

**VANCOUVER**  
**AUG 04 2017**  
**COURT OF APPEAL**  
**REGISTRY**

Court of Appeal File No. CA44448

**COURT OF APPEAL**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*  
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,  
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW  
WALTER ENERGY CANADA HOLDINGS, INC. NEW WALTER CANADIAN COAL  
CORP., NEW BRULE COAL CORP., NEW WILLOW CREEK COAL CORP., NEW  
WOLVERINE COAL CORP. AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS  
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

(APPELLANT)

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**SUPPLEMENTAL BOOK OF AUTHORITIES OF THE APPELLANT,  
UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST  
("1974 PLAN")**

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**United Mine Workers of America 1974  
Pension Plan and Trust, Appellant**

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**New Walter Energy Canada Holdings,  
Inc., New Walter Canadian Coal Corp.,  
New Brule Coal Corp., New Willow  
Creek Coal Corp., New Wolverine Coal  
Corp., and Cambrian Energybuild  
Holdings ULC, Respondents**

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appreciated the danger, and I can find no sufficient reason either for rejecting his denial or for holding that he ought to have appreciated it. Most people probably know that a small dog may disturb cattle, but I do not believe that there is the same general knowledge about elephants. A man might reasonably think that an elephant would ignore so small an irritation and that, at least if the dog was securely tied up, it would be no danger.

The last issue of fact that I have to determine is whether the plaintiffs or either of them knew that the dog was there.

[His Lordship having considered the evidence on this issue, said that he was not satisfied that the plaintiffs knew of the presence of the dog in the funfair.]

*Judgment for the plaintiffs.*

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; William Charles Crocker.*

J. F. L.

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[1955 M. No. 4033.]

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*Conflict of Laws—Succession—Corporation—Foreign legislation—Comity—Universal succession—Foreign bank liable on English debt—Obligations on debt suspended in foreign bank's State of origin by moratorium—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank decreed "universal successor" to former banks—Recognition of universal succession by English courts—Right of creditor to sue new bank in England—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 208.*

*Conflict of Laws—Foreign legislation.*

Denning,  
Romer and  
Parker L.JJ.

In 1927 a Greek bank issued sterling mortgage bonds, repayable as to principal in 1957 with interest thereon meanwhile. A term of the bonds provided that questions arising should be settled in accordance with English law. The bonds were guaranteed as to principal and interest unconditionally by another Greek bank.

In 1941 payment of interest ceased and no further interest was paid thereafter. In 1949 the Government of Greece declared a moratorium (which continued in force at all material times) on all obligations on the bonds, including any right of action. In 1953 by an Act of the Government of Greece and by royal decree the

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guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies.

In 1955 an offer was made by the original debtor bank to English bondholders, to be guaranteed by the new company. The plaintiff, the holder of bearer bonds, did not accept that offer, but brought an action in the High Court against the new company, claiming interest from 1941 to 1955 inclusive, on the ground that the entire assets and liabilities of the guarantor bank, including its liability under the guarantee, had been assigned and transferred to the new company. Sellers J. awarded the plaintiff six years' interest.

On appeal by the new company it was conceded that the proper law of the bonds was English law :—

*Held*, (1) that the plaintiff could sue the new company in England as the universal (or statutory) successor to the old companies by Greek law, although the new company was not a party to the original guarantee, for the general principles of international comity required the English courts to recognize and give effect to the foreign law which had substituted the new company as the universal successor of the old, unless such recognition was shown to be prejudicial to the rights of English creditors; and there was no evidence in the present case of any such prejudicial effect.

*Per curiam*. The English courts should recognize the principle of universal succession which our own legislation has adopted in the Companies Act, 1948, s. 208.

(2) That the plaintiff could sue on the debt in England as an English debt free of the moratorium, for the acceptance of the foreign law as to the status of the new company did not involve applying the foreign law as to its obligations.

*Kleinwort, Sons & Co. v. Ungarische Baumwollindustrie Aktiengesellschaft* [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38 applied.

Decision of Sellers J. affirmed.

APPEAL from Sellers J.

On December 1, 1927, the National Mortgage Bank of Greece (a company incorporated under Greek law) issued £2,000,000 7 per cent. sterling mortgage bonds. In each of the bonds the National Mortgage Bank of Greece promised to pay the bearer the principal moneys on December 1, 1957, and meanwhile interest half-yearly at 7 per cent. Payment was to be made in sterling at the offices of Hambros Bank Ltd. or Erlangers in London, and at the option of the holder at the National Bank of Greece in Athens by cheque on London. In case of any question arising, it was to be settled by arbitration in London in accordance with the laws of England. The bonds were guaranteed by the National Bank of Greece (a company incorporated under Greek law) in these words: "The National Bank of Greece

" hereby unconditionally guarantees the due payment of the  
 " principal moneys and interest and the due performance of all  
 " the conditions of this bond."

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On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to  $4\frac{1}{2}$  per cent. Bondholders resident in Greece were to be paid only in drachmae. Bondholders permanently resident outside Greece were to be paid in sterling. This modification was stamped on the bonds by an over-stamp. The National Bank of Greece agreed to this modification and their guarantee was continued in full force notwithstanding the modifications.

On April 27, 1941, the Germans captured Athens and occupied Greece: and in the result the National Mortgage Bank of Greece was left with nothing with which to pay the bonds. No further payments were made on the bonds, either during the occupation or since. In November, 1949, the Government of Greece passed a law which suspended all obligations on the bonds, by setting up a moratorium. The substantive rights of the bearers of the bonds were suspended. The remedies by action or otherwise were suspended. It was illegal for the debtors to pay either principal or interest. That moratorium continued at first until June 30, 1952, but it was renewed from time to time and was still in being at the time of the present action.

By Act No. 2292, made on February 18, 1953, the Greek Government passed a law authorizing the amalgamation or merger of banking companies, and it was enacted that " the company  
 " which absorbs another company by merger, or the new com-  
 " pany formed by the amalgamation, becomes the universal  
 " successor to the rights and obligations in general of the amal-  
 " gamated companies, without any further formality or act  
 " whatsoever." By a royal decree, dated February 27, 1953, made in pursuance of that Act, it was enacted that " as from  
 " the publication of the present decree, the National Bank of  
 " Greece Ltd. and the National Bank of Athens Ltd." (a bank hitherto unconnected with the bonds) would cease to exist and  
 " the entire property of each of them in its whole (assets and  
 " liabilities) on the day of publication is considered as being auto-  
 " matically contributed to the new limited liability banking  
 " company (the National Bank of Greece and Athens Company)  
 " constituted by virtue of these presents, which is substituted  
 " ipso jure and without any other formality in all rights and  
 " obligations of the said amalgamated banks, as their universal  
 " successor."

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The new amalgamated company (the defendant company in the present proceedings) was protected in Greece by the moratorium law. On October 27, 1955, the principal debtor, the National Mortgage Bank of Greece, made an offer to the English bondholders to pay them in sterling on the following terms: The principal debt was to be reduced by one-half; all interest from June 1, 1941, to November 30, 1954, was to be waived; and the interest on the bonds from December 1, 1954, onwards was to be  $2\frac{1}{2}$  per cent. only. The new amalgamated company guaranteed the performance of those terms by the principal debtor, the National Mortgage Bank of Greece. If the offer was not accepted the bondholder remained subject to the moratorium law.

That offer was advertised in the Financial Times, and Hambros and Erlangers were authorized by the Bank of England to say that permission had been given under the Exchange Control Act, 1947, for bondholders to accept the offer if they so desired. The plaintiff, who was the holder of bearer bonds to a total of £21,900, did not accept the offer, but brought the present action in December, 1955, claiming interest at  $4\frac{3}{4}$  per cent. on £21,900 for  $14\frac{1}{2}$  years from June 1, 1941, to June 1, 1955, inclusive. His statement of claim recited the bonds and the guarantee by the National Bank of Greece. It did not allege any novation by way of contract with the new company; and the only paragraph which brought in the new company was as follows: "The defendants are a corporation constituted under the laws of Greece and carrying on business inter alia at 6, Old Jewry, E.C.2, in the County of London. By a Greek decree dated February 27, 1953, the entire assets of the National Bank of Greece (including their liability under the said guarantee) were assigned and transferred to the defendants." The defendants denied liability.

At the hearing before Sellers J. the defendant company contended that the proper law of the bond was Greek law. In his judgment on July 12, 1956, Sellers J. held that the proper law was English law, and said that in that event the Greek decrees and the moratorium could not be relied on either by the mortgage bank or by the guarantor bank, since the obligation under the bond was to pay in sterling in London. The Greek law and the evidence of the Greek lawyers established that if the original guarantor company, which by Greek law had ceased to exist, would have been liable on the guarantee, so would the

defendant company ipso facto as the universal successors of the original guarantor.

His Lordship gave judgment for the plaintiff on his claim for interest limited to the six-year period prior to the issue of the writ in December, 1955, namely, £6,241 5s. 1d.

The defendant company appealed. On the hearing of the appeal it was conceded for the defendants that the proper law of the bonds was English law.

*Harold Lever* and *J. H. R. Newey* for the defendant bank. The plaintiff has no cause of action in the English courts against the defendant bank, for it is a stranger to the bond and to the guarantee. When a foreign company is dissolved, by the law of its State of origin the remedy of an English creditor in England is to apply to have its assets in England administered by a winding-up action: see *Halsbury's Laws of England*, 3rd ed., vol. 7, p. 13, and *Cheshire's Private International Law*, 4th ed., p. 478. If there are no assets in England, that remedy has no practical value; that indicates why this plaintiff did not seek a remedy until after the amalgamation with a company which had assets here.

[ROMER L.J. When the defendants in 1955 offered to guarantee the offer of the original debtor, were they not holding themselves out as the transferees of the liabilities and assets of the dissolved company, including the obligation on the guarantee?]

No cause of action can be based on such a holding-out. The plaintiff could try, as he has done, to rely on an estoppel, but he could not go further unless he could show a contract by novation. There is no such plea; the plaintiff relies solely on the Greek decree of amalgamation. But that decree cannot substitute in these courts a new debtor for the old. The court ought not to recognize or give effect to the universal succession; just as our courts do not recognize the status of a foreign administrator unless there has been an English grant: see *Halsbury's Laws of England*, 3rd ed., vol. 7, p. 65, and *Cheshire*, 4th ed., p. 515.

