them here in accordance with those rules. Thus, the validity of an executive act of another State purporting to be done within the limits of the sovereignty of that State cannot be impeached here, even though it might be so impeached in the Courts of its own State. It has been held that the Victorian Court cannot enquire into the validity of a New South Wales patent - a public act of New South Wales - even if its validity is questioned on grounds which, if proved, would render it invalid in New South Wales. (Potter v. Broken Hill Proprietary Limited 3 C.L.R. 479).

There is another consideration to be remembered in this connection. That is, that the rule in MacLeod v. Attorney General of N.S.W. (1891 A.C. 455) is applicable to the States and will remain applicable even though the Statute of Westminster is adopted here. Thus, when considering the application of a statute of another State here under Section 118 it should be borne in mind that if it attempts to operate upon persons or things or events outside that other State it is ultra vires of the enacting legislature. It is not, therefore, a law of that other State and no faith or credit need be given to it. "Full faith and credit is enjoined by the Constitution only in respect to those public acts which are within the legislative jurisdiction of the enacting State." (Bradford Electric Light Co. v. Clapper 286 U.S. 145 per Brandeis J. at

p. 156. See also Western Telegraph Co. v. Brown 234 U.S.542 Atchison Railroad Co. v. Sowers 213 U.S. 55). If the Victorian Parliament passed a statute purporting to regulate the traffic in Adelaide, no faith or credit need be given to it here because none need be given to it in Victoria. It would not be a valid law of Victoria. Of course, it is not giving an extra-territorial application to the law of one State within the meaning of the rule in MacLeod's case to recognize in another State the law of the first State as the proper law governing some obligation in consideration in the Courts of the second. (See Bradford Electric Light Co. v. Clapper 286 U.S. 145 at p. 158). Not in every case, however, where the law of another State escapes the rule in MacLeod's case, will it take effect here if my interpretation of Section 118 is right. Thus a State statute may make provision for the granting by its Courts of divorces to persons not domiciled within the State and that statute is within the legislative power of the State so far as the State courts are concerned (see Poingdestre v. Poingdestre 28 N.Z.L.R. 604), but section 118 does not, it is submitted, compel the Courts of other States to recognize the validity of such divorces.

To sum up the effect of sec. 118 and sec. 51 (xxv) together with the Recognition Act, in my opinion, when the applicability of the laws or the enforcement or the recognition of a judgment of another State is in question in the Courts of South Australia, the proper procedure to adopt is to enquire as follows:

(1) Firstly,if the law of another State is concerned, is that law within the legislative power of the enacting State remembering that that power cannot be exercised so as to have any extra territorial effect?

(2) If it is within that power then would the law or the judgment be applied, recognized or enforced here accord-

ing to the ordinary rules of private international law adopted in England and Australia?

(3) If it would, then it must be applied, recognized or enforced here in spite of any statutory provision under the law of South Australia to the contrary.

(4) If it would not, it need not be applied recognized or enforced here except that the judgment of another State cannot (perhaps) be impeached here on the ground of fraud and that (probably) effect cannot be refused to a substantive defence under the applicable law of another State because of the public policy of South Australia, with the possibility of other exceptions of a similar nature, denying the application, not of the ordinary rules as to jurisdiction and choice of law, but of the exceptions to those rules based on similar grounds of morality and public policy.

Let us now examine sec. 51 (xxiv) and the legislation passed thereunder. I do not propose to discuss the Service & Execution of Process Act in detail or to discuss the vexed question of how far that Act extends the jurisdiction of State Courts, if at all, beyond the limits given to them by the law of their State. I only discuss the power and the legislation from the point of view of private international law, i.e. how far do they extend if at all, the rules of private international law relating to the enforcement here of the judgments of another State.

Here again, we have two views. Does sec. 51 (xxiv) only give to the Commonwealth Parliament a purely procedural and evidentiary power, in other words a power to regulate the actual mode of service and the execution in one State of the judgments of another, only when those judgments would be

entitled to recognition in the first State under the rules of private international law? Or does it convey a power to alter the substantive law so as to render the judgments of any State enforceable over the whole Commonwealth irrespective of the rules of private international law, as to the service of the writ upon the defendant within the territory? If the first alternative is correct, then the subsection only granted to the Commonwealth power to give to the judgments of a State the extra territorial effect that they already had, since in pre-federation days the judgments of the Courts of one State would be enforced in another if they were rendered by a Court of competent jurisdiction under the rules of private international law, and we have already seen that sec. 118 prevents the legislature of any State from decreasing the recognition thus extended. At most, it can only allow the plaintiff to register his judgment here instead of compelling him to bring an action upon it. Such a power, however, is probably conferred by Sec. 51 (xxv). I cannot think that the grant of legislative power is as futile as this. I think that it must have been intended to serve some useful purpose that was not provided for elsewhere in the Constitution. It must not be forgotten that in considering subject matters of law which lie within the boundaries of federal legislative competence Australia is to be regarded as one country in the view of private international law.

