[HIGH COURT OF AUSTRALIA]

HAQUE . . . . . APPELLANT;
DEFENDANT,

AND

HAQUE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

[No 2]

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H C OF A. 1964 1965.

PERTH, 1964, *Sept* 9, 10;

SYDNEY, 1965, *July* 29

Barwick C.J., Kitto, Menzies, Windeyer and Owen JJ.

Private International Law—Choice of law—Succession to property—Classification of property—Movable or immovable—Unpaid balance of purchase moneys due to deceased upon sale of lands—Share of deceased in solvent partnerships the assets of which included lands—Mortgagee's interest in mortgaged lands

The deceased died domiciled in India. At the date of his death he was registered as the proprietor of certain lands in Western Australia which he had contracted to sell Purchase moneys were owing in respect of all these lands and the deceased's obligation to transfer them to the purchasers had not then arisen. The deceased was also at the date of his death a member of two solvent partnerships carrying on business in Western Australia One of these partnerships was dissolved by his death, the other was not. Included amongst the assets of each partnership were lands in Western Australia some of which had been contracted to be sold. The movables of the deceased passed by succession in accordance with Muslim law (*Haque* v *Haque* (1962), 108 C L R 230)

Held (1) By *Kitto*, *Menzies* and *Owen* JJ., *Barwick* C.J. and *Windeyer* J. dissenting, that the lands registered in the name of the deceased and contracted to be sold, and the purchase moneys owing thereon, were movables.

(2) By *Barwick* C J, *Kitto*, *Menzies* and *Owen* JJ., *Windeyer* J dissenting as to certain of the assets of the partnership dissolved by the deceased's death, that the share in the partnership as a whole (in respect of the partnership which was dissolved by the deceased's death) and the money which the partnership agreement provided should be paid to the estate by the surviving partners in satisfaction of the share of the deceased (in respect of the partnership which was not dissolved by the deceased's death) were movables

The nature of a mortgagee's interest in mortgaged land discussed.

The decisions in *In re O'Neill*, *Humphries* v *O'Neill*, [1922] N.Z L R 468; *In re Ralston*, *Perpetual Executors and Trustees Association* v. *Ralston*, [1906] V L.R. 689, per *Cussen* J at p 694, *Livingston* v *Commissioner of Stamp Duties (Q)* (1960), 107 C L R. 411, *per Dixon* C J at p 421, *In re Young*, [1942] V.L.R. 4 and *In re Williams* [1945] V.L R. 213 on the one hand and *In re Hoyles*, *Row* v *Jagg* [1911] 1 Ch 179 on the other, considered and commented upon

Decision of the Supreme Court of Western Australia (*Wolff* C J) *Haque* v *Haque* [No. 2], [1964] W A.R. 172, affirmed

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APPEAL from the Supreme Court of Western Australia.

In an action brought by Saiful Haque and Farida Haque, the children of Abdul Haque (hereinafter called "the deceased") by his second marriage and by Azra Haque, the second wife of the deceased, against Nural Haque as executor of and sole beneficiary named in the will of the deceased, in which action Bibi Kulsum, the first wife of the deceased, and Sufia Ahmed and Jabonnessa Begum, the children of the deceased by his first marriage, were, on their own application, joined as defendants, the Supreme Court of Western Australia (*Wolff* C.J.) declared as follows:

(a) That the will of the deceased was totally void in its dispositions, and

(b) That subject to the payment of debts, duties and administration expenses the following persons were entitled in the distribution of the real and personal estate of the deceased situated within the jurisdiction and in the following shares that is to say:—
the plaintiff Saiful Haque fourteen-fortieths the plaintiff Farida Haque seven-fortieths the defendant Bibi Kulsum five fortieths the defendant Sufia Ahmed seven-fortieths the defendant Jabonnessa Begum seven fortieths.

On appeal to the High Court the judgment of the Supreme Court of Western Australia was varied by substituting in par. (b) of the declaration the words "movable property" for the words "real and personal estate" and by adding after par. (b) a new paragraph lettered (c) as follows:— "That the aforesaid declarations (a) and (b) do not affect the immovables in Western Australia and that it is directed by this order that any question arising in relation to such immovables be reserved for the consideration of the Supreme Court" (*Haque* v. *Haque* (1)). Subsequently in accordance with an order made on a summons for directions the question as to which of the assets of the deceased situate in Western Australia were movables and which were immovables was argued by the parties in open court before *Wolff* C.J.

(1) (1962) 108 C L R. 230, at p 250.

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The assets of the deceased comprised the following property:

(a) A sum of money held on behalf of the deceased by a company.
(b) Two life insurance policies.
(c) Moneys owing to the deceased under contracts of sale of three blocks of land owned by him.
(d) An interest in furniture owned by the partnership of A. & N. Haque.
(e) An interest in seven blocks of land owned by the partnership of A. & N. Haque.
(f) An interest in moneys owing to the partnership of A. & N. Haque under contracts of sale of four blocks of land owned by the partnership.
(g) An interest in certain moneys held on behalf of the partnership of A. & N. Haque by three companies.
(h) An interest in rents accrued to the date of death of the deceased in respect of land owned by the partnership of A. & N. Haque.
(i) An interest in a block of land owned by the partnership of A. Haque & Co.
(j) An interest in debts due to the partnership of A. Haque & Co. by four debtors.
(k) An interest in certain moneys held on behalf of the partnership of A. Haque by three companies.
(l) An interest in the goodwill, fixtures and fittings of a shop held on lease by the partnership of A. Haque & Co.
(m) An interest in a fishing vessel in which the partnership of A. Haque & Co. owned a one-eighth share.
(n) An interest in a motor car owned by the partnership of A. Haque & Co.

The partnership agreement dated 31st March 1937 relating to A. & N. Haque, of which the deceased was a member, contained the following provision: "8. In the event of the dissolution or determination of the partnership by death or from any cause whatsoever, the assets of the partnership shall be realized and all the liabilities of the partnership shall be paid and the balance, if any, shall be divided between the partners in equal shares."

The partnership agreement dated 30th December 1963 relating to A. Haque & Co. of which the deceased was also a member contained the following provision: "12. The death of any partner shall not dissolve the partnership, but the executors or administrators of the deceased partner shall be entitled to continue with the share of the deceased partner in the partnership."

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On 5th November 1963 *Wolff* C.J. declared all the foregoing assets to be movables for the purpose of succession.

From this decision the appellant Nural Haque appealed to the High Court.

R. I. Ainslie Q.C. (with him *J. L. Tookey*), for the appellant. It is a question of law whether interests in the various assets comprising the estate should be classified as movable or immovable. The law of this State determines how the property is to be classified. As to partnership property, s. 33 of the *Partnership Act*, 1895 (W.A.) does no more than set out what was the common law. [He referred to *Boan* v. *Commissioner of Stamps (W.A.)* (1).] But neither the *Partnership Act* nor any doctrine of conversion has any relevance in deciding whether the interest of the deceased in the partnership property is to be classified as an interest in a movable or an immovable—see *In re Berchtold; Berchtold* v. *Capron* (2). So far as the interest of a partner in land owned by the partnership is concerned, the asset of the partnership is land, and it is an immovable. Land is an immovable and all interests in land are immovable. See *Manley* v. *Sartori* (3). [He referred to *Sharp* v. *The Union Trustee Co. of Australia Ltd* (4); *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation (Thomas' Case* [No. 2]) (5); *Livingston* v. *Commissioner of Stamp Duties (Q.)* (6); *Dicey, Conflict of Laws* 7th ed. (1958), p. 495; *Falconbridge, Essays on the Conflict of Laws* 2nd ed. (1954), p. 506.] The partnership land was registered in the names of the partners or in the name of one or other of the partners. They were land investment partnerships and all their assets were situated within Western Australia. In duty cases there is a very artificial rule that a partnership is situated where it carries on business. No case laying down this rule has been concerned with the question of whether partnership land is an immovable or movable. *Forbes* v. *Steven* (7) did not decide that partnership land overseas is to be regarded as a movable. That decision is open to doubt. Land registered in the name of the deceased at his death but which had been sold under contract of sale is an immovable. The fact that the deceased had sold it or entered into a contract of sale in relation to it did not alter the nature of his interest.