Alternatively, if the Greek decree has made the new company the universal successor of the old and it thereby becomes answerable on the English debt in an English court, it is answerable only on the terms of the whole of the Greek law to which the new company was specifically made subject—including the moratorium in force at the date of the amalgamation decree. The succession must be taken with its burdens as well as its benefits. The plaintiff cannot use Greek law when it suits him and reject

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it when it does not. The effect of the moratorium was to make it illegal for any Greek bank to make payments to sterling bondholders; such payments would constitute a penal breach of the Greek currency laws; no sterling bondholders could enforce payment in a Greek court, nor would a Greek court allow the execution of a foreign judgment in favour of legal owners; and any such payment would be contrary to Greek public policy. Thus the amalgamation decree assigned to the new bank a suspended and not an immediate obligation.

*John Foster Q.C.* and *Mark Littman* for the plaintiff. It is of the nature of private international law that on certain substantive matters the foreign law is to be looked at, while on others which are procedural in their nature the foreign law is disregarded. If the first submission for the defendants is correct, it would follow that there could never at any future time be any cause of action in England on the guarantee, although it is an English debt. It would also follow that the assets of the former companies in England would not pass to the new company but would become bona vacantia. That would lead to chaos in the City of London.

The universal successor here has succeeded to both the assets and the liabilities of the former companies, including the unconditional guarantee subject to English law. Universal succession is a concept familiar in European legal systems: see *Martin Wolff*, *Private International Law*, 2nd ed., p. 357, para. 334, on the system of community of goods between spouses. The principles of private international law require our courts to decide by reference to Greek law whether a corporation incorporated in Greece is a juristic person and what that juristic person is; and where the foreign law puts a new corporation in the shoes of the old the English courts will look at the law of its State of incorporation to discover what the new juristic personality is, just as we look to the law of a natural person's domicile to discover his status. The Russian bank cases show that the decree of a foreign government can abolish the former debtor; but where the decree makes the new bank the universal successor of the old, the new person is the same as the old, and is entitled to the assets and liable on the obligations of the old companies in this country without more, so that it is not necessary for the plaintiff to show a new contract in order to sue the new company here. It is conceded that a foreign administrator cannot sue in this country without an English grant; that is procedural; but if there is a universal successor by foreign law the English courts should

recognize it. In *Beavan v. Lord Hastings*,<sup>1</sup> though it was held that a universal successor under Belgian law was not liable to a creditor in equity in an English court, Sir William Page Wood V.-C.<sup>2</sup> indicated that an action at law would lie against the universal successor; see also Cheshire, *Private International Law*, 4th ed., pp. 516-517. In *Bergerem v. Marsh*<sup>3</sup> Bailhache J. said that the succession of a foreign trustee in bankruptcy would be recognized here. Support for the submission that the plaintiff can sue the universal successor here is to be found in section 208 of the Companies Act, 1948, for it provides that where the court has sanctioned an amalgamation it can order all the assets and liabilities of the former companies to be transferred to the new. No interpretation of those sections would be valid which restricted the effect to liabilities recognized by English law. It must operate extraterritorially, for reasons of the comity of nations. Thus, British Railways could be sued in New York on the pre-existing debts of the old railways without any conveyance of property in New York being effected. Section 208 clearly contemplates the transfer of liabilities governed by foreign law.

There is no direct authority on universal succession, possibly because the principle is so obvious. Dicey, *Conflict of Laws*, 6th ed., affords some slight support; see rule 99, p. 440, rule 107, p. 458, the proviso as to "natural persons," and Illustration 4, p. 459; but the only authority cited is *Beavan v. Lord Hastings*.<sup>4</sup> The English courts recognized the doctrine of succession with regard to community of goods in *De Nicols v. Curlier*.<sup>5</sup>

Secondly, the principle of private international law which requires the court to recognize the universal successor is distinct from the principle applicable to its liabilities in England. The decision in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*<sup>6</sup> is conclusive authority against the defendants' submission that the plaintiff cannot sue in England because the liability is by Greek law subject to the moratorium, for this court there decided that where there was a contract, the proper law of which was English, the Hungarian State exchange regulations did not apply to it. The universal successor, like the heir in Roman law, is liable for the debts of the deceased, and those debts include the English debt, which is not in England cut down

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ATHENS S.A.<sup>1</sup> (1856) 2 K. & J. 724.<sup>2</sup> *Ibid.* 727-728.<sup>3</sup> (1921) 6 B. & C.R. 195.<sup>4</sup> 2 K. & J. 724.<sup>5</sup> [1900] A.C. 21; 16 T.L.R. 101.<sup>6</sup> [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

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by the moratorium, though the moratorium is available to protect the new bank against claims in Greece.

[PARKER L.J. Cannot the foreign government imply in its decree that no liabilities shall be transferred which are contrary to public policy?]

That would involve the English courts recognizing the public policy of a foreign country, and that is not done. If the moratorium had been passed just before the amalgamation decree the English courts would, on any claim by the plaintiff, have ignored the moratorium. Similarly, they will ignore it on the present claim.

*Lever* in reply. If the doctrine of universal succession is recognized here, a real danger will accrue, for the new bank would against its will be saddled with all the obligations of the two former companies, and that would be contrary to all good commercial practice and might prejudice creditors of the old companies. Though *Bergerem v. Marsh*<sup>7</sup> appears to be a case in which our courts recognized a succession which operated simply by virtue of a foreign law, it is not an important decision and should not be followed.

[ROMER L.J. The trouble is that it has found its way into Dicey in rule 99 (6th ed., p. 440).]

The rule as stated is limited to bankruptcy, and a trustee in bankruptcy is usually an officer of the court. It is conceded that there may be circumstances in which an English court would accept the jurisdiction of an appointment by a foreign State or court; but to recognize the doctrine of universal succession on so wholesale a scale as to change the debtor of an English creditor offends against the fundamental principles of English law.

*Cur. adv. vult.*

March 16. The following judgments were read.

DENNING L.J. stated the facts up to the date of the moratorium in 1949, and continued: Notwithstanding that moratorium, if an English bondholder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognized

<sup>7</sup> 6 B. & C.R. 195.

the moratorium. The proper law of the contract was English law and no enactment of the Government of Greece could affect the matter: see *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*.<sup>1</sup> A judgment of the English courts against those Greek companies would, however, have been of little use to an English bondholder because it was not enforceable in Greece, as the moratorium law forbade its enforcement there: and it would have been of little use in England because, so far as we know, neither the National Mortgage Bank of Greece nor the National Bank of Greece had any assets in England on which a creditor could levy execution. No English bondholder thought it worth while to seek to obtain a judgment in the English courts against those companies for the interest due to him.

In 1953 came the event which lies at the root of the present proceedings. The Greek Government passed a law amalgamating the National Bank of Greece (the guarantor of the bonds) with the Bank of Athens (a bank hitherto unconnected with the bonds). Those two banks are now amalgamated into one new banking company called the National Bank of Greece and Athens. Let me pause a moment to state the importance of this amalgamation in these proceedings. The plaintiff, Metliss, the holder of some of the bonds, now seeks to recover the interest on the bonds from this new company: and he brings this action in the English courts for the purpose. The reason is not far to seek. The Bank of Athens had, before the amalgamation, carried on business in this country for many years. It presumably had assets here. If the new amalgamated company has taken over those assets, they may be available to satisfy any judgment which the plaintiff may obtain in the English courts.

Before I discuss the amalgamation, however, I must complete the history. The new amalgamated company was, of course, protected in Greece by the moratorium law just as its predecessors had been: and it seems to have assumed that it was protected in England too. It did not anticipate an action by a bondholder in England like the plaintiff. On this assumption, the principal debtor, the National Mortgage Bank of Greece, on October 27, 1955, made an offer to the English bondholders to pay them in sterling on these terms: [His Lordship stated the terms of the offer set out above, and the nature of the plaintiff's claim, and continued:] There was a great contest in the court below as to whether the proper law of the contract contained in

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<sup>1</sup> [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

C. A. the bonds is English law or Greek law. The judge decided that  
1957 it is English law, and there is no appeal from his decision on that  
point.

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The two points raised in the appeal are these: First, the new amalgamated company says that it is not liable to be sued in the English courts on the bonds because it was not a party thereto; secondly, it says that if it can be sued, it can pray in aid the moratorium law of Greece to avoid the liability.

The first point raises a question of great importance in private international law. The plaintiff says that by Greek law the new amalgamated company is the universal successor of the old National Bank of Greece and that the English courts will recognize that succession so that he can sue the new amalgamated company without more ado. The plaintiff does not allege any novation by way of contract with the new company. His statement of claim recites the bonds and the guarantee by the National Bank of Greece, and the only paragraph which brings in the new amalgamated company is this: "The defendants are a corporation constituted under the laws of Greece and carrying on business inter alia at 6, Old Jewry, E.C.2, in the County of London. By a Greek decree dated February 26, 1953, the entire assets of the National Bank of Greece (including their liability under the said guarantee) were assigned and transferred to the defendants." In the reply the plaintiff sought to rely on an estoppel, but it was not pursued before us. The plaintiff rests his case solely on the Greek law relating to the amalgamation. I will therefore state what it is.

[His Lordship stated the enactments of February 18 and February 27, 1953, as set out above, and continued:] The English courts will recognize the Greek law as effective to dissolve the two former banking companies. They were Greek companies. It is only by Greek law that they gained any existence at all. If we recognize their existence by Greek law we must also recognize their dissolution by the same law: see *Lazard Brothers & Co. v. Midland Bank Ltd.*,<sup>2</sup> per Lord Wright. We also recognize the existence of the new amalgamated company, just as we recognize the existence of any other foreign company. But the question is, do we recognize the new amalgamated company as the universal successor of the former companies, so that it can sue and be sued for their debts without more ado?

The Greek lawyers in their evidence made it plain that their concept of a universal successor is derived from the Roman law,

<sup>2</sup> [1933] A.C. 289, 297; 49 T.L.R. 94.

and particularly from succession of an heir on the death of his testator. On looking again into the books of Roman law, I find that the maxim of classical Roman law was that "hereditas est successio in universum jus quod defunctus habuit." The heir stepped into the shoes of the deceased so far as the property rights were concerned. The debts due to or by the deceased were regarded as due to or by the heir personally. The testator and the heir were regarded by law as one person. The heir was liable for the debts of the deceased even though the estate was insufficient to meet them: but Justinian introduced a way of escape by allowing an heir to take the beneficium inventarii, by which, if he made an inventory of the estate within 90 days, he was not liable beyond the assets. If he did not take with benefit of inventory he was liable personally in full.

