

In my view the judgment of the learned judge in the action ought to be set aside, the judgment on the counter-claim, with costs, being the only part of the order which can stand.

VAUGHAN WILLIAMS L.J. The only part of the order of the Court below which stands is that which relates to the counter-claim. The defendants to the counter-claim (that is, the plaintiffs) will have to pay the costs of that, but in the action and on the appeal there will be no costs at all on either side.

Solicitors: *Gibson & Weldon, for Hannay & Hannay, South Shields; Smith, Rundell & Dods, for H. Wilson Paton, Swansea.*

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[1901 F. 1499.]

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Conflict of Laws—Domicil—Matrimonial Domicil—English Husband and Scotch Wife—Marriage Contract in Scotch Form—Settlement of Wife's Property—Real Estate in Scotland—Inalienable Life Interest given to Husband—"Alimentary Provision"—Validity of Restriction as against Husband's Mortgagees—Repugnancy—Public Policy.

The rule that the law of the matrimonial domicil applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law.

Scotch "heritable bonds" must be regarded by an English Court as immovable property and therefore governed by Scotch law.

When it is said that a contract, valid by the law of the country in which it is made, cannot be enforced in England because it is contrary to public policy or the policy of English law, it is meant that the contract conflicts with what are deemed in England to be essential public or moral interests—not merely that it would be invalid under English law.

On the marriage in Scotland of a domiciled Englishman with a domiciled Scotswoman the wife's property, which consisted mainly of Scotch heritable bonds, was settled by a marriage contract executed in Scotland in Scotch form. By this contract the trustees, most of whom were domiciled Englishmen, and who were also the trustees of a contemporaneous settlement of the husband's property in English form, were to hold the wife's

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property upon trust, in case the husband should survive the wife, to pay the income to him during his life, declaring that all payments to him "shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors." The husband survived the wife, having mortgaged his life interest under the Scotch contract to mortgagees in England. He had always retained his English domicil.

By the law of Scotland such a restricted life interest, so far as it does not exceed in amount a reasonable provision, is valid as against creditors, other than "alimentary" creditors, and in such a case, if the husband fails to maintain the children of the marriage, they are entitled to attack the alimentary provision made for him.

Upon a summons by the trustees to determine the rights of the mortgagees as against the husband and the only child of the marriage:—

Held (by Vaughan Williams and Cozens-Hardy L.JJ.), that, having regard to all the circumstances and particularly the nature of the limitations in the Scotch contract, it must be taken to have been the intention of the parties that that contract should be governed, not by the law of the English matrimonial domicil, but by Scotch law, and that the "alimentary provision" to the husband, being valid by that law, must be treated as valid by the English Courts, and consequently valid as against the husband's mortgagees, there being nothing in the provision contrary to the policy of English law in the proper sense of that term:

Held, by Stirling L.J., that, though the husband and wife had contracted that their rights in her property should be regulated by Scotch law, and it was the duty of the trustees to pay the "alimentary provision" from time to time as it became payable into his hands, regardless of incumbrances created by him, yet an assignment by him of the "alimentary provision" in favour of a domiciled Englishman ought to be held by an English Court to bind funds coming in respect of that provision to the assignor's hands within the jurisdiction of that Court.

Decision of Joyce J., [1903] 1 Ch. 933, reversed.

APPEAL from the decision of Joyce J. (1), the question being whether a restraint on the right of alienation of a life interest, given to a husband in his wife's property by a marriage contract in Scotch form, was valid as against his incumbrancers in England.

By a settlement in English form, dated September 20, 1862, and made in contemplation of the marriage of Sir Gerald Vesey Fitzgerald with Miss Lockhart, Sir Gerald's father covenanted with the trustees that his heirs, executors or administrators would, within six months after his death, pay to the trustees the sum of 6000*l.*, to be held by them upon

trust for investment as therein mentioned, and to pay the income of the trust fund to Sir Gerald and his assigns during his life, and after his death to Lady Fitzgerald during her life, and after the death of the survivor to stand possessed of the trust fund in trust for the issue of the intended marriage as therein declared.

By this deed Sir Gerald also assigned to the trustees a policy of insurance for 4000*l.* upon his own life to be held by them upon the same trust.

On the same day a marriage contract in Scotch form was executed by Sir Gerald and Miss Lockhart, whereby, after a recital of the English settlement and in consideration of the provisions therein contained, Miss Lockhart assigned, conveyed, disposed, and made over to the trustees of the English settlement all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally her whole property heritable and movable (with certain specified small exceptions), to be held by the trustees in trust for the ends, uses, and purposes after mentioned, namely: "first, for payment of the expenses of executing this trust; second, for payment of the free annual proceeds of the trust estate" to Miss Lockhart "during all the days of her life, and that on her own receipt alone exclusive of the *jus mariti* and right of administration" of Sir Gerald. "Third, in case the said Sir Gerald shall be the survivor of the spouses, for payment of the whole free annual proceeds of the estate to him during all the days of his life after the death of" Miss Lockhart, "declaring that all payments to the said Sir Gerald shall be strictly alimentary, and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors. Fourth, on the death of the survivor of the said spouses the trustees shall pay over or assign the whole trust funds and estate in their hands" to the child or children of the marriage as therein mentioned.

Both deeds were executed in Scotland.

On September 23, 1862, the marriage was solemnized in Scotland. At the time of the execution of the deed Sir Gerald was domiciled and resident in England and Miss Lockhart was domiciled and resident in Scotland. After the celebration of

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C. A. the marriage Sir Gerald continued to reside in England and
1904 retained his English domicil. The original trustees of the
FITZGERALD, settlements (six in number) were (with one exception) English-
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The funds originally comprised in the Scotch contract consisted of two Scotch heritable bonds for the respective sums of 6000*l.* and 7200*l.*, which were secured upon heritable or immovable property in Scotland, and a sum of 500*l.* cash, which was paid over to the trustees for investment, and was invested by them in Consols. The heritable bonds were assigned to the trustees by a separate deed. At the time when the summons was issued the investment of part of the 7200*l.* had been changed into English securities. By Scotch law heritable bonds of this character are treated as real estate, except for certain purposes specified in the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117.