[WINDEYER J. referred to *Westlake, Private International Law* 4th ed. (1905), p. 203; *In re Piercy; Whitwham* v. *Piercy* (8).]

(1) (1946) 72 C.L.R. 226, at p. 246.
(2) [1923] 1 Ch. 192, at p. 206.
(3) [1927] 1 Ch. 157, at p. 163.
(4) (1944) 69 C.L.R. 539, at p. 551.
(5) (1955) 94 C.L.R. 1, at p. 28.
(6) (1960) 107 C.L.R. 411, at p. 453.
(7) (1870) L.R. 10 Eq. 178.
(8) [1895] 1 Ch. 83.

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[He referred to *Re Burke* (1); *Falconbridge, op., cit.* p. 520.] The position with regard to mortgages must be distinguished. There has been a distinct conflict between the decisions in Australia and those in England and elsewhere as to whether the mortgagee's interest is movable or immovable. The answer does not turn on whether the land is held under the Torrens system—*In re Williams* (2); *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (3). [He referred to *Falconbridge, op. cit.*, p. 570.] Where there is a contract of sale of land the vendor has the right to retain the land until the purchase price is paid. The fact that the vendor still remains the registered proprietor and still has certain rights on default distinguishes this case from the case where the land has been transferred and, although there may be a balance of purchase moneys still remaining owing, the vendor has no interest in the property. All he has then is the right to receive the balance of purchase moneys and the right to cancel the contract if the purchase moneys are not paid. [He referred to *R.* v. *Canadian Pacific Railway* (4); *Australian Mutual Provident Society* v. *Gregory* (5); *J. A. Clarence Smith, Classification by the Site in the Conflict of Laws*, 26 Mod. L. R. 16, at p. 31; *Re Ritchie* (6); *Philipson-Stow* v. *Inland Revenue Commissioners* (7); *Attorney-General* v. *Johnson* (8).]

F. T. P. Burt Q.C. (with him *J. H. O'Halloran*), for the respondents, Saiful Haque and Farida Haque by their guardian ad litem Mohamed Amir Bux and Azra Haque. The difficulty resides in the formulation of the question and in the proper identification of the item of property to be classified. The correct statement is that legal rights are regarded as being either movable or immovable. It may be that in certain circumstances the right takes its character from the proprietary interest that it sustains; but this is not necessarily so. It does not necessarily follow that because there is a right with respect to land the right must necessarily be classified as an immovable. In the end this must depend upon the application of the *lex situs*. While partners have an interest in every item of partnership property, for the solution of the classification question it is not proper or necessary to look behind a single right, which is the partner's share in the partnership. [He referred to *Bakewell* v. *Deputy Federal Commissioner*

(1) [1928] 1 D.L.R. 318.
(2) [1945] V.L.R. 213.
(3) (1936) 55 C.L.R. 483, at p. 493.
(4) [1911] A.C. 328.
(5) (1908) 5 C.L.R. 615.
(6) [1942] 3 D.L.R. 330.
(7) [1961] A.C. 727.
(8) [1907] 2 K.B. 885.

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of Taxation (S.A.) (1).] The partnership share is the article of property. This is consistent with the revenue cases, particularly *Forbes* v. *Steven* (2). There should be only one system of law involved, having regard to the nature of the partnership. It would be difficult to envisage the rights in a continuing partnership being controlled by one system of law as to the immovable assets, and by another system of law as to the movables. *Laidlay* v. *The Lord Advocate* (3) is one of a number of cases in which the share of the partner in the partnership is regarded as being the asset. See also *In re Stokes* (4). The share of a partner in the partnership business is not to be distinguished from the share of a beneficiary under a will. Here the assets of the estate are movable. [He referred to *Livingston* v. *Commissioner of Stamp Duties (Q.)* (5).] The interest of a partner in a partnership may change its locality without the asset lying behind that interest changing its locality. The position of the unpaid vendor of real estate may be assimilated to the position of the mortgagee. Of the two interests which are admittedly existing, one in the real estate and one in the purchase price—one in the security and one in the debt—the interest in the purchase price in the case of a contract of sale of land, and the interest in the debt in the case of a mortgage, is the dominant consideration. The dominant asset is the debt created. [He referred to *Horsfall* v. *Commissioner of Taxes (Vict.)* (6) and to *In re Ralston* (7).]

[KITTO J. referred to *Lysaght* v. *Edwards* (8).]

If the assimilation of an unpaid vendor to a mortgagee is correct, then the conclusion must be that the vendor's interest is movable. [He referred to *McDonald* v. *Dennys Lascelles Ltd.* (9); *In re O'Neill*; *Humphries* v. *O'Neill* (10); *Commissioner of Stamps* v. *Hope* (11).]

G. A. Kennedy, for the respondents Bibi Kulsum, Sufia Ahmed and Jabonnessa Begum. The situation of partnership property is where the partnership carries on business, which is not necessarily where any land owned by it is situated. Only one case departs from this principle, *Boyd* v. *Attorney-General for British Columbia* (12). It is odd then to hold partnership land to be immovable, for that immovable could be situated elsewhere than

(1) (1937) 58 C.L.R. 743, at p. 770.
(2) (1870) L.R. 10 Eq. 178.
(3) (1890) 15 A.C. 468.
(4) (1890) 62 L.T. 176.
(5) (1960) 107 C.L.R. 411.
(6) (1918) 24 C.L.R. 422.
(7) [1906] V.L.R. 689.
(8) (1876) 2 Ch. D. 499.
(9) (1933) 48 C.L.R. 457.
(10) [1922] N.Z.L.R. 468.
(11) [1891] A.C. 476, at p. 481.
(12) (1917) 54 S.C.R. (Can.) 532.

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the location of the land. See, however, *Toledo Society for Crippled Children* v. *Hickok* (1). Other systems of law have adopted the rule that partnership property is movable, for example, Scotland, Ontario, and France (Article 529 of the *Civil Code*). So far as the land under contract of sale is concerned attention must be paid to the substance of the matter. In municipal law conversion operates, emphasizing the debt and not the land. The interest in the land itself is almost valueless because of the outstanding liability to confer a title. The property which passes in the event of the death of the unpaid vendor is the outstanding obligation of the purchaser to pay the purchase price. The possible rescission of a contract of sale of land is adverted to in *In re Ralston* (2) and *In re Millear* (3). That problem is really the same as in a case where a will provides for personalty going to one person and realty to another, and comprised in the estate is a particular item consisting of land under contract. This property would go with the personal estate. The fact that at some future time the purchaser may default and the vendor or his representative exercise his remedies and retake the land does not affect the answer. The difficulties which can ensue if one avoids the test of substance and merely looks to the land, adopting the view that an interest in an immovable is an immovable is illustrated by the cases on Scottish heritable bonds: *Johnstone* v. *Baker* (4) and *Buccleuch* v. *Hoare* (5). *Re Burke* (6) was criticized in *Re Hole* (7).