This concept of the universal successor is firmly entrenched in Continental systems of law: and the important question for our consideration is whether our English courts should recognize it and give effect to it. It is, be it noted, a very different concept from that of a receiver or administrator whose only duty is to collect and distribute the assets which come to his hands. We have nothing quite like it except the amalgamation of two corporations into one by statute, in which case the new amalgamated corporation succeeds to all the rights and liabilities of the former corporations and is, in effect, the universal successor of them. Take, for instance, the amalgamation in 1923 of the numerous railway companies into four main companies, or the amalgamation in 1947 of those four companies into one nationalized corporation, the British Transport Commission. By our law the new corporation succeeded to all the assets and liabilities of the former companies. Even though one of the former companies was insolvent, nevertheless the new amalgamated company had to pay its debts in full: see *In re Lee-on-Solent Railway Co. and Southern Railway Co.*<sup>3</sup> This succession included their assets and liabilities, not only in this country but also in foreign countries. The British Transport Commission succeeded, for instance, to the assets of the Southern Railway Co. in France, and also to any liabilities incurred by that company for negligent navigation by their ships in French waters. I have reason to believe that the French courts, familiar as they are with the concept of a universal successor, hold without hesitation that the British Transport Commission succeeded to

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<sup>3</sup> [1923] 2 K.B. 771; 39 T.L.R. 620.

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these assets and liabilities by virtue of the English statute without any further authority. Other countries would, no doubt, do the same. So also we should recognize a universal succession by foreign law.

Mr. Harold Lever asked us, however, to ignore the laws of other countries and decide this case by English law: he said that if we were to recognize universal succession by foreign law, it might produce injustice to English creditors. His argument proceeded on these lines: In English law a creditor has a right to look to his debtor for payment of the debt and to the assets of that debtor: and he cannot be forced to take anyone else instead, unless there is a new agreement by which he does so. Take this very case and consider the creditors of the two former banks. The English creditors of the old Bank of Athens were entitled to look for payment to that bank; and, notwithstanding the moratorium, in case of default they were entitled to enforce their debt against the assets of that bank in England. Upon dissolution of the bank by Greek law, the English creditors could still have recourse to the English assets by means of a winding-up order: see sections 399 and 400 of the Companies Act, 1948, and *Russian and English Bank and Florence Montefiore Guedalla v. Baring Bros & Co.*<sup>4</sup> Likewise the English creditors of the National Bank of Greece were entitled to look for payment to that bank; but, inasmuch as it had apparently little or nothing in the way of English assets, on its dissolution its English creditors had not much to gain from an English winding-up order. Now consider, it is said, what would happen if the English courts were to recognize the new amalgamated bank as the universal successor of the two former banks. The English creditors of the old Bank of Athens would have the English assets of that bank swept out of their grasp and made available for the English creditors of the old National Bank of Greece. If the assets were insufficient to pay the debts of both banks in full, the creditors of one bank would suffer a loss and the creditors of the other an advantage, contrary to the justice of the case. This is a real difficulty, but I think it can be surmounted by taking a leaf out of the book of Roman law. The Roman jurists had to consider the case where the testator was solvent, but the heir was insolvent. When the heir took over as universal successor, there was a danger that he might use the testator's assets to pay his own creditors, and so the creditors of the dead man might suffer accordingly. To remedy this

<sup>4</sup> [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

injustice the praetor gave relief by separating the assets. This meant that the creditors of the testator might apply to have the estates kept distinct until the debts were paid. This had to be done within a reasonable time, before the estates became inseparably mixed. No creditor who had in any way accepted the personal liability of the heir could afterwards claim to have the assets separated: see the Digest of Justinian, Book 42, Title 6, Article 1 (I), Article 2, X, XII, XV.

Likewise, it seems to me that the English courts would be able to devise machinery to prevent injustice to any creditors or group of creditors: but we are not called on to decide that point in this case. Suffice to say that it is not sufficient to detract from the general principle of universal succession. It is obvious that in the great majority of cases it is just and convenient for this country to recognize universal succession by the law of the domicile: and we ought not to be deterred from this recognition by the hypothetical case of a possible injustice, especially when the law may well be able to meet it, if and whenever it should arise.

It is interesting to notice that the courts of the United States have faced a similar problem and have arrived at a similar conclusion. They draw a sharp distinction between a succession established for a corporation by the law of its creation, and a receiver or liquidator appointed for a corporation still in being: see *Clark v. Williard*.<sup>5</sup> The former is called a "statutory successor" and his title is recognized everywhere, whereas the title of a receiver is not. The principle is stated in the Restatement of the Law of Conflict of Laws (Ch. 6, para. 161, at pp. 234-235) in these words: "If a statute of the State of incorporation which is in force at the time of the dissolution of a corporation provides that all its assets shall, upon dissolution, pass to a person designated in the statute, the right of such person to the personal property, wherever situated and whether tangible or intangible, will be recognized and given effect by other States and the designated person can bring suit in any State upon claims due to the corporation. . . . If the law of the State of incorporation provides that a statutory successor shall be subject to the obligations of the corporation, the liability of the statutory successor will be recognized in other States." Although the principle of universal succession is thus clearly recognized by the courts of the United States, they have run

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<sup>5</sup> (1934) 292 U.S. 112, 120, 121; (1935) 294 U.S. 211, 212-213.



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into difficulties about the protection of local creditors. There is no uniform policy on this point: see *Clark v. Williard*,<sup>6</sup> per Cardozo J.; but this does not detract from the principle itself.

My conclusion is, therefore, that the English courts will recognize this universal succession by the law of Greece and will, accordingly, hold that the new amalgamated company can sue and be sued here as a person who stands in the shoes of the former companies. It is entitled to all the assets and subject to all the liabilities of the former companies just as if it had itself contracted them. To take a parallel from ordinary life: just as the status of an individual, his birth, his death, his marriage and succession are governed by the law of his domicile: so also the status of a corporation, its creation, its dissolution, its amalgamation and succession are governed by the law of its incorporation.

This brings me to the second point. The defendant company says that if the English courts recognize Greek law so as to make it liable as universal successor, so also they should recognize the Greek law of moratorium. The English courts cannot, it is said, when dealing with the liability of the defendant company, take the Greek law in part and reject it in part. They must recognize it in whole or ignore it altogether.

This is a forceful argument, but I do not think we can give effect to it. The rules of private international law do not permit it. The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt. If the old National Bank of Greece had continued in existence, the English courts would give judgment against that company for immediate payment without regard to the moratorium. Greek law has destroyed the old National Bank of Greece and has set up the new company in its place. We recognize that Greek law has power of life and death over the company which it created, and we must accept the substitute which it has provided. But when the substitute stands in our courts to answer for an English debt, it must answer according to English law, which says that the debt must be paid according to its terms. I am of opinion that the defendants are liable in this action, and I would dismiss the appeal.

<sup>6</sup> 294 U.S. 211, 214-215.

ROMER L.J. In this case the plaintiff is suing the defendant company on a guarantee to which the company was not a party. The guarantors were the National Bank of Greece, but the plaintiff's case is that by reason of a decree passed in Greece (which was the country of the National Bank's domicile) the bank ceased to exist in 1953 and the whole of its assets and liabilities, including the liability to the plaintiff under the guarantee, became vested in the defendant company. The plaintiff does not, and could not, rely on novation, but he rests his claim solely on the decree coupled with the fact (now admitted by the defendant company) that the proper law of the contract of guarantee was English. The defendant company's answer, in short, is that our courts will not recognize or enforce against it a liability which it did not contractually accept but which was imposed upon it by foreign law, videlicet, by the law of Greece.

The decree operated on the Bank of Athens as well as on the National Bank of Greece, and its effect under Greek law seems to be fairly clear, and was proved by experts who were called at the trial. In the course of his evidence Mr. Seferiades was asked by Mr. Foster what the expression "assets and liabilities" in Article 4 of Law No. 2292 comprised. He answered: "The construction of the whole article leaves in my opinion no doubt at all that by 'liabilities and assets' it includes all liabilities and rights, but the most important part of this section is the words 'universal successor.' It cannot be treated as anything else except as succession; not as a contractual relationship imposed by law. It would have been quite inconceivable. The law abolishes the personality of the one party. There is not the element of parties in a contract being imposed by law. There is not the element of a specific object. Sellers J.: That gets over the necessity for the new comer to contract? (A) Yes; it has universal succession." A similar view was expressed by Mr. Zaoussis, who said in cross-examination: "Imagine the following situation—that there was an action against the old bank, the action was served before the amalgamation and the trial was fixed after the amalgamation. Well, at the trial the new bank would take the place of the old bank and the position would remain exactly the same. The law provides this and it would be exactly the same. That is the meaning of Article 4. (Q) And that is the meaning of 'universal successor'? (A) Yes, in this case."

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The position accordingly is that under Greek law the defendant company became automatically entitled, on its creation, to the assets of the two former companies and subject to their then existing liabilities. By reason of section 8 of Decree 2292, however, the obligations to which the defendant company became subject were mitigated by such conditions and circumstances as had attended them previously; and among these was the moratorium which the Greek Government had declared in relation to the bonds.

There is no direct authority on the point which we have to consider but, in the absence of some compelling reason to the contrary, one would suppose that, on general principles of international comity, our courts would accord full recognition to these results, under Greek law, of the amalgamation of 1953; just as we would expect the courts of another civilized country to recognize the effect of an amalgamation of English companies under the Companies Act, 1948.