There was only one child of the marriage, a daughter, born on June 19, 1863.

Lady Fitzgerald died on May 16, 1901.

Between the years 1863 and 1901 Sir Gerald and Lady Fitzgerald created in England various incumbrances upon their respective interests under the English and Scotch settlements, in some of which Miss Fitzgerald also joined.

Subsequently Sir Gerald further incumbered his life interest under the two settlements. The defendant Colonel Harford was the first mortgagee of Sir Gerald's life interest under the Scotch settlement.

On October 12, 1901, the summons was taken out by the trustees, who were all then domiciled in England, asking (*inter alia*) for the determination of the question whether Sir Gerald was entitled for his life to the income of the trust funds comprised in the Scotch marriage contract free from incumbrance and without power of alienation, or who was now entitled to the income.

An affidavit was made by Mr. Graham Murray, formerly Lord Advocate of Scotland, in which he said: "By the law of

Scotland it is possible for a person to create a life interest in favour of another person, and, by declaring that life-rent to be alimentary, to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors, and restrain all power of anticipation. Where, therefore, as here, a lady by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life-rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

There was also evidence that by Scotch law "alimentary" creditors of the husband could arrest the alimentary provision, but that no other creditors could do so; and also that, if in the case of such an alimentary provision the husband failed to maintain the children of the marriage, they would be entitled to attach the alimentary provision made for him.

Joyce J. held that, even if the construction and effect of the Scotch contract were properly determinable by the law of Scotland, its validity and operation must be determined by the law of England; and that, inasmuch as the prohibition of alienation of the alimentary provision was, according to English law, repugnant and contrary to public policy, the husband's mortgagees were entitled to receive payment of the income from the trustees.

A question also arose with reference to a policy of assurance which had been substituted for the policy comprised in the English settlement, but the facts relating to that question are immaterial for the purpose of this report.

Sir Gerald appealed.

A. H. Jessel, for Sir Gerald Fitzgerald. The marriage contract is a Scotch contract, and the limitations in it are in the Scotch, not the English, form. According to the evidence of the Scotch lawyers it is a Scotch instrument, and in fact it is admitted to be so by the late Lord Advocate in his affidavit. Also the bulk of the trust funds was originally invested in Scotch heritable bonds. A partial change of investment subsequently took place.

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[VAUGHAN WILLIAMS L.J. To ascertain whether this is a Scotch settlement the matter for consideration is, what was the nature of the settled property at the time of the execution of the settlement. What was done afterwards with the property is, for this purpose, immaterial.]

This then being a Scotch settlement, the interest taken by the husband in his wife's property during his life is "strictly alimentary." It corresponds to what in an English settlement would be a discretionary power in the trustees to pay the income to the husband during his life. That is in no way contrary to public policy. The trust is for the husband, the children, and the alimentary creditors—that is, the persons who supply goods for the husband and children. It is a trust, as the expert evidence shews, "in the ordinary Scotch form."

Being a Scotch settlement executed in Scotland, it should be construed according to the law of Scotland, for the rule in such cases is that the law of the place where the contract was made should govern the construction of the contract: *Corbet v. Waddell* (1); *Chamberlain v. Napier*. (2) The husband's domicile is immaterial.

The *prima facie* rule is that, if there is no contract, the domicile governs the rights of the parties; if there is a contract then, according to the decisions of the English Courts, the form of the contract is the governing consideration.

[COZENS-HARDY L.J. In Dicey's Conflict of Laws it is said (rule 172, sub-rule 1, p. 653) that "a marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicile."]

But that should be read in connection with sub-rule 2, p. 654, that "the parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of matrimonial domicile, in which case their rights will be determined with reference to such other law." And, on p. 652, the rule is confined to "movables." With regard to "immovables," the effect of the contract is governed by "the proper law" of the country where they are situate:

(1) (1879) 7 R. 200, 208.

(2) (1880) 15 Ch. D. 614, 633.

pp. 586, 588; meaning the law to which the parties intended, or may fairly be presumed to have intended, to submit themselves: pp. 540, 586. The form of the instrument is in itself very strong evidence of intention that the law of the country in which it is operative is to govern the construction. The intention of the parties, when not expressed, is to be inferred from the terms and nature of the contract and from the circumstances of the case: p. 568. The authorities are in accordance with that view: *In re Barnard* (1); *In re Mégret* (2); *Viditz v. O'Hagan* (3), the decision in which, though reversed by the Court of Appeal, was not reversed on this point (4); *In re Bankes*. (5) The rights of husband and wife in each other's movables are determined by the matrimonial domicile only where there is no marriage contract or settlement: Dicey, p. 649.

Another point is this. The learned judge has said that, even assuming this to be a Scotch settlement, the money in question is income—cash come into the hands of the trustees in England; and that therefore he is entitled to override the intention of the parties and say that this clause is against public policy and therefore void. But that is contrary to the decision and the reasoning of Lord Selborne L.C. in *Harrison v. Harrison* (6), where he gave effect to the Scotch law, and excluded any doctrine of the English law.

[COZENS-HARDY L.J. That case dealt with Scotch real estate.]

Scotch heritable bonds are real estate.

Joyce J. relied principally upon *Noel v. Robinson*. (7) But *Harrison v. Harrison* (6) is inconsistent with that case.