J. L. Toohey, in reply.

Cur. adv. vult.

1965, July 29. The following written judgments were delivered:—

BARWICK C.J. Appeal from an order of the Supreme Court of Western Australia declaring that certain assets in the testate estate of Abdul Haque are movables to which the respondent next of kin of the deceased are entitled.

The deceased died domiciled in India. By the Muslim law there operative, he was denied any testamentary capacity as to movables of which he died possessed; by that law, they passed by succession to his next of kin. But he made a will, which was proved in Western Australia, by which he devised and bequeathed all his real and personal property to his brother the appellant Nural Haque and of which he appointed him the executor.

(1) (1953) 261 S.W. 2d. 692 (Texas).
(2) [1906] V.L.R. 689.
(3) (1897) 22 V.L.R. 542.
(4) (1817) 4 Mad. 474n [56 E.R. 780n].
(5) (1819) 4 Mad. 467 [56 E.R 777].
(6) [1928] 1 D.L.R. 318.
(7) [1948] 4 D.L.R. 419.

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Included in his assets were the items which are listed in the order of the Supreme Court under appeal. The question as to the relevant character or quality, i.e. whether they are movables or immovables, arises in respect of each of the following items, as in that list, omitting details:

(a) Moneys due to the deceased under contracts of sale of the following land owned by the deceased, viz: (particulars of three properties)
(b) The interest of the deceased in the following land owned by the partnership of A. & N. Haque, viz: (particulars of seven parcels of land)
(c) The interest of the deceased in moneys owing to the partnership of A. & N. Haque under contracts of sale of the following land owned by the partnership, viz: (particulars of four parcels of land)
(d) The interest of the deceased in rents accrued to the date of death in respect of premises at Queen Victoria Street, Fremantle owned by the partnership of A. & N. Haque.
(e) The interest of the deceased in the property at Stirling Highway, Cottesloe, owned by the partnership of A. Haque & Co.
(f) The interest of the deceased in the goodwill, fixtures and fittings of the shop, at South Street, Fremantle leased to the partnership of A. Haque & Co.

These items may be conveniently grouped, for present purposes, essentially into two classes which I would describe as follows:

(1) The rights of the deceased as an unpaid vendor in the land which he had sold and to the balance of purchase money;
(2) The interest of the deceased in two solvent partnerships, each owning land, one being as well an unpaid vendor of land, and one of such partnerships having terminated on the deceased's death whilst the other continued notwithstanding that death.

Some matters have already been decided as between these parties and need no further discussion. The respondents Saiful Haque, Farida Haque, Bibi Kulsum, Sufia Ahmed and Jabonnessa Begum are the next of kin of the deceased and entitled to succeed to such of his assets as are movables: see *Haque* v. *Haque* (1).

The remaining questions are—

(1) whether all or only some of the abovementioned assets of the deceased are movables by the law of Western Australia, and

(1) (1962) 108 C.L.R. 230.

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(2) What does the law of Western Australia provide as to the succession to any of such assets as are immovables according to that law.

The Supreme Court has decided that each of the said items is a movable and that therefore the respondent next of kin are entitled to succeed to all of them.

The first items which I will consider are the assets described in the list as "moneys due to the deceased under contracts of sale of" parcels of land in Western Australia, but which I have expressed as in class (1) above.

The title to the freehold in these lands remained registered in the name of the deceased at his death but, having been sold under contracts of sale, balances of purchase money were at his death due or had yet to fall due. Undoubtedly the deceased at his death had a beneficial interest in those lands. It was the interest of an unpaid vendor under contracts which I assume were liable to be specifically enforced. In my opinion, the primary question to be resolved in this case is not what is the relevant character or quality of the rights to obtain the balances of purchase money; but what is the relevant character or quality of those interests in those lands. Though, as I shall later point out, the same result should follow, in my opinion, whichever question is treated as primary.

The specific questions which must be answered in connexion with the deceased's interests in the lands are (1) whether, according to the law of Western Australia, the interest of an unpaid vendor in land in Western Australia is a movable or an immovable ?: and (2) if such an interest is by that law an immovable, what does the law of Western Australia provide as to the succession to such an immovable ?

Western Australian law, for municipal purposes, following the law of England, is based so far presently relevant upon the dichotomy of proprietary interests into realty and personalty, a classification which does not correspond with the division of things into movables and immovables. But when occasion arises, as it does here, for the application of that part of the law of Western Australia which includes the rules governing the choice of law in a conflict as between the law of Western Australia and the law of a system which is not based on the concepts of real and personal property, it becomes necessary to assign assets for the purposes of succession to one or other of the categories of movables and immovables.

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The concept of mobility or immobility is primarily concerned with physical things and not with estates, rights or interests. It is only by a conceptual process that these can be fitted into the notion of movables and immovables. Land is by its very nature immovable: and every interest in it must, in my opinion, of necessity be regarded as of the same character or quality. Otherwise, it would seem to me impossible even to begin to make a translation of English land tenures into the classification of immovables.

Physical objects not attached to land, with some exceptions not presently material, are movables, as must be every proprietary interest in them. But rights, or choses in action, have no physical quality which can really be described as movable or immovable. They are concepts: physical mobility is not a quality of the conceptual. But choses in action must be fitted into a scheme of things which requires that they be classified as either movable or immovable.

By the law of Western Australia, following the law of England, choses in action for municipal purposes are assigned a *situs* or location. Thus, a simple contract debt is usually situate where the debtor resides; a share in a company under the *Companies Act* upon the company's register is situate where that register is kept; a specialty debt where the specialty happens to be; and so on. These "locations" spring in part from historical considerations and in part from convenience: see for example, *Commissioner of Stamps* v. *Hope* (1). The location of each such chose in action is capable of change and, therefore, is in a sense mobile. By transference, as it seems to me, such choses in action come to be regarded themselves as movables. But it does not follow that every chose in action is of necessity a movable. Whether or not any particular chose in action is a movable must depend, in my opinion, on the nature of the situation which is assigned to it. I shall return later to the question of what situation should be assigned to the right to the balance of purchase money upon a sale of land and to the question whether, as a chose in action, it is a movable or an immovable.

What then is the relevant character of the interest which the vendor retains in the land pending settlement of the purchase ?

There seems to be no decision of an appellate court as to the relevant character of this interest. But it was decided in *Re Burke* (2) by *Taylor* J. in the Saskatchewan King's Bench that real property owned by a deceased subject to an agreement for sale was an immovable and its succession governed by the *lex*

(1) [1891] A.C. 476, at p. 481.

(2) [1928] 1 D.L.R. 318.

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situs, in that case the law of Saskatchewan. On the other hand, it was decided in *Re Hole* (1) by *Dysart* J. in the Manitoba King's Bench that the right of an unpaid vendor of land to the purchase money where the purchaser had been let into possession and no lien or charge on the land had been reserved to vendor, was a movable; an equitable lien not being thought sufficient to create a significant interest in the land.

However, there are several decisions as to the character of the interest of a mortgagee in the mortgaged land *vis-à-vis* the categories of movables and immovables.