The dissolution under Greek law of the National Bank of Greece is a fact which clearly has to be, and is, recognized by our courts. If a foreign corporation is dissolved by its own domestic law "its existence as a juristic person ceases in the "eyes of English law" and thereafter it cannot be sued here (Cheshire's Private International Law, 4th ed., p. 478). Accordingly, the old Bank of Greece ceased for all relevant purposes to exist in 1953. It is further established that the status and powers of a foreign corporation which is still in being are ascertained and determined by reference to the law of the country in which it has its domicile: Dicey's Conflict of Laws, 6th ed., pp. 194, 195, namely, the country in which it is incorporated. That being so, we would surely look also to the country of the company's incorporation to discover what incidents had been attached by its laws to the body which it had created. Having ascertained what they are, effect would, in general, be given to them in our courts. I say "in general" because the recognition which we accord to foreign legislative or administrative acts is subject to one important qualification, namely, that municipal laws will not be given an extra-territorial effect if they are prejudicial to the rights of other nations or to those of their subjects (*per* Selwyn L.J. in *The Halley*).<sup>7</sup> Subject to this qualification I can see no reason why we should not recognize and give effect to the defendant company's succession to the

<sup>7</sup> (1868) L.R. 2 P.C. 193, 203.

assets and liabilities of the former banks which resulted from (and which was indeed the whole object of) the amalgamating decree. It cannot be said that the succession was in any way repugnant to our own system of jurisprudence, for we ourselves have adopted it in the amalgamation of companies under section 208 of the Companies Act, 1948. Apart altogether from that, however, it is well-established that we will give effect to foreign adjudications (or their equivalent) of bankruptcy—provided at all events that the foreign bankruptcy does not discriminate against creditors in this country. Moreover, it was held in *Dulaney v. Merry & Sons*<sup>8</sup> that a trustee under a deed of assignment for the benefit of creditors executed by a foreign debtor in the country of his domicile, and valid by the law of that country, can establish in the courts of this country a good title, as against an execution creditor, to goods in this country belonging, at the date of the assignment, to the debtor, although the deed had not been registered pursuant to the Deeds of Arrangement Act, 1887. The deed in that case had been executed in the State of Maryland, and Channell J.<sup>9</sup> drew attention in his judgment to the fact, proved in evidence, that English creditors and other foreign creditors would rank *pari passu* with the American creditors in the administration of the estate under the deed. Another illustration of the recognition by our courts of succession under foreign law is to be found in the case of the death of persons of foreign domicile; the beneficial succession, whether testate or intestate, to the movables of such persons is governed by the law of the domicile. Finally, and of more direct relevance to the present case, is a proposition which is exemplified by Illustration No. 4 of Dicey's Conflict of Laws (6th ed., p. 459). That is to the effect that if A., an Englishman, dies in a foreign country and B. becomes his successor there without benefit of inventory, B. can be sued here for a debt which A. had incurred in his lifetime to an English creditor. *Beavan v. Lord Hastings*<sup>10</sup> is cited in support of that proposition, though the editors recognize in the footnote that the case is not a direct authority; Sir William Page Wood V.-C. did not in fact have to deal with the point, for the only issue before him was whether the plaintiff creditor had a remedy in equity and he decided that he had not. In the course of his judgment, however, the Vice-Chancellor does appear to be assuming that the plaintiff could have sued the defendant, as universal successor to his brother, by an action at law; but

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<sup>8</sup> [1901] 1 Q.B. 536; 17 T.L.R. 253.

<sup>9</sup> [1901] 1 Q.B. 536, 539.

<sup>10</sup> (1856) 2 K. & J. 724, 727.

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 1957 (if at all) that aspect of the matter was canvassed.

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The foregoing considerations all tend to support the view that we ought to recognize the effect under Greek law of the dissolution of the two former companies and the creation of the defendant bank; but subject always to the qualification to which Selwyn L.J. referred in *The Halley*.<sup>11</sup> Under Greek law the defendant company became entitled to such assets (if any) as the National Bank of Greece possessed in this country; and I can see no reason why, subject to safeguarding the rights of the creditors, our courts should not have assisted the defendant company to obtain possession of those assets. As a corollary we should, in my opinion, also enforce against the defendant company the liabilities which accompanied the right to the assets. Unless, therefore, the amalgamation is within Selwyn L.J.'s qualification, the liability on which the plaintiff is suing in this action appears to me to be an incident of the amalgamation which should be recognized and enforced by our courts. That the incident is favourable to the English creditors of the old National Bank of Greece cannot be doubted. While that corporation was still in existence it could have been sued here. Its dissolution prevented any such action from being taken thereafter, but the creditors could have presented a petition to wind it up under section 400 of the Companies Act, 1948. The right to do so was not interfered with by the Greek decree (nor could it have been) but the creditors acquired in addition under that decree a right to payment out of the assets of the Bank of Athens to which the defendant bank succeeded. So far, therefore, as the English creditors of the old National Bank are concerned no question of detriment arises as an obstacle to our recognition of the amalgamation.

The position of the English creditors of the Bank of Athens is, of course, different; but it is not before us and we have no information as to those creditors. It is possible that their debts were paid or satisfactorily provided for when the amalgamation was effected. If, however, they had at that time sought the protection of our courts it may well be that their interests would have been safeguarded in the manner suggested by my Lord [Denning L.J.], whose judgment I have had the advantage of reading. It is, however, perhaps enough for me to say that it has not been established in these proceedings that the amalgamation was necessarily detrimental to the English

<sup>11</sup> L.R. 2 P.C. 193, 203.

creditors of the old Bank of Athens and their position in the matter can, in my opinion, be disregarded.

In my judgment, therefore, the plaintiff is entitled to succeed in the claim which he has brought against the defendant company; for the decree created a statutory universal succession of a kind which our courts will recognize, and the liability on which the plaintiff sues is an incident of that succession which is favourable to the English creditors of the former National Bank of Greece.

As to the defendant bank's second point, there is really nothing that I can add to my Lord's rejection of it. The defendant company took over the whole of the liabilities of the former National Bank, and not merely those which could only be enforced in Greece. It became, of course, entitled to the same protection under the moratorium as the old bank had formerly enjoyed and could not therefore be sued in Greece. The moratorium, however, never afforded protection against proceedings in this country, and in that respect the defendant company cannot be in any better position than was its predecessor. For the above reasons, I agree that the appeal must be dismissed.

PARKER L.J. I have come to the same conclusion. The first point taken before this court is that the defendants, the new bank, are not liable on the guarantee since they are not parties to it, and it is not suggested that there has been a novation. The plaintiff relies solely on a Greek decree whereby the entire assets and liabilities of the National Bank of Greece, the original guarantors, were transferred to the defendants, and such a transfer, it is contended, will not be recognized by our courts.

Now the law of Greece has adopted the conception of "universal succession" as developed in Roman law. Under this conception a new person or entity continues the personality of another. All the rights and liabilities of the former are automatically transferred to and vested in the latter. The new person or entity succeeds "per universitatem" and not by a series of particular acts to each item of property. Thus, under many Continental systems of law which adopt this conception, two persons on marriage succeed in the absence of special contract to the goods of the other. "The spouses become co-owners of the whole without any act of transfer such as conveyance, registration, or assignment, by the mere fact of marriage, uno actu. The acquisition is similar to the 'universal succession' upon death. The 'couple' succeeds the husband, the 'couple'

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“succeeds the wife”: see Martin Wolff, *Private International Law* (2nd ed., p. 357). Again, an heir who takes “without benefit of inventory” succeeds to the assets and liabilities of the deceased and becomes personally liable for the deceased’s liabilities regardless of the value of the assets. Further, in many systems of law, a trustee in bankruptcy succeeds in the same way to all the assets of the bankrupt. Similarly, under the relevant Greek law the new bank is “substituted, ipso jure and without any other formality, in all rights and obligations of the amalgamated banks, as their universal successor.”

The question in issue is whether the English courts should recognize this law as vesting the liabilities of the amalgamated banks in the new bank. There is no doubt that the English courts recognize the law of the country of domicile as governing the status of a person and the law of the country of incorporation as governing the status of a body of persons. In the case of a corporation that is the law by which the creation and dissolution are governed, and our courts will look to that law to “find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature.” These are the words of Bowen L.J. in reference to the English company in *Baroness Wenlock v. River Dee Co.*<sup>12</sup>

Accordingly, it is clear that we recognize the existence of the new bank; but the more difficult question is whether we should also recognize its succession to the assets and liabilities of the old bank. Though no evidence was given as to the respective assets and liabilities of the amalgamated banks in this country, it may well be that, whereas both had liabilities, only one, the Bank of Athens, had assets here. If that were the case, then, if the total assets here were insufficient to pay off the liabilities of both the old banks, the creditors of the Bank of Athens would be prejudiced, whereas the creditors of the National Bank of Greece would gain an advantage. Looked at in this way, it could be contended that no transfer of assets and liabilities in this country should be recognized, and that the respective creditors should be left to wind up the old banks and to obtain payment or a dividend in the liquidations as in the case of the Russian banks. In the case of the Russian banks, however, the foreign legislation purported to confiscate the assets here to the prejudice of all English creditors, whereas on the assumptions

<sup>12</sup> (1887) 36 Ch.D. 674, 685n.; 3 T.L.R. 814.

made above in the present case the English creditors as a whole are in no way prejudiced, and the foreign legislation is in no sense confiscatory. In any event, the point does not arise here since there is no evidence that any English creditors have been prejudiced.

I have come to the conclusion that we should recognize this transfer of assets and liabilities. Not only does the balance of convenience suggest that result, but it seems to me that such authority as there is points that way. Thus the English courts recognize the transfer of assets to husband and wife on marriage where by the law of the country of the matrimonial domicile there is, in the absence of contract, a "universal succession" by the couple to the goods of each spouse. As Lord Lindley said in *In re Martin, Loustalan v. Loustalan*<sup>13</sup>: "It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense." Again, a foreign heir who elects to succeed "without benefit of inventory" could, it seems, if he came within the jurisdiction, be sued here by English creditors for payment in full of any debts irrespective of the amount of the assets: Dicey's Conflict of Laws (6th ed., p. 459) cites *Beavan v. Lord Hastings*<sup>14</sup> for this proposition, and I think rightly. It is true that the action against the heir in equity failed since the latter had not rendered himself accountable as an executor de son tort, but the Vice-Chancellor clearly took the view that an action at law would lie.

It is, of course, true that a foreign administrator cannot sue or be sued here in that capacity. His status as an administrator is not recognized here and he must take out an English grant. There is, however, good reason for this. Not only is he not a "universal successor" but it is necessary to see that the rights of English creditors as a whole are safeguarded and that duties are paid.

Again, "An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country, to whose jurisdiction he is properly subject, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England": see Dicey, Rule 99 (6th ed., p. 440), and

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<sup>13</sup> [1900] P. 211, 233; 16 T.L.R. 354.      <sup>14</sup> 2 K. & J. 724.



C. A. *Bergerem v. Marsh.*<sup>15</sup> This is, however, subject to the proviso that the foreign law enables the English creditors to share all the assets equally with the foreign creditors.

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Finally, I am influenced in coming to this conclusion because, as it seems to me, our legislation has in effect adopted the conception of "universal succession" in section 208 of the Companies Act, 1948. Thus, when an amalgamation of two companies is sanctioned by the court and the order provides for the transfer of property or liabilities, then by subsection (2) "that property shall, by virtue of the order, be transferred to" and vest in, and those liabilities shall, by virtue of the order, "be transferred to and become the liabilities of, the transferee company." The property and liabilities there referred to are plainly intended to include property and liabilities abroad. It is true that creditors can object, but if they do not I should expect the foreign courts to recognize the transfer.