Scott v. Allnutt (8), which also had apparently great weight with the learned judge, is distinguishable, for there Lord Elibank, the son, had a life estate vested in him, which is not the case here, the husband's interest being only an interest for alimentary purposes.

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(1) (1887) 56 L. T. 9.

(2) [1901] 1 Ch. 547.

(3) [1899] 2 Ch. 569.

(4) Vide [1900] 2 Ch. 87.

(5) [1902] 2 Ch. 333.

(6) (1873) L. R. 8 Ch. 342, 348.

(7) (1682, 1687) 2 Vent. 358; 1

Vern. 90, 453, 460, 469.

(8) (1831) 2 Dow & C. 404.

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Again, the rule which the learned judge quoted from Westlake's *Private International Law*, 3rd ed. p. 71 (not "76"), s. 39—that the legality and operation of a marriage settlement or contract, when the meaning has been ascertained, and generally its interpretation also, will be referred to the matrimonial domicile—is wrong. *In re Barnard* (1) goes beyond the proposition, and *Anstruther v. Adair* (2) negatives it. It is also opposed to Foote's *Private International Jurisprudence*, 2nd ed. pp. 315 et seq., and Story's *Conflict of Laws*, s. 276, in both of which works the rule is properly stated. The learned judge also referred to Vaizey on *Settlements*, pp. 1640 et seq., but the learned author merely cites Westlake as his authority. He says the presumption that the law of the matrimonial domicile is the guide "may" yield to indications that the law of the place where the contract is made was intended; but it is submitted that the authorities are precise, that it "shall" yield to that law. The question how far the law of matrimonial domicile regulates the right of the husband in movables is dealt with in Westlake, s. 36, p. 68, and following sections.

It is not contrary to public policy that a wife should stipulate for the settlement of her property as against her husband's creditors. It is not against public policy that the children of Scotch people should be provided for as against their parent's creditors. It is submitted that the learned judge has misinterpreted this instrument, and that he should not have applied English law to it.

Badcock, K.C., and *T. T. Methold*, for Colonel Harford. There is no such thing known to English law as a life interest given to a man subject to a restraint on anticipation. An Englishman cannot settle his vested interest in property so as to place it beyond the reach of his creditors. If property is given to a man for his life the donor cannot take away the incidents to a life estate, for to do so would be contrary to public policy: *Graves v. Dolphin* (3); *Brandon v. Robinson* (4); *Foley v. Burnell*. (5) It is contrary to the policy of the law

(1) 56 L. T. 9.

(3) (1826) 1 Sim. 66; 27 R. R. 166.

(2) (1834) 2 My. & K. 513; 39
 R. R. 263.

(4) (1811) 18 Ves. 429, 433; 11
 R. R. 226.

(5) (1783) 1 Bro. C. C. 274.

that a man shall have property with which he cannot deal. All those cases decide that a man cannot have a life estate with a restraint on anticipation: all that can be done is to give him an interest until alienation. An Englishman cannot, by going to Scotland and marrying there, come back to England and set his creditors at defiance. It is submitted that an English Court will not give effect to a gift to a man of a life estate freed from the power of alienation. Reliance is placed on the *lex fori*, which is the main point in this case. The trustees have come to an English forum, and therefore the question must be decided according to English law. The rule is thus stated in Dicey, rule 172, sub-rule 1, p. 653: "A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicile." Then, under sub-rule 2, the parties may make it part of the contract that their rights shall be subject to some other law than that of the matrimonial domicile.

[COZENS-HARDY L.J. Note 1 on p. 674 says that the same result will follow if it can be "fairly inferred" from the terms of the contract that the intention of the parties, though not expressed, was that it should be construed with reference to some other law than that of the matrimonial domicile.]

Colliss v. Hector (1) is an illustration of that.

[COZENS-HARDY L.J. referred to *Este v. Smyth*. (2)]

That a gift to a man for life with a restraint on alienation is repugnant and void: see *Younghusband v. Gisborne*. (3) It is so whether the transaction is carried out by giving him the property or by creating a trust: *Davidson v. Chalmers*. (4) An English Court will not enforce a right otherwise duly acquired under the law of a foreign country when the enforcement would be inconsistent with the policy of English law: Dicey's *Conflict of Laws*, p. 32. In *Brook v. Brook* (5) Lord Campbell L.C. said: "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be

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(1) (1875) L. R. 19 Eq. 334.

(3) (1844) 1 Coll. 400; 66 R. R. 120.

(2) (1854) 18 Beav. 112.

(4) (1864) 33 Beav. 653.

(5) (1861) 9 H. L. C. 193, 212.

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performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions." And at p. 218: "Some American decisions, cited on behalf of the appellants, remain to be noticed. In *Greenwood v. Curtis* (1) the general doctrine was acted upon that a contract, valid in a foreign State, may be enforced in a State in which it would not be valid, but with this important qualification, 'Unless the enforcing of it should hold out a bad example to the citizens of the State in which it is to be enforced.' Now the Legislature of England, whether wisely or not, considers the marriage of a man with the sister of his deceased wife 'contrary to God's law,' and of bad example." To restrain a man from anticipating his income in order to prejudice his creditors would be "holding out a bad example."

When a woman is restrained from anticipation her separate interest is the creation of a Court of Equity, and can be moulded as that Court pleases. That is also the case where lunatics are concerned, but it does not apply to sane men of full age. In this case there is a conflict between Scottish law and the status of persons in England, which is one of the five classes given in Dicey's Conflict of Laws at p. 34. No Englishman can give himself the capacity to acquire such a right as this.

This is not a gift by will, which might perhaps be governed by the law of the testator's domicil. It is a contract; and it is not admitted that it was a Scottish contract, for the parties had an English matrimonial domicil in contemplation. An Englishman may agree that his rights shall be regulated by foreign law, provided that the rights thus conferred do not offend against English law, but if he contracts with a view to residence in England he cannot contract himself out of English law.

