Evershed M.R. left this point open, but felt that if it applied to the marriage of domiciled Englishmen and foreigners, logically it should also apply to the marriage between two English domiciled persons. " If the latter, then it would appear to introduce a ground for dissolution of marriage which is not found in the statute."[2] Bucknill L.J. did not specifically discuss this point, though he agreed in general with the reasons given by Evershed M.R. for the dismissal of the appeal. Denning L.J., however, specifically rested his decision on the doctrine of frustration. If the marriage is between persons domiciled in different countries, the substantial validity of the marriage may depend on the personal law of one or other of the parties to it. A marriage, valid by the local law, may be voidable by reason of a condition imported by the personal law of one of the parties, if the parties married on the basis of that law. Here the parties intended to come to England to live and the husband married on the basis of that fundamental assumption. An essential condition of the marriage had failed and therefore the marriage was voidable in English courts. This is an interesting doctrine, but it does open up alarming possibilities. The learned Judge used the analogy of the personal law to solve the question whether the marriage was monogamous or polygamous. But the intention of the parties (a test implicit in the phrase " married on the basis of that law ") is surely quite irrelevant. We cannot test the nature of marriage by intention, race or domicil. The only criterion is the law of the place of celebration. Cheshire attacks this view, preferring the test of the matrimonial domicil, but this hardly seems supported by the cases. Victorian law recognises only monogamy so far as its forms of marriage are concerned. As the formalities of a marriage celebrated in Victoria must depend on Victorian law, does not this incidentally decide the nature of the marriage itself ? Two persons domiciled in India cannot while in Victoria enter into a polygamous marriage which will be recognised as valid by Victorian law. It seems, therefore, with respect, that the analogy of monogamous and polygamous marriages does not really assist the argument of Denning L.J. concerning frustration.

G.W.P.

2. At page 305.

## PRIVATE INTERNATIONAL LAW: TESTATOR'S FAMILY MAINTENANCE LEGISLATION.

The judgment of Sholl J., in *Re Paulin*[1] is of interest because it deals, apparently for the first time in Victoria, with the question of the choice of law rules to be read into the Testator's Family Maintenance legislation contained in Part V of the *Administration and Probate Act* 1928[2].

The decision was on an application by a widow for provision to be made for her out of the estate of her deceased husband, who had failed to make any testamentary provision for her. The testator, whose last domicile was found to be Victorian, left both immovables and movables

1. [1950] A.L.R. 503.
2. As amended by Act No. 4483 (1937).

in Victoria and immovables in New South Wales. The main question of interest was whether the Victorian Supreme Court could exercise any powers under Part V of the Act in relation to the immovables in New South Wales.

Generally speaking, provisions on similar lines enacted in other systems having a common law ancestry have not included any express definition of the scope of such legislation. The task of determining the limits of operation of this type of law has been left to the Courts[3].

A notable exception is the English *Inheritance (Family Provision) Act* 1938, which applies only where the testator has died domiciled in England[4].

In dealing with legislation not including a choice of law rule, Courts in various Australian States, Canadian Provinces, and New Zealand have in the main agreed that this legislation should be classified as a law relating to material validity which is, on general conflicts principles, governed as to movables by the *lex domicilii* of the testator at the time of death, and as to immovables by the *lex situs*.

In the opinion of Sholl J., the decisions of these Courts established the following propositions[5] :—

" (1) The Courts of the testator's domicil alone can exercise the discretionary power arising under the appropriate Testator's Family Maintenance legislation of the domicil so as to affect his movables and his immovables in the territory of the domicil ; . . . [6] "

" (2) The same Courts alone can exercise such discretionary power so as to affect under the same legislation his movables outside the territory of the domicil ; . . . [7] "

" (3) The Courts of the *situs* can alone exercise a discretionary power to affect, and then only if there is Testator's Family Maintenance legislation in the *situs* providing for it, immovables of the testator out of the jurisdiction of the Courts of his domicil ; and the Courts of the domicil cannot exercise their discretion so as to deal with such immovables ; . . . [8] "