It was submitted in the argument of this appeal that there is such an analogy between the interest of an unpaid vendor and that of a mortgagee that the relevant character or quality of each interest should be held to be the same. It was further submitted that upon the authorities, a mortgage debt, including the mortgagee's interest in the mortgaged land, is a movable and that, therefore, the rights of the unpaid vendor both to the balance of purchase money and to the retained interest in the land are movables.

No doubt there are remarkable similarities between the nature of the respective rights of vendor and mortgagee and of their respective relationships to purchaser and to mortgagor. But I much doubt the propriety of approximating these interests to each other for the purpose of decision in this case. Indeed, it seems to me that there are radical differences between them; also the opportunities of the unpaid vendor to deal with the land and to determine, unaided by Courts or by officials, to whom it shall be transferred are much greater than those of the mortgagee in relation to the mortgaged land. Further, the right to recover the purchase money is more dependent on the maintenance in the vendor of the interest in the land than is the recovery of the mortgage debt upon the retention by the mortgagee of his interest in the mortgaged land.

However, having regard to the view I have formed as to the relevant quality of the mortgagee's interest in the mortgaged land, and as to the result of the authorities, I find it unnecessary to pursue and determine the validity of the suggested analogy. I am prepared to assume, for present purposes, that a sufficient correspondence exists between the interest of an unpaid vendor in the land sold, and the interest of a mortgagee in the mortgaged land, whether or not the title to that land is held under a system of registered title, at least to justify applying to the interest of the

(1) [1948] 4 D.L.R. 419.

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unpaid vendor the same character or quality for the purposes of determining the proper law as to its succession as would be given to the interest of the mortgagee in the mortgaged land.

I turn, therefore, to the decided cases which have dealt, or which have been taken to have dealt with, the question whether the interest of the mortgagee in the mortgaged land is a movable or an immovable according to the law of England, and according to systems of law which are relevantly identical with that law.

But before doing so, I should mention in passing that, to my mind, there is considerable force in the view that, according to English law, when the conflict of laws which is said to arise is a conflict between systems of law, each of which employ the division of proprietary rights and interests into realty or personalty, there is no need to determine whether an asset involved in such conflict is a movable or immovable. In the case of such a conflict "*mobilia*" would be equated to "personalty" as from time to time it is in the language of English judges and the succession to the personalty would be governed by the law of the domicile.

The purpose of adopting the division of things into movables and immovables where there is a conflict of laws is to find a common basis of classification with the other system which does not use the English concepts of real and personal property: *Cheshire, Private International Law*, 6th ed. (1961), p. 461. On this view, the classification of things into movables and immovables is not necessarily universal in cases of conflict. There would seem to be little point in placing an asset in a category not in use in either system of law for the purpose of determining the proper law to govern the succession to it where both systems in conflict already employ a classification common to both. The comity existing between nations employing the same concepts of realty and personalty would not seem to call for such an irrelevant exercise. The conflict could in such a case be resolved by determining the proper law to be applied to the succession to the asset viewed as realty or personalty, as the case may be.

Of course, to adopt different bases of classification in cases of conflict may produce different results, particularly in marginal cases, according to the system of law with which the conflict arises. Also to characterize an asset as realty or personalty in connexion with a conflict with a system which also uses that classification of proprietary interests may seem to involve a departure from the policy behind the retention of the law of the *situs* as the law to determine the succession to immovables: but,

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on the other hand, the law of the *situs* can determine the category into which any asset should be placed.

Farwell L.J. in *In re Hoyles; Row* v. *Jagg* (1) expressed the view and *Cozens-Hardy* M.R. was clearly inclined to the same view that there is no need to re-classify assets in connexion with a conflict with a system also adopting the classification of estates, rights, interests into realty or personalty (2). The matter has not been expressly adverted to so far as I am aware in any English or Australian case. However, there is a passage in the judgment of Lord *Tomlin* in *Macdonald* v. *Macdonald* (3) which appears to treat the classification of assets into movables or immovables as required universally in cases of conflict. Whether His Lordship was intending to disapprove *Farwell* L.J. s propositions in *In re Hoyles* (4) is not quite clear. His Lordship does not expressly do so though it is clear that he adopted the decision in *In re Hoyles* (5) in relation to the relevant character or quality of a mortgage of land.

Some text writers seem to me to regard *Farwell* L.J.'s view as correct: see *Cheshire, Private International Law*, 6th ed. (1961), p. 49; *Schmitthoff, The English Conflict of Laws*, 3rd ed. (1954), pp. 43, 45; *Falconbridge, Conflict of Laws*, 2nd ed. (1954), p. 509; *Graveson, Conflict of Laws*, 3rd ed. (1955), pp. 37, 38. But there is no unanimity on the point. See particularly *Dicey's Conflict of Laws*, 7th ed. (1958), p. 497; also *Inglis, Conflict of Laws* (1959), p. 387. However, this question has not been argued before us and its decision is not necessary, in my opinion, for the resolution of this case. If *Farwell* L.J.'s view were accepted, it would explain and justify the results of some of the cases to which I shall refer, e.g. *In re Ralston* (6) and *In re O'Neill dec'd.* (7).

However, notwithstanding the view of at least the majority of the members of the Court as to the need to do so, the Court of Appeal decided in *In re Hoyles* (5) that a mortgage debt for the purposes of a conflict of laws was an immovable. The Court was not prepared to accept the argument that, because in English law the debt is regarded as principal and the security as accessory, the mortgage debt and the mortgagee's interest in the land should be regarded as movable (8).

Cozens-Hardy M.R. thought that, apart from authoritative opinions of text writers as to the immovable quality of all interests in land, the nature and extent of the mortgagee's interest in the

(1) [1911] 1 Ch. 179, at p. 185.
(2) [1911] 1 Ch., at p. 183.
(3) [1932] S.C. (H.L.) 79, at p. 84.
(4) [1911] 1 Ch., at p. 185.
(5) [1911] 1 Ch. 179.
(6) [1906] V.L.R. 689.
(7) [1922] N.Z.L.R. 468.
(8) [1911] 1 Ch., at pp. 181, 182.

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land and the inseparability of the personal covenant from that interest justified the conclusion that the mortgage was an immovable. *Farwell* L.J. also called attention to the nature of the mortgagee's interest in the land, and the extent of his control over it and was prepared to accept the text writers who said that every interest in land was, by English law, an immovable. The Court really decided, in my opinion, that both the mortgagee's interest in the mortgaged land and the mortgage debt were immovables, the debt being an immovable because it was so bound up with the interest in the land.

Whilst in deciding this case the Court of Appeal was conscious of a particular public policy expressed in the *Statute of Mortmain*, which required control by the law of the *situs* of the alienation of rights in the land, I do not think its decision as to the relevant character or quality of the mortgagee's interest in the land should be read as having been rested upon that ground exclusively. The use of the *Statute of Mortmain*, as it seems to me, was but an instance of the basic public policy that the territorial sovereign determines what changes may take place in the ownership of its land and of proprietary interest therein through the application of the principle that the law of the *situs* both decides the relevant character or quality of the asset and governs the succession to it, if it treats it as an immovable.

The actual decision in *In re Hoyles* (1) appears to have been accepted by text writers on Private International Law. See *Dicey, Conflict of Laws* 7th ed. (1958), pp. 54, 508; *Westlake, Private International Law* 6th ed. (1922), pp. 209, 210, and the abovementioned authors.