If the decision of the learned judge is reversed, it will in future only be necessary to say that a restriction on alienation shall be an "alimentary" interest according to the law of Scotland, and it must be supported.

(1) (1810) 6 Mass. 358.

[STIRLING L.J. referred to *In re Mégret*. (1)]

An English Court will not enforce a bargain which is contrary to the policy of English law: *Hope v. Hope* (2); *Grell v. Levy* (3); *Rousillon v. Rousillon* (4); *Sottomayor v. De Barros* (5); *In re Bankes*. (6) The Court will not allow foreign law to be used so as to cause injustice: *Lord Cranstown v. Johnston*. (7)

[COZENS-HARDY L.J. referred to *Freke v. Lord Carbery*. (8)]

There is no doubt of the jurisdiction of the English Courts: *Ex parte Pollard*. (9) This question arises with regard to arrears of interest and income. It is not material that some of the money is derived from heritable bonds which in Scotland are considered immovables: *Scott v. Allnutt*. (10) The settlement was framed as a settlement of personal property. There is no action in rem. The reasonable inference here is that the parties intended the law of the matrimonial domicile to apply. They have not contracted themselves out of that law. And, so far from there being any evidence of an intention that the Scotch law should apply, Sir Gerald himself says in his affidavit that he always supposed he had power to mortgage his interest. If the law is doubtful it is not safe to impute to the parties an intention which they have not expressed.

It has been said that the daughter has an interest in the "alimentary" provision for her father; if so, she is capable of parting with that interest, and she has in fact joined in some of the mortgages.

No doubt real estate in Scotland must be governed by the law of Scotland, and a Scotch heritable bond is according to that law real estate. But it is quite another question whether such a bond is "immovable" property according to international law: Foote's Private International Jurisprudence, 2nd ed. pp. 184, 187, 189. If a heritable bond is given as security for a debt, the debt by its nature is movable whatever may be the security given for it.

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(1) [1901] 1 Ch. 547.

(2) (1857) 8 D. M. & G. 731.

(3) (1864) 16 C. B. (N.S.) 73.

(4) (1880) 14 Ch. D. 351.

(5) (1877) 3 P. D. 1.

(6) [1902] 2 Ch. 333.

(7) (1796) 3 Ves. 170; 3 R. R. 80.

(8) (1873) L. R. 16 Eq. 461.

(9) (1840) Mont. & Ch. 239, 251.

(10) 2 Dow & C. 404.

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[*Jessel* referred to Dicey's Conflict of Laws, p. 514, as shewing that the *lex situs* of the land charged by a bond determines the character of the bond: *Jerningham v. Herbert*. (1)]

In *Duncan v. Lawson* (2) it was held that leaseholds in England, belonging to a domiciled Scotsman, devolve in case of his intestacy upon the persons entitled under the English Statute of Distributions.

[COZENS-HARDY L.J. referred to *Freke v. Lord Carbery*. (3)]

The question depends on the nature of the property, not on the law of the country. A debt, whatever may be the security for it, is in its nature movable. The money due on a Scotch heritable bond will pass by the will of a domiciled Englishman: *Duchess of Buccleugh v. Hoare* (4); *Johnstone v. Baker*. (5)

There has been some alteration in the law of Scotland since those cases.

[COZENS-HARDY L.J. A Scotch heritable bond now stands in a position similar to that of a leasehold in England. But suppose it were Scotch real estate?]

In that case the question would arise whether the provisions of the settlement could be enforced in England as being contrary to English law.

But the Court is now dealing with the income of a fund.

In *Scott v. Allnutt* (6) entailed land in Scotland was sold for redemption of the land tax, and the surplus proceeds were invested in the names of trustees, who were to pay the interest to the heir of entail in possession until the money should be reinvested in land. It was held by the House of Lords that an assignment in English form by the next of entail of his contingent reversionary right to the interest was valid, on the ground that the interest was in substance movable.

[COZENS-HARDY L.J. In that case the property was not inalienable by Scotch law.]

But the assignment was not valid by Scotch law, and that is so here.

(1) (1829) 4 Russ. 388; 28 R. R. 136.

(2) (1889) 41 Ch. D. 394.

(3) L. R. 16 Eq. 461.

(4) (1819) 4 Madd. 467.

(5) (1817) 4 Madd. 474, n.

(6) 2 Dow & C. 404.

W. F. Hamilton, K.C., and W. E. Vernon, for another incumbrancer. This is not a question as to the carrying out of a covenant, for there is a settlement, and its construction must be determined, not by Scotch law, but by the law of the Court which has jurisdiction over the parties. If there had only been an agreement in the present case the Court would not have carried it out except by a protected life interest in the ordinary form. A man could not settle his own property in this way. In Scotland an alimentary creditor could attach the income in case of non-payment of his debt. The principle must be the same whether it is a life interest or an absolute interest; in either case a man cannot be deprived of the power of alienation. This limitation is either a condition as to the enjoyment of the property, or a restriction upon the capacity of alienation by a person who is under no other restriction. Can that capacity be affected by an instrument executed by a foreigner in a foreign country?

Crossman, for Miss Fitzgerald. The daughter is an alimentary creditor, and the judgment as it stands interferes with her rights. The judgment should be made expressly subject to these rights.

[*Badcock, K.C.*, said that he should not object to that.]

Blakesley, G. R. Northcote, A. H. Withers, and G. D. Pepys, for other incumbrancers.

Edward Ford, for the trustees.