In a very large number of casesthere can be no doubt as to the validity throughout the Commonwealth of the judgments of the Courts of one State where the process has been served in another. For section 75 (IV) of the Constitution confers original jurisdiction on the High Court in all matters between residents of different States. Sec. 77 (ii) and (iii) give to the Commonwealth Parliament power to make laws defining the extent to which the jurisdiction of any

federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States and investing any Court of a State with federal jurisdiction. I do not intend to discuss the nature and extent of the judicial power of the Commonwealth but there can be no doubt that the process and judgments of the High Court in the exercise of its jurisdiction under Section 75 (iv) can be served and enforced anywhere in the Commonwealth. Then, sec. 39 of the Judiciary Act 1901-1933, passed in pursuance of sec. 77, provides that the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States except as provided in the section: so far, then, the State Courts have been deprived of jurisdiction in all matters between residents of different States. Sec. 39 (2) then goes on to invest the several Courts of the States within the limits of their several jurisdictions with federal jurisdiction in all matters in which the High Court has original jurisdiction except as provided elsewhere in the Act. Sec. 39 is a valid exercize of the legislative power of the Commonwealth. See Lorenzo v. Carey 29 C.L.R. 243. The jurisdiction which the Supreme Courts of the States, therefore, exercise in actions between residents of different States is federal jurisdiction, (See Sanderson & Co. v. Crawford 1915 V.L.R 568, Swan Hill Co-operative Society Ltd. v. Richardson 36 A.L.R. 156) and the territorial limitation to the international competence of the State Courts can be disregarded. This is admittedly not decisive of the whole question: for there may be cases in which the process of the State Courts has to be served outside the State upon a defendant who is not a resident of another State. (See Coates v. Coates 1925 V.L.R. 231). Moreover, Sec. 75 (IV) has received a very narrow construction, (see T.& G. Mutual Life Assurance Society v. Howe 31 C.L.R. 294, Watson v. Cameron 40 C.L.R. 446). It is possible, therefore, that the

question of the extent of the power conferred by sec. 51 (xxiv) may arise in a case where secs. 75 and 77 are not applicable.

The authorities on this point are not consistent. Thus, in Mackenzie v. Manwell 20 W.N. (N.S.W) 18 and in Blunt v. Collingwood Tin Mining Co. 20 W.N. (N.S.W) 158 it was held that judgments of a State Court where the process was served on the defendant outside the jurisdiction and he did not appear, were a mere nullity in New South Wales and could not be enforced there even under the Service & Execution of Process Act. An opposite decision was given in Pringle v. Musgrove 20 W.N. 280. In Ex parte Penglase 3 L.R. (N.S.W) 680 the Full Court of New South Wales while denying the right of the registrar to refuse to register a judgment of the Court of another State produced to him in pursuance of the Service & Execution of Process Act left the question open as to whether the judgment was a nullity or not, holding that the proper method to determine this was for the defendant to apply for a stay of proceedings. On the other hand in Adcock v. Aarons 5 W.A.L.R. 140 it was held that a judgment of the Court of another State could be enforced in Western Australia under the Service & Execution of Process Act which would before federation have been a mere nullity. (See per McMillan J. at p. 150). I think with respect that the dictum of Griffith C.J. in McGlew v. New South Wales Malting Co. Ltd. 25 C.L.R. 416 at p. 420 is a correct statement of the law.

> "The efficacy of the civil process of a colony was "limited by the territorial limits of the colony "beyond which limits the writs of the Supreme Court "were, as it used to be said, mere waste paper. By "the Constitution Sec. 51 (xxiv) power was given to "the Commonwealth Parliament to legislate with respect "to the service of State writs throughout the Common- "wealth and the execution of judgments obtained under "them. This power is obviously not limited to the mode "of performance of the manual act of service but "extends also to the extra-territorial operation of the "writ when served."

I respectfully agree with this statement. I think that sec. 51 (xxiv) must go at least as far as to give the Commonwealth Parliament power to make the judgment of a State Court in an ordinary personal action binding throughout the Commonwealth, even though the defendant was served outside the State and did not appear in the action. I cannot place any other interpretation on the sub-section which would not make it entirely redundant and futile. I think that the result of the subsection and the legislation thereunder is that the bar to the extra territorial operation of a judgment in personam, because of the service of process outside the territory of the Court pronouncing the judgment has been lifted as between the States of the Commonwealth.(I) How much further sec. 51 (xxiv) can take the matter I am not prepared to say. We have seen, for example, that sec. 118 does not compel the Courts of one State to entertain an action to enforce the penal laws of another. (See Wisconsin v. Pelican Insurance Co. 127 U.S. 265). It is a matter of grave doubt to me whether section 51 (xxiv) empowers the Commonwealth Parliament to enact that a judgment obtained in one State as a result of an action brought upon the penal laws of that State can be enforced in another State. It may be however that the Service & Execution of Process Act does not purport to do this.(II) It certainly seems illogical to hold

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(I) This is the conclusion reached by Dr. Wynes, see 8 A.L.J. 194.

(II) Section 12 only confers on a judgment given against the defendant who has been served in pursuance of the Act the same force and effect as if the writ had been served on the defendant within the State in which it was issued. This seems to show that the Act was only directed to removing the jurisdictional bar against service outside the territory. A judgment recovered in another State in a penal action there could not be enforced here even if the defendant had been served within the State of the judgment apart from sec. 51 (xxiv). There is however no provision in the Service & Execution of Process Act enabling the enforceability of a State judgment to be questioned in the Courts of a State where it is sought to be enforced. (See Sec. 21 (2)). Section 25 giving power to stay proceedings on the judgment hardly seems apt to cover this. However this may be, the Act would of course be construed if possible so as not to exceed the power given by Sec. 51 (xxiv). The real question is as to the extent of that power.

that the judgment can have so much more extra-territorial effect than the law on which it is based. Take the case of a revenue law of another State. If my construction of sec. 118 is correct then it is clear that our Courts would not entertain an action brought by a local governing body in Victoria for rates due to it or even by the Victorian State for income tax, since, according to the rules of private international law, one State does not enforce the revenue laws of another. (See Municipal Council of Sydney v. Bull 1909 1 K.B. 7). Does sec. 55 (xxiv) if appropriate legislation is passed thereunder, compel our Courts to enforce here a judgment obtained in Victoria by the local governing body or the State? To these and similar questions, it is conceived that no certain answer is possible. The matter still awaits authoritative decision.(I)

(I) See generally on the matters dealt with in this Appendix Wynes Executive & Legislative Powers in Australia pps. 289-94.