As I have mentioned, the decision was adopted by Lord *Tomlin* in *Macdonald* v. *Macdonald* (2). His Lordship's opinion was expressly concurred in by two other of the Lords of Appeal participating in that case and not dissented from by the other two participating Lords of Appeal.

I have not found any case, except those to which I will later refer, in which *In re Hoyles* (1) has been adversely commented upon, although in *In re Anziani; Herbert* v. *Christopherson* (3), *Maugham* J. (as he then was) seemingly had some misgivings as to the correctness of some aspects of *Farwell* L.J.'s remarks which are not germane to the present case.

But the decision has not been followed in New Zealand or in Victoria: see *In re Ralston; Perpetual Executors and Trustees*

(1) [1911] 1 Ch. 179.
(2) [1932] S.C. (H.L.) 79.
(3) [1930] 1 Ch. 407.

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Association v. *Ralston* (1) and *In re O'Neill*; *Humphries* v. *O'Neill* (2). These decisions place significant reliance on the decisions of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland* (3), and in *Lambe* v. *Manuel* (4). It is thus necessary to examine the latter decisions.

Harding v. *Commissioners of Stamps for Queensland* (3) was concerned with the construction of a Queensland revenue statute. Their Lordships decided the construction of the statute on the footing that the Queensland legislature had enacted language which had already been judicially construed in a statute of the United Kingdom identical in language and purpose. Each act imposed succession duties in the same terms: see *Wallace* v. *Attorney-General* (5). The construction adopted in that case and followed in *Harding* v. *Commissioners of Stamps for Queensland* (3) as applied to the Queensland statute was that the general and unqualified words of the statute should be confined in their operation to imposing duty upon dispositions to which any person becomes entitled by the laws of Queensland. A comparable qualification of the general words of a statute imposing legacy duty had been arrived in an earlier case, *Thomson* v. *Advocate-General* (6), on the basis that an English statute imposing duties could not have been intended to apply so as to bring to duty legacies given by the wills of persons dying domiciled in places other than the United Kingdom.

Essentially the construction adopted in the two cases derived from rules of construction of statutes relating to revenue duties: see *R.* v. *Lovitt* (7), and was largely founded upon practical considerations of the administration of revenue laws; see *Wallace's Case* (8). The effect of the construction may be stated by saying that the personal property of a deceased who dies domiciled out of the United Kingdom, notwithstanding its physical presence within the United Kingdom is regarded for the purposes of the revenue statutes as not being located in the United Kingdom but where the deceased died domiciled.

Having decided the construction of the Queensland statute the members of the Privy Council in *Harding's Case* (3) applied it to the facts of that case in a single paragraph of their judgment, the facts being that the deceased died domiciled in Victoria possessed, *inter alia*, of two debts secured on land, stock and goods in Queensland. Their Lordships said: "Arguments have

(1) [1906] V L.R. 689.
(2) [1922] N.Z.L.R. 468.
(3) [1898] A.C. 769.
(4) [1903] A.C. 68.
(5) (1865) L.R. 1 Ch. 1.
(6) (1845) 12 Cl. & F. 1 [8 E.R. 1294].
(7) [1912] A.C. 212, at pp. 220, 221.
(8) (1865) L.R. 1 Ch., at p. 7.

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been presented at the bar which are founded on definitions of real estate in Queensland statutes, and on decisions respecting the locality of mortgage debts and similar property. Their Lordships fail to see that the definitions were intended to apply or do apply to the principle that movables follow the person. And, as regards locality, it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached, and which devolves according to the law of the owner's domicil" (1).

The argument for the successful appellant had been that: "On the true construction of the Act of 1892, considered apart from that of 1895, personal property other than leaseholds situate in Queensland, of persons dying domiciled elsewhere than in Queensland, was not subject to succession duty. The two mortgages and shares in question were for all purposes part of the testator's personal estate" (2); and for the respondents, after referring the Board to some cases "with regard to the mortgages being immovable property", counsel claimed that "they" the mortgages "are incorporeal rights. . . . . locally situate in" (3) Queensland, which locality was decisive.

It might be observed in this connexion in relation to their Lordships' decision that, if the mortgagee's interest in the land were regarded as a movable, it might have been said to be located in Victoria where the deceased was domiciled. In strictness, movables have no locality though they are governed by the law of the domicile. But they are sometimes said to be located in the place of the domicile. That their Lordships referred to the locality of the assets as in Queensland tends, I think, towards the conclusion that, in that case, in the passage I have quoted, they were not dealing with the mortgagee's interest in the land but with the right to recover the debt from the mortgagor, taken as separate from the security for the purposes of the revenue statute.

In *Lambe* v. *Manuel* (4) the Privy Council applied the principles of construction of revenue statutes developed in the cases of *Thomson* v. *Advocate-General* (5); *Wallace* v. *Attorney-General* (6) and *Harding* v. *Commissioners of Stamps for Queensland* (7) to a statute of the province of Quebec, the *Quebec Succession Duty Act of* 1892, imposing taxes upon "all transmissions, owing to death, of the property in, usufruct, or enjoyment of, movable and immovable property in the province." It was held that the

(1) [1898] A.C., at pp. 774, 775.
(2) [1898] A.C., at pp. 770, 771.
(3) [1898] A.C., at p. 771.
(4) [1903] A.C. 68.
(5) (1845) 12 Cl. & F. 1 [8 E.R. 1294].
(6) (1865) L.R. 1 Ch. 1.
(7) [1898] A.C. 769.

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taxes were imposed only on movable property which was claimed under or by virtue of Quebec law and not on the transmission of movables resulting from a succession devolving under the law of Ontario. The Quebec statute did not clearly indicate that the deceased's domicile was immaterial to the determination of the situation of the assets as did the Queensland amendment of 1895 to which their Lordships referred in *Harding's Case* (1): cf. *R.* v. *Lovitt* (2) where attention is drawn to this circumstance. As the deceased died domiciled in Ontario, the Quebec statute as construed by their Lordships did not reach to the deceased's movables. An asset described as "a mortgage debt secured by hypothec on land in Montreal" was held to be a movable. There seems to have been no contest in that case that the debt as such was a movable apart from the argument that it should be regarded as situate in Quebec because the mortgaged land was an immovable there situate. It seems that the debt was treated for revenue purposes as the asset which devolved under the law of Ontario: cf. *Payne* v. *The King* (3).

In my opinion, it is far from clear that the Privy Council in *Harding's Case* (1) or in *Lambe* v. *Manuel* (4) decided that the mortgagee's interest in the mortgaged land was a movable: they appear to have decided that for revenue purposes the debt due by the mortgagor was a movable.

I do not regard the decisions in these cases as binding me to decide that, in relation to such a conflict of laws as arises in the instant case with respect to the succession to the assets of the deceased, the mortgagee's interest in the mortgaged land or the mortgage debt is a movable. Still less do I feel bound by them to decide that the rights of the unpaid vendor in the land and to the balance of purchase money are, in such a case, movables.

In *Lawson* v. *Commissioners of Inland Revenue* (5), *Palles* C.B. decided that a mortgage of foreign land was a movable. He decided this because, by English Law, the beneficial interest in the mortgage passed to the administrator as personalty and not to the heir as realty, and because English law regarded the debt as principal and the security therefor as accessory.