A. H. Jessel, in reply. The settlement is a conveyance of Scotch real estate, and as regards that estate it must be governed by the *lex situs*. A change of investment can make no difference. In determining what is the law of the marriage contract, if any weight is to be attached to the matrimonial domicile, i.e., the domicile of the husband, it may be outweighed by the intention of the parties: *In re Bankes* (1); *Viditz v. O'Hagan*. (2) Here the settlement is in the Scotch form, and the nature of it is such that the only possible inference is that the parties intended it to operate according to Scotch law.

[*VAUGHAN WILLIAMS L.J.* If an English Court came to the conclusion that this particular provision would be inconsistent

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(1) [1902] 2 Ch. 333, 343.

(2) [1900] 2 Ch. 87.

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with the just rights of creditors, would not the Court refuse to enforce that provision, whatever might be the law governing the settlement ?]

In some cases that might be so, if, e.g., the provision would be contrary to public policy, or injurious to morals, or shocking to the conscience. In the present case there is nothing really contrary to public policy in the proper sense of that term. This inalienable life interest may be contrary to English law, or rather to the rules of equity, but there is nothing in it contrary to public policy. There is nothing immoral or criminal in it: Dicey's *Conflict of Laws*, pp. 558, 560; *In re Missouri Steamship Co.* (1) *Kaufman v. Gerson* (2) governs the present case. In that case the locus contractus was also the locus solutionis, but the principle of the decision applies here. Other cases on the subject are *Janson v. Driefontein Consolidated Mines* (3), in which were cited some observations of Parke B. in *Egerton v. Earl Brownlow* (4), to the effect that public policy "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights." See also the observations of Lord Davey to the same effect. (5) An objection to the enforcing of a contract on the ground that it is contrary to public policy must be limited to contracts which involve the doing of a criminal or immoral act: *Printing and Numerical Registering Co. v. Sampson* (6); *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.* (7); *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (8); Westlake's *Private International Law*, 3rd ed. p. 260. There is nothing contrary to public morality in a contract entered into on marriage that the husband's life interest in his wife's property shall be inalienable by him; there is nothing in the nature of such a contract more immoral than in a limitation to a woman for her separate use without power of anticipation. A Court of Equity will always respect contracts entered into upon marriage. If an executory contract contained a pro-

(1) (1889) 42 Ch. D. 321, 325.

(2) [1903] 2 K. B. 114, 117.

(3) [1902] A. C. 484, 496.

(4) (1853) 4 H. L. C. 1, 123.

(5) [1902] A. C. 500.

(6) (1875) L. R. 19 Eq. 462, 465.

(7) [1892] 3 Ch. 447, 451, 452.

(8) [1893] 1 Ch. 630.

vision contrary to law, the Court would execute it *cy-près*, so as to carry out as far as possible the intention of the parties. It is no doubt true that the Court of Chancery leans against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest: per Lord Davey in *Wharton v. Masterman* (1); but this alimentary provision is valid under Scotch law. In a Scotch Court the restriction would be enforced, and the result ought not to depend upon whether the English or the Scotch jurisdiction is involved. It is submitted that an alimentary creditor of the husband could enforce the trust in an English Court: *Dowse v. Gorton*. (2)

Badcock, K.C., referred to Theobald on Wills, 5th ed. p. 441.

Cur. adv. vult.

March 7. COZENS-HARDY L.J. read his judgment as follows:—The first question for consideration on this appeal is whether what I may shortly describe as the Scotch settlement is subject to the law of Scotland, or whether it must be governed by English law. Now this Scotch settlement dealt with the property of a domiciled Scotch lady, who was about to marry a domiciled Englishman, and there is no doubt that the “matrimonial domicile” was English. It is not suggested that a permanent residence in Scotland after the marriage was contemplated. As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply. See *Van Grutten v. Digby* (3), in which case the matrimonial domicile was French, but the contract, though made in France and void by French law, was nevertheless treated by Sir John Romilly as valid so far as it related to property within the jurisdiction. See also *Viditz v. O'Hagan*. (4) The decision in that case was reversed by the Court of Appeal, but not on a ground in any way affecting this point. It is not necessary that there should

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(1) [1895] A. C. 186, 198.

(2) [1891] A. C. 190.

(3) (1862) 31 Beav. 561.

(4) [1899] 2 Ch. 569.

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be an express stipulation. It is sufficient if the Court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.

Applying these principles to the Scotch settlement, I find several important indications. (a) The great bulk of the property, namely, 13,200*l.*, was invested in heritable bonds. It has been settled by a chain of authorities, which ought not now to be reviewed by us, namely, by Grant M.R. in *Johnstone v. Baker* (1), by Leach M.R. in *Jerningham v. Herbert* (2), and by Wigram V.-C. in *Allen v. Anderson* (3), that heritable bonds must be regarded in our Courts as immovables. If so, it can scarcely be denied that the *lex loci*—i.e., the law of Scotland—must apply to the extent of the 13,200*l.* I am aware that there has been a change of investment of part of this sum into English securities, but this change cannot alter the law applicable to the settlement. I may add that, as to the 13,200*l.*, the matter does not rest in contract. There is an actual completed assignment of the heritable bonds. (b) There was, however, 500*l.* cash belonging to the lady, which was paid over to the trustees for investment, and which was, in fact, invested in Consols, although it might have been invested in heritable securities in Scotland. It seems to me that this sum cannot fairly be treated as intended to be subject to a different law from that which is applicable to the bulk of the property. (c) The whole frame of the settlement is in Scotch form, and the limitations are of such a nature that they can only take effect if Scotch law is to be applied. I therefore feel bound to treat this as a settlement made in Scotland by a domiciled Scotch lady of Scotch property, in Scotch form, and subject to Scotch law. The trustees of this Scotch settlement must in Scotland follow the Scotch law, and their residence in England, or their English domicile, is irrelevant. This being so, it follows, in my opinion, that we are bound to hold that Sir Gerald Fitzgerald takes such interest, and such interest only, as the Courts in Scotland would declare him entitled to :

(1) 4 Madd. 474, n.