The second point taken is an alternative. If the English courts recognize the Greek law transferring the liabilities then, it is said, they should also recognize the Greek laws suspending the liability under the guarantee. The plaintiff cannot, it is said, rely in part on Greek law and reject the rest. Alternatively, it is said that on a true interpretation of the Greek decree effecting the amalgamation only those liabilities are transferred which are not contrary to the public policy of Greece. To transfer a liability to pay an English bondholder would be to transfer something which was illegal by Greek law and contrary to the public policy of Greece. These arguments, however, on analysis are not, in my opinion, valid arguments. The application of the foreign law to status does not involve applying the foreign law as to obligations. What was transferred was the liability under the guarantee, whatever it might from time to time be. If the old National Bank of Greece was liable to be sued in England, as it was, so could the new bank. Further there is no room for any implication cutting down the type of liability transferred—indeed, any such limitation would be inconsistent with the conception of "universal succession" on which the defendants must rely to obtain the foreign assets. Accordingly, I would dismiss the appeal.

*Appeal dismissed.*

*Leave to appeal to the House of Lords granted.*

Solicitors: *Stibbard, Gibson & Co.; Hardman, Phillips & Mann.*

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<sup>15</sup> (1921) 6 B. & C.R. 195.

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the case of *Thwaites v. Wilding* [1883]<sup>2</sup>; but that case merely said that the conditions imposed by the Act must be rigidly complied with in order to deprive the landlord of his remedy at common law, and to bring the lodger within the protection of the Act. In that case the plaintiff had not complied with those conditions at all, but relied upon a previous declaration and inventory made on the occasion of a former distress. In this case the plaintiff has rigidly complied with the conditions of the Act.

*Roskill, K.C. (H. S. Simmons with him)*, for the defendant.—The inventory is not subscribed in fact. Subscribed does not mean superscribed. It means inscribed at the end or foot of the document. The statute deprives the landlord of his common-law right—recognised as such in *Morton v. Palmer* [1881],<sup>3</sup> if any such recognition were necessary—provided the lodger complies with certain conditions which must be rigidly complied with—*Thwaites v. Wilding*.<sup>2</sup> This is not a mere technicality; the object of the Legislature is to authenticate the inventory itself as the document of the lodger, that his mind may go with its contents, so that he cannot subsequently escape full responsibility for the statements contained in it. If the plaintiff's view is correct he may merely sign the declaration, leave some one else to draw up the inventory, and then, when he is charged with a misdemeanour, plead that he never subscribed the inventory, and was not aware of its contents.

*E. Cockle* was not called upon in reply.

LORD ALVERSTONE, C.J.—This appeal must be allowed. In deciding this case the County Court Judge purported to follow the decision of *Thwaites v. Wilding*.<sup>2</sup> That case simply decided that the conditions of the Act must be rigidly complied with. With that I entirely agree. But that does not place any interpretation upon the terms of the Act. The Act says that a lodger may serve his superior landlord with a declaration in writing made by the lodger to which shall be annexed a correct inventory subscribed

by the lodger. In this case the declaration stated that the inventory, which is partly written on the same piece of paper, is a correct inventory; and that declaration is subscribed. In my opinion that is a sufficient subscription of the inventory to satisfy the terms of the Act.

KENNEDY, J., and RIDLEY, J., concurred.

*Appeal allowed.*

Solicitors—Dyson, Smith & Marchant, for appellant; Steadman, Van Praagh & Gaylor, for respondent.

[Reported by *W. Hussey Griffith, Esq., Barrister-at-Law.*

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*Company—Holder of Fully Paid Shares—Limitation of Liability—Contract Subject to Foreign Law—Personal Liability of Shareholders by Foreign Law.*

*An English limited company was empowered by its memorandum and articles of association to transact business abroad. The company contracted a debt in a foreign State by the law of which each stockholder in a corporation was individually and personally liable for a part of the debts of the corporation proportionate to his share of its capital. The company having failed to pay the debt, the creditor brought an action in England against a shareholder whose shares were fully paid up, claiming to recover from him a part of the debt proportionate to his interest in the capital:—Held, that the claim, being inconsistent with the limitation of a shareholder's liability by English law, could not be maintained.*

Action tried by Kennedy, J., without a jury.

The plaintiffs, the Rison Iron and Locomotive Works, were a corporation incorporated by virtue of the laws of the State of California in the United States of America, and carried on the business of

(2) 52 L. J. Q.B. 734; 12 Q.B. D. 4.

(3) 45 L. T. 426.

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general machinery manufacturers in that State.

The defendant, Sir Christopher Furness, was a member and shareholder of and in a company called the Copper King, Lim., whose registered offices were in the City of London, and was the holder of 62,166 l. shares in the company.

The Copper King, Lim., was registered as a joint-stock company under the Companies Acts, 1862 to 1898, with a capital of 350,000l. divided into 350,000 shares of 1l. each, all of which was fully subscribed, and by its memorandum of association the objects for which the company was incorporated were, *inter alia*, (a) To acquire any gold, copper, silver, or other mines, mining rights and auriferous land in the United States of America, Australasia, and elsewhere, concessions, grants, decrees, rights, powers, privileges, or contracts from any Government, company, State, sovereign, or authority, supreme, municipal, local, or otherwise, which might seem to the said company capable of being turned to account, and to work, develop, carry out, exercise, and turn to account the same. (b) To search for, prospect, examine, and explore any territories and places in the United States of America, Australasia, and elsewhere, and to employ and equip expeditions, explorers, experts, and other agents. (c) To search for, crush, win, get, quarry, smelt, calcine, refine, dress, amalgamate, manipulate, and prepare for market auriferous quartz and ore and mineral substances of all kinds, whether auriferous or not, and to carry on any other metallurgical operations which might seem conducive to any of the company's objects. (d) To purchase, hire, or otherwise acquire, use, maintain, sell, exchange, or otherwise deal with or dispose of and turn to account, engines, waggons, steam and other ships, barges, plant, machinery, live and dead stock, hides, skins, fat, and other animal products, implements, stores, and materials of every kind requisite for any of the purposes of the company, and to acquire by purchase, lease, or otherwise any lands or buildings, real or personal property, easements, rights, or privileges, which the company might think suitable or convenient for any purposes of its business. (e) To carry out all or any of the fore-

going objects in any parts of the world, and either as principals or agents or in partnership or conjunction with any other person, firm, association, or company.

(f) To do all such other things as were incidental or conducive to the attainment of the above objects. And by the articles of association the directors were empowered by article 87 thereof—(D) To appoint in order to execute any instrument or transact any business abroad any person or persons, the attorney or attorneys of the board, or the said company, with such powers as they deem fit, including power to appear before all proper authorities and make all necessary declarations so as to enable the company's operations to be validly carried on abroad. . . .

(L) To do all such other things and take such steps as might be then or might at any time become necessary so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company might carry on business or where all or any of the property and undertaking of the company might be situate.

Pursuant to these terms of the memorandum and articles of association, the Copper King, Lim., carried on business in the counties of Fresno and Contra Costa, in the State of California aforesaid.

The plaintiffs, in accordance with contracts made between themselves and the Copper King, Lim. (such contracts being contained in letters dated respectively on and between May 12 and June 2, 1902), between September 30 and December 15, 1902, supplied and delivered machinery and goods to, and did work for, the Copper King, Lim., in the State of California, at the total price and cost of 10,404 dollars 96 cents.

On February 4, 1903, the plaintiffs commenced an action against the Copper King, Lim., in the Superior Court of the City and County of San Francisco, in the United States of America, for payment of that sum, and issued writs of attachment against the Copper King, Lim., under which the properties of that company in the counties of Fresno and Contra Costa, and certain moneys belonging to them in the bank, were attached pending the action.

In June, 1903, and before the action

## RISDON IRON AND LOCOMOTIVE WORKS v. FURNESS.

had been tried, a petition in bankruptcy was filed against the Copper King, Lim., and subsequently the company was adjudicated bankrupt under the bankruptcy laws of the United States, and in consequence of the adjudication of bankruptcy the action was stayed and the attachments were released, and the plaintiffs alleged that the costs and expenses which they had incurred in and about the actions, attachments, and proceedings were thereby rendered useless and lost, and that they, as from the adjudication, became and were creditors of the estate of the Copper King, Lim., for the said sum of 10,404 dollars 96 cents, and for the amount of the said costs—namely, 1,077 dollars 20 cents—making together the total sum of 11,482 dollars 16 cents.

At extraordinary general meetings of the Copper King, Lim., held respectively on July 31 and August 13, 1903, a special resolution was duly passed and confirmed that the company should be voluntarily wound up.

The plaintiffs alleged that the Copper King, Lim., so carrying on business as aforesaid in the State of California, and the defendant as a member and shareholder thereof, as above stated, became and were subject to the laws of that State, and in particular to article 12 of the Constitution of the State of California,<sup>1</sup>

(1) The Constitution of the State of California, 1879, art. 12, provides:

Section 3 [so far as material]: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted and incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole subscribed capital stock or shares of the corporation."

Section 15: "No corporation organised outside the limits of this State shall be allowed to transact business within this State on more favourable conditions than are prescribed by law to similar corporations organised under the laws of this State."

The Civil Code of the State of California provides:

Section 322: "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corpora-

and section 322 of the Civil Code of the State of California<sup>1</sup>; that the defendant,

tion may institute joint or several actions against any of its stockholders for the proportion of his claim, payable by each, and in such action the Court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt; and if an action has been brought against him upon such debt, it shall be dismissed as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock. The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the instalments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or other trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee shall not be liable under the provisions of this section by reason of any such investment, nor shall the person for whose benefit the investment is made be responsible in respect to the stock, until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder as respects such liability. In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this state."



## RISDON IRON AND LOCOMOTIVE WORKS v. FURNESS.

as such shareholder, was personally liable for such proportion of the said debt of 11,482 dollars 16 cents owing by the Copper King, Lim., as the amount of his shares therein bore to the total subscribed capital of the Copper King, Lim., and that the defendant was liable to pay the sum of 405*l.* 15*s.*, being the portion of the said debt (in English currency) due from the defendant.

The plaintiffs accordingly brought the present action, claiming payment of the last-mentioned sum.

The defendant, in his statement of defence, *inter alia*, alleged that if article 12 of the Constitution of the State of California and section 322 of the Civil Code of the State of California were as represented by the plaintiffs, that article and section, so far as they purported to affect foreign companies or corporations, or the shareholders or stockholders thereof, were unconstitutional and invalid, being contrary to the provisions of the Constitution of the United States of America; and he denied that he, as a shareholder in the Copper King, Lim., became subject to the laws of the State of California, or was personally liable for the debts of the company, or any part thereof, and alleged that the statement of claim disclosed no cause of action.