But it seems to me, with all due respect, that these are irrelevant considerations when determining whether the interest of the mortgagee in the land is a movable or an immovable, or the question of where the secured debt is situated for the purpose of

(1) [1898] A C 769
(2) [1912] A C. 212, at pp. 220, 221.
(3) [1902] A C. 552, at p 560.
(4) [1903] A C. 68
(5) [1896] 2 Ir R. 418.

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determining whether it is a movable or an immovable. The doctrines as to the devolution of the mortgage debt and of the benefit of the mortgage security to the administrator rather than to the heir depended essentially on English conceptions of realty and personalty: see *Thornborough* v. *Baker* (1); *Tabor* v. *Grover* (2); *Attorney-General* v. *Meyrick* (3), per *Strange* M.R. (4); and in truth the treatment of the debt as principal and the security as accessory is also related to these conceptions: see *Halsbury*, 3rd ed., vol. 27, par. 498, p. 270. Such considerations, in my opinion, have no place when considering whether the mortgagee's interest in the land is an immovable or a movable. That an asset is personalty for municipal purposes is not, in my opinion, relevant to the question whether, in a conflict of laws between systems, one of which does not employ the dichotomy of realty and personalty, that asset is a movable or an immovable: nor, in my opinion, are the reasons or doctrines for or by which an asset is treated for municipal purposes as personalty or as realty: cf. *Freke* v. *Lord Carbery* (5). The exclusion of equitable doctrines of conversion from having any effect in this connexion is but an application of this reasoning: *In re Berchtold; Berchtold* v. *Capron* (6).

In *In re Ralston* (7) *Cussen* J. decided that the relevant character of debts secured on Victorian land was that of movables and that, as the *Intestate Estates Act* 1896 of Victoria, according to the construction placed upon it, applied only to the movables of a deceased dying domiciled in Victoria, the Act did not apply to a mortgage debt due to a deceased who died domiciled in Tasmania though the debt was secured on Victorian land. His Honour reached this conclusion because "our law looks primarily at the personal obligation" (8), in contrast to the law of Scotland in relation to heritable lands: see *Jerningham* v. *Herbert* (9). His Honour also referred in this connexion to *Harding* v. *Commissioners of Stamps for Queensland* (10). I have already discussed both of these reasons for his Honour's decision.

In *In re O'Neill* (11) it was decided that the proper law to apply to the succession to mortgages of New Zealand land was the law of the domicile of the deceased intestate, which was Victoria. *Salmond* J., speaking for the Full Court of the Supreme Court of New Zealand, held that the mortgage debts and the interest of

(1) (1675) 3 Swans. 628 [36 E R. 1000]
(2) (1699) 2 Vern. 367 [23 E R. 831].
(3) (1750) 2 Ves. Sen. 44 [28 E R. 30].
(4) (1750) 2 Ves. Sen., at p. 46 [28 E R., at p. 31].
(5) (1873) L.R. 16 Eq. 461, at p. 466.
(6) [1923] 1 Ch. 192, at p. 206.
(7) [1906] V L R. 689.
(8) [1906] V.L R., at p 694.
(9) (1828) 4 Russ. 388 [38 E.R. 851].
(10) [1898] A C. 769.
(11) [1922] N Z.L R. 468.

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the mortgagee in the mortgaged land were movables. Again, the treatment by English law of the debt as principal and the security as accessory was regarded as decisive: see (1). Further this principle of the municipal law of England was held to extend the movable character of the debt to the security so that the interest of the mortgagee in the land became an immovable: (2); and *Harding's Case* (3) was regarded as deciding that a mortgage of land was a movable (4).

In *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (5) *Dixon* J. (as he then was) said (6): "The obligation put in suit" —the mortgagor's promise to pay the mortgage debt— "is a constituent part of the form of instrument which, under that law, creates the collection of interdependent personal and proprietary rights by which payment of the mortgage moneys is secured. It is true that English law regards the mortgage debt as the principal right to which the security over the land is accessory. It is probably also true that, in spite of *In re Hoyles* (7), the mortgage debt is a movable and not an immovable (*Harding* v. *Commissioners of Stamps for Queensland* (3); *Lambe* v. *Manuel* (8); *In re Ralston* (9); *In re O'Neill* (10); and cf. *Australian Law Journal*, vol. 2, p. 85)." But these expressions, guarded as they were, were not necessary to the decision of the case then in hand.

In *Commissioner of Stamps* (*Q.*) v. *Counsell* (11), a case which decided that domicile in a territory constitutes a sufficient connexion with that territory to enable its legislature to impose a tax on personal property situated outside the territory of persons domiciled within it, *Latham* C.J. said (12): "The mortgage debts were secured upon land but they also are personal property for the purpose of succession (*Thornborough* v. *Baker* (13); *Tabor* v. *Grover* (14)) and a mortgagee's interest in the mortgaged land is treated as personalty for revenue purposes (*Attorney-General* v. *Worrall* (15)). See also cases mentioned in *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (6), especially *In re Ralston; Perpetual Executors and Trustees Association* v. *Ralston* (16)." But it would seem from the first citations made that his Honour may

(1) [1922] N.Z.L.R., at p. 475.
(2) [1922] N.Z.L.R., at pp. 475, 476.
(3) [1898] A.C. 769.
(4) [1922] N.Z.L.R., at p. 476.
(5) (1936) 55 C.L.R. 483.
(6) (1936) 55 C.L.R., at p. 493.
(7) [1911] 1 Ch. 179.
(8) [1903] A.C. 68.
(9) [1906] V.L.R. 689.
(10) [1922] N.Z.L.R. 468.
(11) (1937) 57 C.L.R. 248.
(12) (1937) 57 C.L.R., at p. 254.
(13) (1675) 3 Swans. 628 [36 E.R. 1000].
(14) (1699) 2 Vern. 367 [23 E.R. 831].
(15) [1895] 1 Q.B. 99.
(16) [1906] V.L.R. 689, at p. 694.

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have been referring to personalty and not to movables as such, though "personal property" is often used to refer to movables which follow the person.

In *Livingston* v. *Commissioner of Stamp Duties* (*Q.*) (1), *Dixon* C.J. expressed the view that "doubtless" mortgages are to be considered movables and not immovables for the purposes of private international law (2), founding himself on *In re Ralston* (3), *In re O'Neill* (4) and *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (5). However, this was not a necessary step in his Honour's decision in that case and although entitled to the highest respect, the expression of opinion was obiter. I have already discussed the authorities upon which his Honour's opinion on the point was based both in this case and in *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (5).

In *In re Young* (6) *Martin* J. expressed the opinion that by reason of the authorities to which I have made reference, mortgages of land should be held to be movables.

In *In re Williams; National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Brien* (7), the Full Court of the State of Victoria felt bound by those authorities to hold that mortgage debts were movables.

In re Hoyles (8) has been followed in Canada: see per *Duff* J., *Royal Trust Co.* v. *Provincial Secretary-Treasurer of New Brunswick* (9); *Re Burke* (10); *Re Hole* (11); *Toronto General Trusts Co.* v. *The King* (12) and in New South Wales: see *Re Donnelly* (13).

In this state of the authorities, even on the footing that the unpaid vendor's interest in the land ought to be treated in the same way as the mortgagee's interest in the land, this Court is free, in my opinion, to consider the matter on principle, giving due weight to the opinions of the learned Justices to which I have referred.