(2) 4 Russ. 388; 28 R. R. 136.

(3) (1846) 5 Hare, 163.

Anstruther v. Adair. (1) There ought to be no difference in a matter of this kind between the Court of Session and the High Court. The nature and extent of his interest cannot depend upon his domicile, although his capacity to deal with his interest may perhaps depend upon his domicile. To take the somewhat analogous case of a life interest in English property given by the will of a domiciled Englishman for the separate use of a married woman, without power of anticipation, it has never, so far as I am aware, been suggested that the nature and extent of her interest varied according as her domicile was, or was not, English. The trust would be regarded in our Courts as valid and operative, even though by the law of her domicile neither the separate use nor the restraint upon anticipation was recognised. And, on general principles, the same view ought to be adopted by the Courts of the country in which the married woman was domiciled. In short, by the law of England, it is the Scotch law which must be applied to this Scotch settlement.

It is, however, strongly urged that a strictly alimentary provision for an adult male is not only unknown to and inconsistent with the provisions of English law, as in general it undoubtedly is, but that it is contrary to public policy, and ought therefore to be wholly disregarded in an English Court. I cannot adopt this argument. There is nothing immoral in such a provision. Indeed, there are many instances in which pensions or retiring allowances are by statute made not transferable, or liable to be attached by any legal process. I may refer to the pension allowed to a retiring clergyman under the Incumbents' Resignation Act, 1871, and to the observations of the Court of Appeal on that statute in *Gathercole v. Smith*. (2) Moreover, it has been long settled that at common law, and apart from any statutory enactments prohibiting assignment, certain salaries or pensions are inalienable. For example, the half-pay of an officer. In *Flarty v. Odum* (3) Lord Kenyon said: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant. . . . Emoluments of this

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(1) 2 My. & K. 513; 39 R. R. 263.

(2) (1881) 17 Ch. D. 1.

(3) (1790) 3 T. R. 681, 682; 1 R. R. 791.

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sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. . . . It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." In the following year the same question came up for consideration in *Lidderdale v. Duke of Montrose*. (1) This was an action by an officer on half-pay against the Paymasters-General of the Army to recover arrears of his half-pay, and the only question was whether an assignment by way of mortgage, of which the defendants had due notice, justified them in withholding the money from the plaintiff. The Court were clearly of opinion that, "on principles of public policy, as well as on account of the interest of the officers themselves, by law such assignments were void." The mortgagee was not party to this action, but it seems to have been thought that he might obtain equitable relief, and he accordingly filed a bill in the Exchequer: see *Stone v. Lidderdale*. (2) It was argued that the assignment was good in equity, as a transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. But Macdonald C.B., in a considered judgment, declined to accept this view, and held that the plaintiff was not entitled to any relief in equity in respect of the mortgage. In short, he declined to affect the conscience of the mortgagor in respect of future instalments of the half-pay.

In my opinion it is impossible to disregard this "alimentary provision" on the ground of public policy. The Scotch Court would declare that the interest given to Sir Gerald cannot be assigned, and would disregard the claims of his specific mortgagees, and it is our duty to follow and adopt the Scotch law: *Anstruther v. Adair*. (3)

(1) (1791) 4 T. R. 248, 250; 2 R. R. 375. (2) (1795) 2 Anstr. 533; 3 R. R. 622.

(3) 2 My. & K. 513; 39 R. R. 263.

But then it was urged that Sir Gerald could bind, and did bind, the income as and when it reaches the hands of the trustees in England, and that, whatever might be the rights of his alimentary creditors, he himself ought not to be allowed to claim from the trustees the income which he has, by a contract binding on his conscience, charged in favour of his mortgagees. I doubt whether this doctrine, which is explained and illustrated by Lord Macnaghten in *Tailby v. Official Receiver* (1), has any application to a vested life interest, the assignment of which takes effect, if at all, for reasons wholly independent of conscience. An assignment of a vested equitable interest is complete and operative, though voluntary. It in no way depends upon contract, or upon anything further to be done by the assignor. The doctrine applies only where there is no present property capable of assignment, such as possibilities and expectancies. *Stone v. Lidderdale* (2) is an authority against the respondent's contention, and I know of no authority in its favour. I may observe that the defendant Lidderdale was a domiciled Englishman, whose general capacity to contract was undoubted. Moreover, this contention is really only another way of presenting the argument that we ought to disregard the Scotch law. If the life interest is capable of assignment, the Court would grant specific performance of the contract, and would aid the mortgagees by granting an injunction. If, however, as in *Stone v. Lidderdale* (2), the interest is non-assignable, I think it follows that no effect can be given to a deed purporting to assign by way of anticipation. The decision of the House of Lords in *Scott v. Allnutt* (3), which was relied upon, does not really touch the case.

In my opinion, the order of Joyce J. was wrong, in so far as it declared that the whole of the income during the life of Sir Gerald is payable to his assignees or incumbrancers, according to their respective priorities. If the amount of the income were very large, any excess beyond a reasonable amount would, according to the Scotch law, pass to the assignees or incumbrancers, but I do not understand that it is suggested that

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(1) (1888) 13 App. Cas. 523, 543.

(2) 2 Anstr. 533; 3 R. R. 622.

3) 2 Dow & C. 404.

C. A. there is any excess in the present case. I think the declaration
 1904 should be to the effect that Sir Gerald is entitled to the whole
 FITZGERALD, income during his life, free from the claim of any assignees or
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 SURMAN his alimentary creditors, or of Miss Fitzgerald, and without
v. prejudice to any prior payment in respect of the policy, which
 FITZGERALD. is the subject of another appeal by Miss Fitzgerald.