*Montague Lush, K.C.*, and *E. M. Pollock*, for the plaintiffs.—The defendant, as a shareholder in the Copper King, Lim., is personally liable to the plaintiffs for a share of its debt proportionate to his share of its capital. By its memorandum and articles of association the Copper King, Lim., is empowered to enter into contracts in California. A contract is governed by the law which the parties intend should govern it, and where a person subject to English law enters into a contract in a foreign country it is presumed that it is intended to be governed by the law of that country in the absence of evidence to the contrary—*Branly v. South-Eastern Railway* [1862].<sup>2</sup> In the present case the circumstances shew that the contracts between the Copper King, Lim., and the plaintiffs were intended to be governed by the law of California. A party who contracts in a foreign

(2) 31 L. J. C.P. 286; 12 C. B. (N.S.) 63.

country does so in the character assigned to him by the law of that country. It is true that by the comity of nations the law of one country does not altogether ignore the artificial persons created by the law of another country, but it only recognises them so far as its own principles enable it to do so—*Lindley on Companies* (6th ed.), p. 1,222 and note thereon; *Foote's Private International Law* (3rd ed.), p. 126; *Alivon v. Furnival* [1834],<sup>3</sup> and *Newby v. Van Oppen* [1872].<sup>4</sup> Thus the Copper King, Lim., could not have made these contracts as an English limited company, which is an artificial creation existing only in the sight of English law and unknown to Californian law. It could only have made them as a corporation or joint-stock association, such as the law of California recognises, and as to which it is provided by article 12 of the Constitution of that State<sup>1</sup> and section 322 of the Civil Code thereof,<sup>1</sup> that each stockholder in the corporation shall be individually and personally liable for its debts. The defendant accordingly became personally liable to the plaintiffs upon these contracts—*Flash v. Conn* [1883]<sup>5</sup> and *Pinney v. Nelson* [1901].<sup>6</sup>

Moreover, the defendant entered expressly into the contracts with the plaintiffs either as principal or as guarantor. By article 87 of the company's articles of association he and the other shareholders empowered the directors to enter into the contracts in California on their behalf, or they thereby undertook to indemnify them against liability. Having regard to that article, the plaintiffs naturally entered into the contracts on the understanding that the liability of the shareholders was to be unlimited, in accordance with the law of California, and it would be contrary to justice not to give effect to that view.

Though the contracts purported to make the shareholders personally liable, they were not *ultra vires* the Companies Acts or the constitution of the company as an English limited company. They do not affect the limitation of the liability of

(3) 3 L. J. Ex. 241; 1 C. M. & R. 277, 296.

(4) 41 L. J. Q.B. 148; L. R. 7 Q.B. 293.

(5) 109 U.S. R. 371 (Amer.).

(6) 183 U.S. R. 144 (Amer.).

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the shareholders as such. The shareholders by the articles of association voluntarily submitted themselves to a liability over and above and quite distinct from their liability by English law. It was immaterial whether the plaintiffs brought the action in California and sued on the judgment in England, or brought the action directly in England, because in either case the English Court would have to enforce Californian law.

*J. A. Hamilton, K.C.*, and *Leck*, for the defendant.—The defendant is not personally liable for a share of the debt owing by the Copper King, Lim., to the plaintiffs by reason of the contracts. He never personally entered into any contract with the plaintiffs. There was never, in fact, any privity of contract between them. He did not by the articles of association of the company or otherwise empower the directors to enter into contracts on his behalf or to pledge his credit for the company's debts; nor did he undertake to indemnify the creditors of the company. If the articles of association purport to empower the directors to pledge the credit of the shareholders for more than the amount of their calls, the articles are *ultra vires*.

The defendant is not liable merely because the contracts are governed by the law of California. It may be that by the law of that State the stockholders of a corporation are individually liable for its debts, but the defendant has never submitted himself or become liable to the law of that State. One State undoubtedly for purposes of procedure takes notice of the constitution of a corporation in another State. Here the question is whether a member of an English limited company, who has paid his calls in full, can be made liable for a debt of the company contrary to the law of England. The company exists by virtue of the English Acts as a limited company only. The defendant is entitled to plead that the company alone, and not himself personally, is liable on the contracts—*General Steam Navigation Co. v. Guillon* [1843].<sup>7</sup> If the contention of the plaintiffs is sound, it follows that every part-owner of a tramp steamer whose captain is empowered to pledge the credit

(7) 13 L. J. Ex. 168; 11 M. & W. 877.

of the company is in danger of becoming personally liable by the law of some country where the steamer may call.

The cases cited are distinguishable. In *Flash v. Conn*<sup>5</sup> the defendant was a shareholder in a corporation subject by the terms of its constitution to the law of the State of New York, by which stockholders were personally liable to the creditors of the corporation. He did not and could not contend that he was not personally liable by the intrinsic constitution of the company. That case is the converse of this, in which the defendant is a shareholder in a company by the constitution of which the liability of the shareholders is limited to the calls on their shares. In *Pinney v. Nelson*<sup>6</sup> the company was incorporated in Colorado for the purpose of carrying on business in California, but the defendant, though a stockholder in the company, was subject to the jurisdiction of the State of California. The case is thus entirely different from that in which the shareholder is not subject to the foreign jurisdiction imposing personal liability. In that case the only question was whether the section of the Civil Code of California making the stockholder liable was valid as being in accordance with the Constitution of the United States. If it was valid, it followed as a matter of course that the defendant was liable. In *Branly v. South-Eastern Railway*<sup>2</sup> it was assumed that there was a contract between the plaintiff and the defendants, and the question was merely what law governed it. Here there is no contract between the plaintiffs and the defendant.

*Montague Lush, K.C.*, in reply.—The statutory limitation of liability by the Companies Acts did not prevent the defendant from authorising the directors to make a contract which would be personally binding upon him. It is only a limitation of his liability to the company. A decision in favour of the plaintiffs would not have the far-reaching effects suggested. It is rarely that the articles of a shipping company empower the captain to pledge the credit of the owners. In any case the shareholders would only be affected by the law of a foreign country in which they had authorised the directors to transact business.

*Curr. adv. vult.*

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Jan. 11, 1905.—KENNEDY, J.—In this case the plaintiffs are a foreign corporation incorporated under and by virtue of the laws of the State of California, and carry on the business of general machinery manufacturers there. To this Californian corporation an English company, the Copper King, Lim., which was registered as a joint-stock company under the Companies Acts, 1862 to 1878, became, as the plaintiffs allege, indebted in the year 1902 for machinery and goods supplied to, and work and labour done for, the Copper King, Lim., and their agents, the Pacific Coast Smelting and Refining Co., in San Francisco.

The defendant Sir Christopher Furness was, when this indebtedness was created, a large shareholder in the Copper King, Lim. In 1903 the plaintiffs commenced an action against the Copper King, Lim., in the Superior Court of the City and County of San Francisco to recover the amount of the debt. Before, however, this action could be tried, certain creditors of the Copper King, Lim., commenced in America bankruptcy proceedings against the Copper King, Lim., and on their petition the Copper King, Lim., was adjudicated bankrupt according to and under the bankruptcy laws of the United States. In August, 1903, resolutions for a voluntary winding-up of the Copper King, Lim., which had been passed at shareholders' meetings held in the previous June, were duly confirmed. On June 18, 1903, the present action was commenced, in which the plaintiffs seek to recover from the defendant a sum of 405*l.* 15*s.*, being the same proportion of the alleged total claim, consisting partly of the debt above mentioned and partly of costs incurred by the plaintiffs in their action against the Copper King, Lim., which the bankruptcy proceedings rendered abortive, as the amount of the defendant's holding in the Copper King, Lim., bears to the total share capital of that company.

The claim of the plaintiffs, as pleaded and as agreed before me by counsel who appeared in support of it, is grounded on article 12 of the Constitution of the State of California and section 322 of the Civil Code of the same State, and

also upon certain provisions in the memorandum and articles of association of the Copper King, Lim.

Sections 3 and 15 of article 12 of the Californian Constitution, so far as they are pleaded and relied upon by the plaintiffs, provide, in substance, that each stockholder of a corporation or joint-stock association shall be individually and personally liable for all the debts and liabilities which have been contracted during the time he was a stockholder according to the proportion which his holding bears to the subscribed capital stock or shares of the corporation; and, further, that no corporation organised outside the limits of the State shall be allowed to transact business within the State on more favourable conditions than are prescribed by law to similar corporations organised under the law of the State. The material parts of section 322 of the Civil Code are to the same effect, and it expressly enacts that the liability of each stockholder of a corporation formed under the laws of any other State or territory of the United States, or of any foreign country, and doing business within the State of California, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of that State.

The provisions of the memorandum of association of the Copper King, Lim., upon which the plaintiffs rely, are fully set out in the statement of claim. I may sufficiently state them as declaring the objects of the incorporation to be (*inter alia*) the acquisition of mines, mining rights, and auriferous land in the United States of America, Australasia, and elsewhere, and of concessions and privileges which might be worked or developed; the working of ores and minerals; the acquisition by purchase, hire, or otherwise of various kinds of machinery; the carrying out of any of the declared objects in any parts of the world, either as principals or as agents; and the doing of all such other things as were incidental or conducive to the attainment of the declared objects of the incorporation.

By sections D and L of article 87 of the articles of association the directors of the Copper King, Lim., were empowered to

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appoint any person or persons the attorney or attorneys of the board for the transaction of business abroad with such persons as they might deem fit, and might be necessary to enable the company's operations to be validly carried on abroad, and to do all such other things as might then or might at any time become necessary, so as to comply with any statutory enactment, rule, or regulation in any country, colony, or place where the company might carry on business or where all or any of the property and undertaking of the company might be situate.

In the defence the defendant, whilst denying or not admitting several of the averments of the statement of claim, which, so far as they appear to me to be material, I have set forth above, further objects that the statement of claim discloses no cause of action; and it was ordered on a summons that this point of law should be argued in the first instance. After hearing the argument I reserved my judgment, in order that I might be enabled more fully to peruse and consider two decisions of the Supreme Court of the United States to which the plaintiffs' counsel drew my attention and upon which they strongly relied—not, of course, as binding authorities, but as valuable supports to their contention. I have found nothing in those cases which affects the view, to which I was strongly inclined at the conclusion of the arguments of counsel, that the defendant is right in his demurrer, and that the plaintiffs have no cause of action here. In my opinion the defendant did not, by becoming a shareholder in the Copper King, Lim., under the memorandum and articles of association, authorise the company or constitute the company, or any director of the company, his agent to pledge his personal credit or to create a personal obligation enforceable here against him, either in the nature of debt or of guarantee in favour of those with whom the company might do business either in California or elsewhere. The Copper King, Lim., is an English company, registered under English law, the liability of whose members is, as the memorandum of association expressly states, limited—limited, that is, under and according to the pro-

visions of English law, which governs such companies, and prescribes and defines the liabilities of their shareholders. Whilst this company may, under those articles, trade and carry on business in any foreign country as therein set forth, and may do all things necessary or conducive to that end, and its directors may under article 87 of the articles of association take all necessary and proper steps to comply on the part of the company with the requirements of the law of a foreign country where the company carries on business, a proceeding on the part of the company to enlarge the boundary of the liability of a shareholder beyond the boundary fixed by the constitution of the company must be, in my view, held in an English Court to be *ultra vires*. Further, whatever be the laws of a foreign country in which an English limited company carries on business, an English Court, at all events, cannot, in my judgment, recognise as a valid cause of action a claim in respect of debts of the company arising by virtue of those laws which is inconsistent with the limitation of the shareholders' liability according to English law. That limitation is the legal basis of the shareholder's relation to the company.