There are no decisions binding upon this Court, though there are expressions of opinion, not all in the same sense, by eminent judges to whose views great respect is due. However, those opinions which are against the decision which commends itself to me depend essentially either upon the validity of the reasoning in *Lawson* v. *Commissioners of Inland Revenue* (14) or upon the authoritative quality in the relevant respect of the decision of the

(1) (1960) 107 C.L.R. 411.
(2) (1960) 107 C.L.R., at p. 421.
(3) [1906] V.L.R. 689, at p. 694.
(4) [1922] N.Z.L.R. 468.
(5) (1936) 55 C.L.R. 483.
(6) [1942] V.L.R. 4.
(7) [1945] V.L.R. 213.
(8) [1911] 1 Ch. 179.
(9) [1925] 2 D.L.R. 49, at p. 53.
(10) [1928] 1 D.L.R. 318.
(11) [1948] 4 D.L.R. 419.
(12) (1917) 39 D.L.R. 380, at p. 389.
(13) (1927) 28 S.R. (N.S.W.) 34.
(14) [1896] 2 Ir.R. 418.

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Privy Council in *Harding* v. *Commissioners of Stamps for Queensland* (1).

I may say in passing that not only is there no unanimity in English law as to the relevant character of a mortgage of land but apparently this is not a settled question in all systems which use for municipal purposes the classification of movables and immovables: e.g. Article 526 of the *Civil Code of France*; *Blackwood Wright, French Civil Code* p. 395, note (t): *Colin & Capitant, Cours elementaire de Droit Civil français* 1, 8th ed. pp. 709, 710: *Aubry & Rau, Cours de Droit Civil français* 11, 6th ed. p. 36. But there are such significant differences in approach to make these writings on the French Code of small persuasion in considering the question in English law.

In my opinion, the considerations adverted to by the members of the Court of Appeal in *In re Hoyles* (2) rightly lead to the conclusion that the mortgagee's interest in the mortgaged land is an immovable in connexion with a conflict of laws where the division of assets into movables and immovables becomes necessary. They also, in my opinion, lead to the conclusion that that interest attracts to itself the mortgage debt so that it is an immovable.

Both reasons apply, in my opinion, *a fortiori* to the case of the unpaid vendor. I have already mentioned that the extent to which the vendor may deal with the land and to which the right to obtain the purchase money is annexed to the vendor's interest in the land is greater than is the case with the mortgagee, a circumstance which underlines the relevance and the applicability to the case of the unpaid vendor of the basic public policy behind the division of things into movables and immovables, and the retention of the law of the *situs* in relation to immovables, their identification and their succession.

With all due respect, I am unable to accept the reasons given in *Lawson* v. *Commissioners of Inland Revenue* (3), *In re Ralston* (4), and *In re O'Neill* (5) for deciding that that interest is a movable.

Nor are there any reasons in *Harding* v. *Commissioners of Stamps for Queensland* (1) or in *Lambe* v. *Manuel* (6) for so deciding.

In my opinion, *Story*, *Westlake*, *Dicey* and the other text writers to whom I have made reference are correct when they say without qualification that every interest in land is an immovable: e.g. *Story, Conflict of Laws*, 8th ed. (1883), s. 447. These views have

(1) [1898] A.C. 769.
(2) [1911] 1 Ch. 179.
(3) [1896] 2 Ir.R. 418.
(4) [1906] V.L.R. 689.
(5) [1922] N.Z.L.R. 468.
(6) [1903] A.C. 68.

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been accepted in England and in Canada: e.g. *Henderson* v. *Bank of Hamilton* (1). The interest of a mortgagee in the mortgaged land is clearly within this general statement: and, even more clearly, so is the interest of the unpaid vendor in the land the subject of sale.

On principle, in my opinion, every interest in land, whatever the reason for its creation or the purpose its creation or retention is designed to serve, is an immovable.

It follows that the interest of the deceased in the lands standing in his name, though subject to an uncompleted but specifically enforceable contract of sale, is an immovable. In my opinion, *Re Burke* (2) was rightly decided.

What is the consequence of this view upon the relevant character of the right to the unpaid purchase money?

No doubt a mortgage debt, unlike, as I have said, the obligation to pay the purchase price, may be severed from the security. Acts of Parliament which abolish the personal covenant without destroying the security, and acts of the mortgagee in releasing the security whilst maintaining the debt are instances. *Payne* v. *The King* (3) is an instance of the debt being separately regarded for purposes of a statute levying revenue upon the grant of probate or letters of administration. Perhaps *Lambe* v. *Manuel* (4) and *Harding's Case* (5) are other examples. But, generally speaking, the mortgage debt cannot be assigned without the security, and, for the purpose of succession, when the debt remains at the deceased's death charged upon the land, the debt, in my opinion, cannot be severed from the security so as to have a different relevant character or quality. If the mortgagee's interest is an immovable, the debt, in my opinion, is necessarily also an immovable.

The right to recover the balance of purchase money, so closely identified with the vendor's interest in the land, because of the identification, is, in my opinion, also an immovable.

Whilst for municipal purposes it has been possible to allow the paramount significance of the mortgage debt as a chose in action and its character as personalty to so infect the mortgagee's interest in the land that that interest is treated as personalty, this process, dealing exclusively with concepts, in my opinion, cannot be followed so to give to an immovable the quality of a movable.

It seems to me that that which in some circumstances may be a movable may in other circumstances be an immovable because

(1) (1894) 23 S.C.R. (Can.) 716.
(2) [1928] 1 D.L.R. 318.
(3) [1902] A.C. 552.
(4) [1903] A.C. 68.
(5) [1898] A.C. 769.

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of the extent to which it is identified with or attached to an immovable; but, in my opinion, an immovable can never lose that character or quality. To my mind, the fundamental reason for the division of things into movables and immovables denies that possibility.

Earlier I expressed the view that all choses in action are not necessarily, because of their nature as such, movables and that the relevant character or quality of any particular chose in action will depend on the situation which is assigned to it.

If I were to approach the decision of this matter by asking as the primary question what is the situation of the debt due by the purchaser for the balance of purchase money I should reach the same result as I have already expressed as to its relevant character or quality. It seems to me that for purposes of succession where there is a conflict of laws, the mortgage debt cannot be treated as if it were an unsecured debt situate where the mortgagor may be, or where the specialty may be if the mortgage instrument is, or is deemed to be, under seal and, therefore, a movable.

Lord *Watson* pointed out quite clearly in *Walsh* v. *The Queen* (1), that it is not possible to regard a secured debt in a like case as an unsecured debt. He says: "Although the debt be not yet due and payable, so that the creditor has had no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only . . . . it is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a jus ad rem, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor" (2).

In *In re Ralston* (3), *Cussen* J. felt it necessary to qualify his decision that a mortgage debt was a movable by saying that at least this was so where there was no question of insolvency of the debtor. With great respect, I have some difficulty in understanding the reason for this qualification. How can the nature of the mortgagee's interest in the land, whilst the debt is outstanding or of the mortgage debt itself, be affected by the solvency of the mortgagor? Both, it seems to me, have the same relevant character or quality whether or not the mortgagor is solvent or insolvent. But that his Honour felt the need in that case to add the qualification suggests, to my mind, that, with great respect,

(1) [1894] A.C. 144.
(2) [1894] A.C., at p. 148.
(3) [1906] V.L.R. 689.

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his Honour was inclined to do that which Lord *Watson* thought inadmissible, namely, to treat the secured debt as if no resort would be had to the security, as if it were unsecured.