STIRLING L.J. read the following judgment:—I agree with Cozens-Hardy L.J. that Sir Gerald and Lady Fitzgerald entered into a contract that their rights in the property of Lady Fitzgerald (who at the time of the marriage was domiciled in Scotland) should be regulated by the Scotch law: *Este v. Smyth* (1); *Chamberlain v. Napier*. (2) That property is now vested in trustees who are domiciled in England; but that circumstance is merely accidental, and cannot, as between the trustees and Sir Gerald Fitzgerald, affect either the duty of the trustees or the rights of Sir Gerald, which must, I conceive, be governed by the law of Scotland; and if a Scotch Court would (as I think the evidence shews it would) hold that trustees domiciled in Scotland ought to pay the alimentary provision, made for Sir Gerald by the contract in Scotch form of September 20, 1862, into his hands from time to time as it becomes payable, regardless of the incumbrances which he has purported to create thereon, then, in my opinion, this Court ought likewise to hold that such is the duty of the trustees in the present case. If Sir Gerald Fitzgerald were a domiciled Scotsman there would be nothing more to be said. But he was at the date of the marriage, and has ever since been, a domiciled Englishman, and he is now resident within the jurisdiction of the English Courts. His capacity to deal with his property is an incident of his status: see *Viditz v. O'Hagan* (3); and, therefore, is governed by English law. By that law, as stated by Lord Macnaghten in *Tailby v. Official Receiver* (4), “it has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form

(1) 18 Beav. 112.

(2) 15 Ch. D. 614.

(3) [1900] 2 Ch. 87.

(4) 13 App. Cas. 523, 543.

of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." In *In re Coleman* (1) this principle was applied to an assignment of an interest under a will to which the assignor became entitled only by virtue of the exercise from time to time in his favour of a discretion vested in the trustees of the will. In this respect the capacity of Sir Gerald Fitzgerald is entirely different from that of a domiciled Scotsman, who, according to the law of Scotland, is unable to alienate an alimentary provision any more than, according to the law of England, a retired officer can alienate his half-pay, either at law or in equity, or a retired incumbent the pension allowed to him under the Incumbents' Resignation Act, 1871, or a married woman separate estate as to which she is restrained from anticipation. In such cases the person entitled to the property in question is by English law incapacitated from dealing with it. But that law does not in general recognise any restraint as regards the property of a man of full age. I cannot see why the English owner of an alimentary provision, created by foreign law, should be held to be incapable of making a disposition of it when it comes to his hands. The foreign law has full effect given to it when it is allowed to determine what ought to come to the hands of the owner in respect of the alimentary provision; after it reaches his hands he is not under any obligation imposed by the foreign law as to how he should apply it, and, as it seems to me, the English law ought to determine whether that which has come to his hands, and become property at his disposal, is to any and what extent subject to obligations arising out of dealings valid according to that law. In my opinion, therefore, an assignment of an alimentary provision, created under foreign law, by will or voluntary deed inter vivos in favour of a domiciled Englishman,

(1) (1888) 39 Ch. D. 443.

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ought to be held by the Courts of this country to bind funds coming in respect of that provision to his hands within the jurisdiction of those Courts. In the present case the alimentary provision was created by a contract into which Sir Gerald entered for valuable consideration. But I cannot see that this puts Sir Gerald in a better position than if he were a volunteer ; for I take it to be clearly settled that the doctrine on which I rely applies to property acquired by contract for value just as much as to property acquired by gift. In my judgment, therefore, an order ought to be made on the lines of that actually made by the Court of Appeal in *In re Coleman*. (1) But, although I have been unable to satisfy myself that the opinion which I have expressed is opposed to any existing authority, I can adduce no decision in support of it, while the weighty and considered opinions of my brethren are adverse. In these circumstances I cannot regret that my own view is not to prevail.

VAUGHAN WILLIAMS L.J. read the following judgment:—
 In my judgment the ante-nuptial contract entered into by Sir Gerald Fitzgerald and Miss Lockhart, with the concurrence of her mother, Lady Lockhart, ought not to be construed and applied according to English law, which is undoubtedly the law of the matrimonial domicile of the husband and wife, and which law would *primâ facie* determine all questions arising under that marriage contract, but ought to be construed and applied according to Scotch law. It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of the marriage, was a domiciled Scotswoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the *primâ facie* presumption that the law of the matrimonial domicile is to govern the contract.

Now the Scotch law is thus stated by the late Lord Advocate (Mr. Graham Murray) in his affidavit : “ By the law of Scotland

(1) 39 Ch. D. 443.

it is possible for a person to create a life interest in favour of another person, and, by declaring that life-rent to be alimentary, to exclude, so far as the life interest does not exceed in amount a reasonable provision, the diligence of ordinary creditors and restrain all power of anticipation. When, therefore, as here, a lady by ante-nuptial marriage contract conveys her funds to trustees, it is possible for her to create a life-rent of these funds in favour of her surviving husband, and to exclude his ordinary creditors and to restrain him from anticipation."

The late Lord Advocate further points out that the non-chargeable nature of such an alimentary life-rent would be upheld by the Scottish Courts, if the question were there raised by a creditor against a Scottish trustee, and says that it is for the English Court to determine whether, in a question with the English creditors of an English debtor, it will give effect to the Scotch law.

Assuming, as I do, that Scotch law governs all the rights created by the express or implied force of the words of the contract, it may be that there are rights which operate upon the contractual rights which are governed, not by the law which by the disclosed intention of the parties has come to be the "proper law of the contract," determining all questions of its legal effect and construction, but by the law of the actual domicile at the time when any dealing with the property the subject of the contract is attempted, such as questions of personal capacity in cases of minority, coverture, &c.