The two American cases do not appear to me to assist the plaintiffs' contention in the present case. In the earlier of the two—*Flash v. Conn*,<sup>5</sup> where a stockholder was sued for the debt of the company—the company carried on business in the State of Florida, and the action was commenced against the stockholder in that State; but it was a company incorporated under an Act of the New York Legislature in 1848, which expressly provided for the liability of individual stockholders in such a corporation in respect of debts of the corporate body. The stockholder had therefore become a member of the company upon that condition.

In the later American case—*Pinney v. Nelson*<sup>6</sup>—the facts were more like those of the present case. There the corporation was founded under the laws of the State of Colorado; but, by the express terms of the articles of incorporation, for the purpose of carrying on business outside the State and, specifically, for carrying on business in the State of California.



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The defendants, shareholders in the corporation, were sued—and, as Mr. Justice Brewer, who delivered the judgment in the Supreme Court, held, rightly sued—under the provisions of the Californian Constitution and the laws which I have already set forth, in respect of unpaid debts of the corporation. But it does not appear from the report what were the provisions, if any, in the articles of incorporation as to limitation of liability, all that can plainly be inferred being that neither under these provisions nor under the law of Colorado was there anything expressly declaring the personal liability of stockholders for debts of the corporation. Further (and this seems to me of itself to afford a material distinction, if it were necessary to find one), the action in *Pinney v. Nelson*<sup>6</sup> was an action brought in the State of California against stockholders in the corporation who were residents in and citizens of the State of California. The utmost which the opinion of the Supreme Court in *Pinney v. Nelson*<sup>6</sup> can be cited to support is that where a company, in accordance with the express provisions of its constitution, trades in a foreign State which has, in regard to the personal liability of shareholders, such laws as the State of California, those laws may properly be enforced in the Courts of that State against a shareholder of the company who is properly within the jurisdiction of those Courts.

I give judgment for the defendant, with costs.

*Judgment accordingly.*

Solicitors—Balfour Allan & North, for plaintiffs;  
W. A. Crump & Son, for defendant.

[Reported by J. Ritchie, Esq.,  
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

|                        |  |
|------------------------|--|
| VAUGHAN WILLIAMS, L.J. | } FITCH v.<br>BERMONDSEY<br>GUARDIANS. |
| ROMER, L.J.            |  |
| STIRLING, L.J.         |  |
| 1905.                  |  |
| Jan. 19, 20.           |  |

*Poor Law — Pauper Lunatic — Out-Union Patient—Expenses of Maintenance—Amount Chargeable—Lunacy Act, 1890 (53 Vict. c. 5), s. 283.*

*The visiting committee of a lunatic asylum are not empowered under sub-section 3 of section 283 of the Lunacy Act, 1890, to fix a weekly sum, not exceeding 14s., in respect of the maintenance in the asylum of out-county pauper lunatics, in addition to the weekly sum already fixed by them, under sub-section 1, in respect of the maintenance of each pauper lunatic in the asylum; but where they have, under sub-section 1, fixed a weekly sum of less than 14s. in respect of each pauper lunatic, they have power to differentiate between in-county and out-county pauper lunatics by fixing the maximum weekly sum of 14s. in respect of out-county pauper lunatics.*

*Decision of Divisional Court (73 L. J. K.B. 985; [1904] 2 K.B. 709) affirmed.*

Appeal from a decision of the Divisional Court (Lord Alverstone, C.J., Kennedy, J., and Phillimore, J.).

The facts and argument are fully set out in the report of the case in the Court below. For the present purpose the following short statement is sufficient:

The action was brought in the City of London Court by the clerk to the visiting committee of the City of London Lunatic Asylum against the guardians of the parish of Bermondsey to recover 11l. 5s. for the lodging and maintenance in the asylum of a lunatic, whose legal settlement was in Bermondsey, from January 1, 1904, to February 15, 1904—forty-five days at 2s. per day, 4l. 10s.; and from February 15, 1904, to March 30, 1904—forty-five days at 3s. per day, 6l. 15s. The defendants paid into Court 9l. in respect of the claim, being at the rate of 2s. per day during both periods. The question was whether from February 15

DICEY, MORRIS AND COLLINS  
ON  
THE CONFLICT OF LAWS

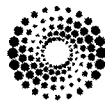
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### *Characterisation and the Incidental Question*

rules of the English conflict of laws: “succession to immovables is governed by the law of the *situs*”; “the formal validity of a marriage is governed by the law of the place of celebration”; “capacity to marry is governed by the law of the parties’ domicile.” In these examples, succession to immovables, formal validity of marriage and capacity to marry are the categories, while *situs*, place of celebration and domicile are the connecting factors.

The problem of characterisation consists in determining which juridical concept or category is appropriate in any given case. Assume, for example, that it is claimed that a marriage is void because the parties did not have the consent of their parents: should this be regarded as falling into the category “formal validity of a marriage” or should one take the view that it comes under “capacity to marry”? The answer could clearly determine the outcome of the case: this would be so if the law of the parties’ domicile required them to obtain the consent of their parents, while the law of the place where the marriage was celebrated did not. 2-003

It might seem possible to solve the above problem simply on the basis of normal legal reasoning—though the untutored assumption of most lawyers that parental consent relates to capacity is not in fact the solution adopted by the English courts<sup>8</sup>—but the next problem may seem more difficult. Assume that a testator domiciled in England makes a will disposing of land in Utopia (such will not being made in contemplation of marriage) and subsequently marries. He dies shortly afterwards. Is the will revoked by the marriage? Under the law of England it will be, but we will assume that this is not the case under the law of Utopia. In such a situation, the answer to the question whether the will is revoked could depend on whether the issue is characterised as one relating to succession or to matrimonial law (proprietary consequences of marriage).<sup>9</sup> 2-004

It will be seen from the above examples that the problem of characterisation arises whenever a system of conflict of laws is based on categories and connecting factors. In such a system, it is always necessary to determine which is the appropriate category in any given case. Since the English rules of the conflict of laws are based on categories and connecting factors, there is no way of avoiding the problem, though it may be ameliorated by selecting narrower and more specific categories. Thus the problem set out in the previous paragraph would disappear if there were a category “revocation of a will by subsequent marriage.”<sup>10</sup> 2-005

**Characterisation and the application of European Regulations.** The doctrine of characterisation examined in this chapter is, therefore, a doctrine which is an essential part of the mechanism by which a court chooses which law to apply in cases in which the framework for the decision, and the rules for choice of law, are those of the common law. In cases in which English statutes modify the choice of law rules of common law, the sphere of their 2-006

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<sup>8</sup> See *Ogden v Ogden* [1908] P. 46 (CA), discussed at para.17-020, below.

<sup>9</sup> It was in these terms that the Court of Appeal analysed the problem in the leading case on the subject, *Re Martin* [1900] P. 211. It concluded that it fell within the category “matrimonial law.”

<sup>10</sup> The problem of characterisation can be entirely avoided only by adopting a system of conflict of laws, such as the American doctrine of interest analysis, which does not use categories.

rule which the court must apply. For if the answer is that it does, there is neither room nor need for a separate exercise in characterisation.

**Conclusions.** In essence, characterisation is a process of refining English conflict rules by expressing them with greater precision. If the relevant rule is, for example, “succession to movables is governed by the *lex domicilii* of the deceased,” characterisation involves deciding precisely which issues should be governed by the *lex domicilii*. The term “succession” is simply a useful way of referring to the bundle of issues that are regarded as appropriate for determination by the *lex domicilii*. To believe that a term such as “succession” has an objectively defined meaning which exists independently of the purpose for which it is used is mere conceptualism. It is, therefore, pointless to search for the “true” meaning of the term. Moreover, since the purpose of the exercise is to reformulate rules of English law, it is contrary to principle to look to foreign law for the answer. This seems to have been recognised by the English courts. For example, in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*, a recent English case in which the issue of characterisation received extended judicial discussion, Auld L.J. accepted that “the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence.”<sup>69</sup> 2-038

The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law.<sup>70</sup> In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created. As Mance L.J. said in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*,<sup>71</sup> when dealing with the characterisation of issues: 2-039

“The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage [i.e. for characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived.

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<sup>69</sup> [1996] 1 W.L.R. 387, 407 (CA). The decision was discussed and applied by the Court of Appeal in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] Q.B. 825 (CA), and in *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] 2 W.L.R. 199 (characterisation of “capacity” of a corporation to be undertaken in a broad internationalist sense).

<sup>70</sup> This approach borrows from interest analysis, but it is used to develop and refine the traditional English rules of the conflict of laws, not to replace them.

<sup>71</sup> [2001] Q.B. 825 (CA), at [27]. See also *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] 2 W.L.R. 199 (characterisation of “capacity” of a corporation to be undertaken in a broad internationalist sense).

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## 2. STATUS

30R-009 **RULE 174**—The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.<sup>34</sup>

## COMMENT

30-010 **The principle in the Rule.** Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed.<sup>35</sup> That law will determine whether the entity has a separate legal existence.<sup>36</sup> The law of that country will determine the legal nature of the

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<sup>34</sup> *Bonanza Creek Gold Mining Co v R.* [1916] 1 A.C. 566 (PC); *Lazard Bros. v Midland Bank* [1933] A.C. 289; *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509; *Arab Monetary Fund v Hashim (No.3)* [1991] 2 A.C. 114; *Gulf Consolidated Company for Services and Industries EC v Credit Suisse First Boston Ltd* [1992] 2 Lloyd's Rep. 301; *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 W.L.R. 840; *Presentaciones Musicales SA v Secunda* [1994] Ch. 271 (CA); *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] Q.B. 282; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287; *Phoenix Marine Inc. v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora* [1999] 2 All E.R. (Comm.) 577 (CA); *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm.), [2005] 2 Lloyd's Rep. 129, affirmed in part and reversed in part, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 W.L.R. 2276 without reference to the point; *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30–014 *et seq.* See also *Dubai Bank Ltd v Galadar' (No.4)*, *The Times*, February 23, 1990; *Dubai Bank Ltd v Galadari (No.5)*, *The Times*, June 26, 1990; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *Trustees of Our Lady of the Sacred Heart v Registrar-General* [2008] NTSC 13; *Re Liquidation of Founding Partners Global Fund Ltd* [2011] SC (Bda) 19 Com (Sup Ct Bermuda); Foreign Corporations (Application of Laws) Act 1989, ss.7, 8 (Australia); *Taiwan via Versand Ltd v Commodore Electronics Ltd* [1993] 2 H.K.C. 650 (Hong Kong Foreign Corporations Ordinance 1993, s.2(1), (3)).