It had been argued for one of the beneficiaries of the Victorian estate that the whole estate could be dealt with because, first, the application was an action *in personam* against the executors and the beneficiaries, all of whom were either within or had consented to the jurisdiction[9]; or it was really an action for administration of a trust of mixed property—movables within and immovables within and without the jurisdiction[10]. These arguments were rejected because thay were based on the view that the matter should be dealt with as one of administration. The authorities in other jurisdictions showed that an applicant under this legislation is not in the position of a creditor setting up a claim at the stage of admistration, but is seeking a share in the beneficial

3. J. H. C. Morris, 62 *L.Q.R.* at pp. 178-9.
4. Section 1 (1).
5. [1950] A.L.R. at p. 505.
6. *Pain v. Holt*, (1919) 19 S.R. (N.S.W.) 105.
7. *Re Sellar*, (1925) 25 S.R. (N.S.W.) 540 ; *Re Butchart*, [1932] N.Z.L.R., at p. 131 ; *Re Ostrander Estate*, 8 W.W.R. 367.
8. *Pain v. Holt (supra)* ; *Re Donnelly*, (1927) 28 S.R. (N.S.W.) 34 ; *Re Osborne*, [1928] St. R. (Qd.) 129 ; *Re Butchart (supra)*.
9. Dicey, *Conflict of Laws*, 6th ed., pp. 145-7.
10. *op. cit.*, p. 149.

surplus remaining after administration is completed and accordingly the legislation should be properly classified as relating to material validity.

A third argument advanced for the same beneficiary was that the Court had jurisdiction to determine the succession to and claims against the estate of a deceased person when it has made a grant of probate in respect of that estate[11] as illustrated by *Re Ross*[12].

In *Re Ross* neither party raised any question as to the English Courts' jurisdiction to hear the action against the executrix of the deceased's English will, the plaintiff and the executrix being apparently resident and probably domiciled in England, and probate of the English will having been granted by the English Court. It was assumed that although the testatrix had died domiciled in Italy, the English Court could determine whether, under Italian law, as both the *lex domicilii* governing her movables and the *lex situs* governing her immovables in Italy, the plaintiff enjoyed a right to a *legitima portio*. But this case, concerned as it was with a foreign inflexible rule which restricted the testatrix's power of testamentary disposition to a fixed proportion of her estate, could not cover the instant case, where the Victorian Court was, in effect, being asked to exercise a jurisdiction and a discretion vested by a New South Wales statute in the New South Wales Court.

Sholl J. did not need to go beyond the fact that a New South Wales statute had vested sole jurisdiction to make provision out of New South Wales immovables in the New South Wales Court to show that *Re Ross* would not justify the Victorian Court in making an order affecting the whole of the testator's estate. The question of jurisdiction was concluded *in limine*.

But even if the New South Wales statute had not limited jurisdiction to the New South Wales Court alone (which, admittedly, is inconceivable) but had merely provided that the testator's omission to make adequate provision could be remedied by a discretionary judicial order, the discretionary nature of the relief authorised would deter any court other than the New South Wales Court from making an order affecting the New South Wales immovables. The certainty of coincidence in the terms of the order which could have been made by the English Court in *Re Ross* with that which could have been made by an Italian Court would have been lacking. The absence of this certainty would bring the principle of effectiveness into play.

Having come to the conclusion that he was not entitled to make an order affecting the immovables in New South Wales, Sholl J., decided that in arriving at the quantum of provision to be made for the applicant, he could take account of the fact that there were immovables in New South Wales. Accordingly he assessed the provision he would make if he had the power to make an order binding the testator's property wherever situate and deducted from that preliminary assessment the proportion thereof referable to the immovables in New South Wales.

It would seem that this course can be taken only where the property which cannot be affected by the Court's order is liable to be affected by an order made by some other Court under legislation generally similar to our own.

H.A.J.F.

11. *op. cit.*, pp. 312-3.
12. [1930] 1 Ch. 377.