I cannot, however, persuade myself that in this case any question of personal capacity is raised. The case is simply this, that previous to the marriage a contract in the Scotch form, governed as to its legal construction and effect by the law of Scotland, was executed, whereby Miss Lockhart's property was settled upon trust (amongst other things), in case the husband should survive, that the proceeds of the estate should be paid to him for his life, but that all payments to him should be "strictly alimentary," and should "not be assignable nor liable to arrestment, or any other legal diligence at the instance of his creditors." These words of the contract limit the interest which the husband is to take, in the same way as

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C. A. in an English marriage contract the wife's interest is made
1904 subject to a restraint on anticipation.

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SURMAN no personal incapacity; neither the wife, in the case which I
v. have put, nor the husband in the present case, can claim more
FITZGERALD. under the trust than is given to her or him by the trust. It
Vaughan seems to me that no equity acting on the conscience of Sir
Williams L.J. Gerald Fitzgerald can enable him, in respect of the life income
given to him by the trust created by the contract, to do with
that income that which it is impossible for him to do accord-
ing to the effect of the Scotch contract, when construed by
Scotch law.

Indeed, in the matter of the comparison of equities, I think that no obligations can bind the conscience of a person taking a life estate bestowed on him by another more strongly than the trust contract containing the conditions under which the donor has bestowed the gift, and this whether the conditions are expressed or are imposed by the law governing the contract. *Anstruther v. Adair* (1) is really an authority for the proposition that an English Court of Equity, in construing a Scotch contract or enforcing a trust thereunder, will not enforce a wife's equity to a settlement against a husband who comes to the Court to enforce against the surviving trustee resident in London his right to have a fund transferred to him absolutely, as the survivor of his wife, by virtue of a clause in the marriage contract. This seems to me in principle to decide that a Court of Equity in England will not, in contravention of plain provisions in a foreign contract, enforce equities binding the conscience of a beneficiary claiming under that contract.

If I am right in holding that in this case no question of personal capacity is raised, and if I am also right in what I have just said as to a Court of Equity not enforcing equities which, though binding the conscience of such a beneficiary, are inconsistent with the instrument under which he claims when construed by its proper law, i.e., the foreign law, the only remaining question is whether the provision in this Scotch

(1) 2 My. & K. 513; 39 R. R. 263.

marriage contract, "that all payments to Sir Gerald Fitzgerald shall be strictly alimentary and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of his creditors," so conflicts with what are deemed in England to be essential public interests, that the provision cannot be enforced here. This, as I understand, is the ground on which Joyce J. refused to give effect to the provision. He relied upon the law as stated in Westlake on Private International Law, 3rd ed. s. 215, that, "where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law."

The law thus stated seems to me to be accurate, and to correspond, as pointed out by Westlake, p. 40, with art. 6 of the Code Napoléon: "Private contracts cannot derogate from laws which interest public order or good morals." The question in each case is, whether the foreign law or the private agreement conflicts with a law in which the public order and good morals concerned are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognised and insisted upon by all civilised nations.

The English law, in so far as it refuses to give effect to provisions which affect to control the rights of disposition which are attached to an absolute transfer of property, does not seem to me to be a matter regarding "public order or good morals."

It is, I think, merely a logical development from legal definitions adopted by the English law. But it is true that in its application this law has been made the means of protecting creditors, and yet I do not think that in a country which allows restriction on anticipation in respect of the separate property of a wife, it can possibly be said that to enforce a provision in a Scotch contract inconsistent with this law would be contrary to public order and good morals, even though the result might be to defeat the just rights of a creditor.

There are other instances to which my attention has been called by the judgments of my learned brethren, which I have

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C. A. been allowed to read, in which sometimes the Legislature and
 1904 sometimes the Courts of Common Law have recognised restric-
 ~~~~~  
 FITZGERALD,      tions as inconsistent as those in this Scotch contract with the  
*In re.*      alleged essential rule of public order and good morals.  
 SURMAN      I agree with the judgment delivered by Cozens-Hardy L.J.  
*v.*      I cannot agree with the conclusion of Joyce J.  
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THE COURT granted a stay of execution, pending an appeal to the House of Lords, on terms.

Solicitors: *G. J. Fowler; Surman & Quekett; Redfern & Hunt; White, Borrett & Co.; Trower, Still & Co.; Keen, Rogers & Co.*

W. L. C.

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[00124 of 1903.]

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*Company—Register of Members—Transfer of Shares—Non-registration—“Default or Unnecessary Delay” in Registration—Accidental Mistake—Reconstruction of Company—Voluntary Liquidation—Unregistered Shareholder—Dissent from Resolutions, Notice of—Rectification of Register—Registration nunc pro tunc, Order for—Retrospective Registration—Rights of Third Parties, Protection of—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 35, 98, 131, 161.*

The power given to the Court by s. 35 of the Companies Act, 1862, of rectifying the register of members of a limited company is exercisable in any of the cases therein mentioned, whether a company is in liquidation or not; and, accordingly, in a liquidation the power is not, by s. 98, limited to rectification for the purpose of settling the list of contributories.

In ordering rectification of the register under s. 35, whether the company is in liquidation or not, the Court has power, in a proper case, to fix a particular date at which the registration shall become operative, even to the extent of making it retrospective; but subject, if necessary, to conditions protecting the rights of third persons.

The transferee of shares in a limited company sent in his transfer to the company for registration in the usual course, but by mistake or oversight registration of the transfer was omitted. Subsequently the company passed resolutions for a voluntary winding-up with a view to reconstruction, whereupon the transferee, in the belief that his transfer had been registered, and purporting to act under s. 161 of the Companies Act, 1862, served the liquidator with notice of dissent, which, however,