<sup>35</sup> *Associated Shipping Services v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan*, *Financial Times*, July 31, 1991 (CA); *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1302 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *International Association of Science and Technology for Development v Hamza* (1995) 122 D.L.R. (4th) 92 (Alta CA).

<sup>36</sup> See authorities in preceding note.



entity so created, e.g. whether the entity is a corporation or partnership,<sup>37</sup> and, if the latter, the legal incidents which attach to it.<sup>38</sup>

It is well established that a corporation duly created in a foreign country is to be recognised as a corporation in England,<sup>39</sup> and accordingly foreign corporations can both sue<sup>40</sup> and be sued<sup>41</sup> in their corporate capacity in the courts. Whether a corporation has been dissolved must be determined by the law of its place of incorporation<sup>42</sup> for “the will of the sovereign authority which created it can also destroy it.”<sup>43</sup> If according to that law the corporation is in the process of being wound up, it can still sue and be sued in England,<sup>44</sup> but if this process has ended, and the corporation has been dissolved, the corporation has been held to be dead in the eyes of the English courts.<sup>45</sup> If the

30-011

<sup>37</sup> *Von Hellfeld v Rechnitzer* [1914] 1 Ch. 748 (CA); *Dreyfus v CIR* (1929) 14 T.C. 560, 576-577 (CA); *The Saudi Prince* [1982] 2 Lloyd's Rep. 255; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418, 509; *The Kommunar (No.2)*, above; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.) *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. *cf. Backman v Canada* [2001] S.C.R. 367 (Sup Ct Can) (whether a foreign partnership is recognised in Canada for the purposes of tax legislation depends on the requirements for the existence of a partnership in Canadian law).

<sup>38</sup> *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. As to whether, if it is a partnership, the partners are to be sued alone, together or as a firm, see above, para.7-017; *Johnson Matthey & Wallace Ltd v Ahmed Alloush* (1985) 135 N.L.J. 1012; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn*, above.

<sup>39</sup> *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532, 1535; *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287.

<sup>40</sup> *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532.

<sup>41</sup> *Newby v Van Oppen* (1872) L.R. 7 Q.B. 293.

<sup>42</sup> As to identification of the law of the place of incorporation, see below, paras 30-014 *et seq.*

<sup>43</sup> *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30-015 *et seq.* See M. Mann (1955) 18 M.L.R. 8; Wortley (1933) 14 B.Y.I.L.1. It is possible that the courts would not recognise a dissolution effected in defiance of a rule of public international law; see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883 (CA and HL), above, paras 5-054, 25-011 and see F.A. Mann, *Studies in International Law* (1973), p.366, for a discussion of the recognition of international delinquencies by municipal courts.

<sup>44</sup> *cf. Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] A.C. 112; *Banque Internationale de Commerce de Petrograd v Goukassow* [1925] A.C. 150; *Employers' Liability Assurance Corporation Ltd v Sedgwick Collins & Co Ltd* [1927] A.C. 95; *First Russian Insurance Co v London and Lancashire Insurance Co* [1928] Ch. 922. *Seemle*, whether an action must be brought or defended by the liquidator depends on the law of the place of incorporation: see *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch. 513, 524; and Rule 179, below.

<sup>45</sup> *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435; *Deutsche Bank v Banque des Marchands de Moscou* (1932) 158 L.T. 364 (CA); *Lazard Bros v Midland Bank* [1933] A.C. 289; *Burr v Anglo-French Banking Corp* (1933) 49 T.L.R. 405; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682. See also *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550. *cf. Home Mortgage Ltd v Robertson* [1988] 4 W.W.R. 260 (Sask).

foreign corporation has a branch in England, the latter cannot sue after the former has been dissolved.<sup>46</sup> The branch should be wound up,<sup>47</sup> and the English liquidator can then sue in the name of the company, although it has been dissolved.<sup>48</sup> Where a corporation is dissolved by the law of its place of incorporation but a branch existing in another country is still recognised there, and that branch claims to have a legal existence in England and seeks to bring proceedings here, it is dubious if recognition should be granted.<sup>49</sup> Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation.<sup>50</sup> If that law provides for a *successio in universum jus* then the amalgamated company will be recognised in England as succeeding to the assets and liabilities of its predecessors.<sup>51</sup> The law of the place of incorporation must, however, provide for a true universal succession<sup>52</sup> and, further, it is possible that the successor corporation may be so radically different from its predecessor that it cannot be properly described as the same legal entity.<sup>53</sup> But the law of the place of incorporation

<sup>46</sup> *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435.

<sup>47</sup> *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435, 444; *Re Russian and English Bank* [1932] 1 Ch. 663; *Re Tea Trading Co and K. & C. Popoff Bros* [1933] Ch. 647; *Re Russian Bank for Foreign Trade* [1933] Ch. 745; *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] Ch. 404; *Banque des Marchands de Moscou v Kindersley* [1951] Ch. 112 (CA); *Re Azoff-Don Commercial Bank* [1954] Ch. 315. It has been held that, in these circumstances, the court may not make an administration order: *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.) (a case involving the EC Insolvency Regulation).

<sup>48</sup> *Russian and English Bank v Baring Bros* [1936] A.C. 405. See M. Mann (1952) 15 M.L.R. 479; (1955) 18 M.L.R. 8.

<sup>49</sup> *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 K.B. 682, 691, reversed on other grounds, [1925] A.C. 150; *Re Russian Bank for Foreign Trade* [1933] Ch. 745, 763. Also *Sea Insurance Co v Rossia Insurance Co* (1924) 20 Ll.L.R. 308 (CA); M. Mann (1955) 18 M.L.R. 8, 10–11.

<sup>50</sup> *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509; *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 W.L.R. 840; *Industrie Chimiche Italia Centrale v Tsaviliris & Sons* [1996] 1 W.L.R. 774; *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora* [1999] 2 All E.R. (Comm.) 577 (CA); *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550, reversed in part, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 W.L.R. 2276, without reference to the point. *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm.), [2005] 2 Lloyd's Rep. 129. cf. *R.K.O. Pictures Inc v Cannon Screen Entertainment Ltd* [1990] B.C.L.C. 364. If companies incorporated in different countries are amalgamated it would seem that the law of the place of incorporation of each company must permit or recognise the amalgamation with the other: *Global Container Lines Ltd v Bonyad Shipping Co*, above, although in this case the capacity of the predecessor corporation to continue to proceed with litigation after the amalgamation was recognised since it was found to exist under the law of the place of incorporation of that corporation.

<sup>51</sup> *National Bank of Greece and Athens SA v Metliss*, above; *SEB Trygg Holding Aktiebolag v Manches*, above, affirmed, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 2276, without reference to the point. See also *Steel Authority of India Ltd v Hind Metals Inc* [1984] 1 Lloyd's Rep. 405, 407.

<sup>52</sup> *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8. cf. *Adams v National Bank of Greece & Athens SA* [1958] 2 Q.B. 59, 74; [1961] A.C. 255, 283, 289.

<sup>53</sup> *The Kommunar (No.2)*, above (Russian registered corporation limited by shares so fundamentally different from predecessor state trading enterprise privatised under Russian legislation that it could not be held to be the same entity).

cannot discharge the new company of liabilities which vested in it on the amalgamation unless the law of the place of incorporation is the law which governs those liabilities.<sup>54</sup>

**International organisations.**<sup>55</sup> In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry*,<sup>56</sup> the House of Lords held that English courts would not recognise an organisation created by treaty as such: such an organisation only had legal status to the extent that the treaty creating it was incorporated into English law. Accordingly, The International Tin Council was invested with legal personality since subordinate legislation provided that that organisation was to have the legal capacities of a body corporate.<sup>57</sup> In *Arab Monetary Fund v Hashim (No.3)*<sup>58</sup> an international banking organisation established by treaty between 20 Arab States and the Palestine Liberation Organisation had been given corporate status by virtue of a domestic law decree under the law of the United Arab Emirates. The House of Lords held that since that decree conferred legal personality on the organisation and created a body corporate, the entity so created could be recognised in England as being possessed of capacity to sue, on the basis of Rule 174. 30-012

In *Westland Helicopters Ltd v Arab Organisation for Industrialisation*,<sup>59</sup> it was held that the decision in the *Arab Monetary Fund* case was concerned only with the question of whether the fact that the organisation had been accorded legal personality under the law of the United Arab Emirates led to the conclusion that it also had capacity to sue in the English court. The decision was not in any way concerned with the impact of the domestic law of the Emirates on the constitution or government of the organisation or upon the authority of the officers of the fund to represent it in transactions with third parties. Accordingly, where an organisation, created by treaty between States, was given legal personality under the law of Egypt, one of those States, questions as to the meaning, effect and operation of the constitution of the organisation in so far as they were issues which, according to public international law, could only be determined by reference to the treaty and to the principles of public international law, must be so determined, and were not to be resolved by reference to the domestic law of Egypt. 30-013

**Identification of law of place of incorporation.** Identification of the law of the place of incorporation may present difficulties where different States or 30-014

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<sup>54</sup> *Adams v National Bank of Greece & Athens SA* [1961] A.C. 255. See Grodecki (1961) 24 M.L.R. 701. See also *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 A.C. 147 (PC).

<sup>55</sup> See Jenks (1945) 22 B.Y.I.L. 267; F.A. Mann (1967) 43 B.Y.I.L. 145, reprinted in *Studies in International Law* (1973), p.553; Marston (1991) 40 I.C.L.Q. 403; (1997) 2 Hofstra L. & Policy Symposium 75; above, para.30-011.

<sup>56</sup> [1990] 2 A.C. 418.

<sup>57</sup> SI 1972/120, art.5 (made under the International Organisations Act 1968). See also International Organisations Act 2005, s.5, inserting a new s.4B into International Organisations Act 1968.

<sup>58</sup> [1991] 2 A.C. 114.

<sup>59</sup> [1995] Q.B. 282.