The case of the balance of purchase money is in this respect even clearer. The right to the balance of purchase money is inseparably connected with the interest in the land which the vendor must be able to convey if he is to obtain payment of the debt. Inherent in that right as a chose in action is the obligation to convey. Viewed as a chose in action, I cannot think it has any other situation than that of the vendor's interest in the land: that situation being immovable, the debt for the purchase money, in my opinion, is necessarily an immovable. Thus, in my opinion, even if the primary question in this case were whether the debt of the purchaser is a movable or an immovable, the answer should be that it is an immovable.

What then is the law of Western Australia, including its component dealing with conflict of law, with respect to succession to immovables? Is it that the law of the *situs* governs the succession to all immovables or only to some immovables? I have been unable to find any authority or any writing by any text writer or commentator to support the proposition that, in English law, the law of the *situs* only applies to some immovables, and that there are other immovables as to which English law concedes the right of the law of the domicile to determine the succession. I could not regard any of the cases to which I have so far referred as establishing such a proposition. All of these cases which have relevance to the question are founded on the clear assumption or rather the concession, that English law provides that, in a case of a conflict of laws such as occurs in the present case, the law which will govern the succession to an immovable is without exception the law of the *situs*.

Further, on principle, I cannot see any reason why the law of the *situs* should concede that it does not supply the proper law to govern the succession to any immovable. To do so would, in my opinion, be to deny a purpose which the assignment of estates and interests into the classification of immovables appears intended to serve.

In my opinion, the law of Western Australia, like the law of England, is that the proper law to determine the succession to all immovables is the law of the *situs*, and that there are no exceptions to the proposition. In particular, in my opinion, it is inadmissible to reason that whereas the interest in the land is immovable, it is an immovable in an excepted class, namely, a class of case

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where the immovable is regarded for municipal purposes as accessory to something which, considered apart from its association with the land, is a movable: and that therefore the succession to it is governed by the law of the domicile.

Lastly, what is the law of the *situs* in Western Australia with respect to the succession to the vendor's rights against the purchaser and in the land, not viewed as immovables, but, apart from the rules as to conflict of laws, for what these rights are in the municipal law of Western Australia. Comformably, as it seems to me, with everything that has been decided and written on this topic, the law which is to be applied as the law of the *situs* once the asset is identified by that law as an immovable is the municipal law of the place, the asset being treated for what it is irrespective of how it is characterized for the purposes of the conflict of laws: cf. *Cheshire, Private International Law*, 6th ed. (1961), p. 465.

The municipal law of Western Australia does not make special provision for the succession to the rights of an unpaid vendor, and the answer as to what the law of Western Australia provides as to the succession to such rights, in this case, is, in my opinion, plain. They pass under the will of the deceased to the plaintiff Nural Haque, beneficially.

With respect to the other assets, I am in agreement with the conclusions arrived at by his Honour Mr. Justice *Kitto* whose reasons I have had the advantage of reading. But as the facts relating to the affairs of these partnerships are not before us in any detail, I should state the basis upon which I adopt his Honour's conclusions. I do so upon the footing that what the deceased relevantly had at the date of his death, to which his next of kin claim to succeed, was no more than a right, in the one case to a distribution on the winding up of the partnership and, in the other case, to the payment by the former partners of a sum of money equal to the net value of his share in the partnership and, in default of payment, to a winding up of the partnership and the distribution of the assets. I would wish to reserve for future consideration cases where, upon the facts, it can be said that what is available to pass upon the death of the deceased is an interest in the land of the partnership: cf. *In re Holland; Brettell* v. *Holland* (1).

In my opinion, the order of the Supreme Court should be varied by declaring that the items in class (1) of my classification are immovables, and the remainder of the listed items are movables. That means that, in my opinion, the assets itemized in the list

(1) [1907] 2 Ch. 88.

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in the order under appeal as moneys due to the deceased under contracts of sale of the three particular parcels of land are immovables, and the assets itemized in the remainder of the list are movables.

KITTO J. Abdul Haque, who will be called the deceased, died leaving a will by which he devised and bequeathed all his estate to the appellant absolutely. At his death he was resident in Western Australia and had property there; but he was domiciled in India. In Western Australia, as in all countries which accept the general principles of private international law obtaining in English courts, the law of a deceased person's domicile is followed for the purpose of determining the succession to property in that State which the law of the State regards as movable, but the State's own municipal rules govern the succession to property there which that law regards as immovable. Accordingly the will of the deceased, being valid according to the municipal law of Western Australia, entitles the appellant to succeed to immovable property (if any) in that State; but since, according to the relevant Indian law (which is Muslim law as proved in the present case) the right of succession to the property of the deceased belongs to his widow and children notwithstanding a will, the appellant takes no interest under Western Australian law in any of the property in the State which consists of movables. That this is so has been established between the parties in earlier proceedings (1).

By the order made by this Court in those proceedings, any question arising in relation to immovables in Western Australia was expressly left for determination by the Supreme Court of the State. It had been assumed by all concerned that the property of the deceased in Western Australia consisted of movables only; but upon the matter coming again before the Supreme Court the appellant raised for the first time a contention that some of the property should be held to be immovables. *Wolff* C.J., having heard argument on the matter, decided that all the items in question were movables and made an order so declaring. From that order this appeal is brought, but in relation to some only of the assets to which it refers.

The order as drawn up takes the form of a declaration that the assets set out in a schedule are all movables. The schedule repeats a list which had been prepared between the parties and accordingly is expressed in their language and not that of the learned Judge. Though clear enough in intention, some of the

(1) (1962) 108 C.L.R. 230.

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descriptions employed tend to conceal the difficulties which it is necessary to resolve. For example, the first description is "moneys due to the deceased under contracts of sale" of certain lands, whereas the question to be decided concerns not only rights to receive purchase moneys but also interests in the lands comprised in the contracts. It is necessary therefore to define the question which arises in relation to each relevant item of property.

(1) The first question concerns three parcels of freehold land in Western Australia. In respect of each parcel there was in force at the death of the deceased a contract by which he had bound himself to sell and convey the land to a purchaser upon payment of a price of which the whole or part was still unpaid. Unfortunately the terms of the contracts were not proved in the Supreme Court and are therefore not before us; but it is not suggested by any party that in any instance the time for completion had arrived or that the deceased had tendered a transfer. It is to be assumed, therefore, that the contracts were still *in fieri*. In each instance the deceased had the legal title to the land at his death, and subject to the contract he held it for his own benefit absolutely. But by the operation of well-known equitable principles the making of the contract had to an extent transferred the beneficial ownership to the purchaser. The deceased was not a mere trustee for the purchaser, but his position was something between that of a mere trustee and a mortgagee. He could exercise for his own benefit such rights with regard to the land as were consistent with the contractual rights of the purchaser until payment of the purchase money in full, and until that event he had a lien or charge for the unpaid purchase money: see *Lysaght* v. *Edwards* (1). Sir *George Jessel* M.R. (*ibid.*) would have described him as being in a position analogous to (though not identical with) that of a mortgagee, one point of similarity being that if the contract should be validly cancelled for nonpayment of the purchase money the land would become his absolute property once more. Accordingly for some purposes he was in the position of a trustee, though for some he was not, as may be seen by contrasting *Lysaght* v. *Edwards* (2) with *Rayner* v. *Preston* (3) and *In re Colling* (4). A fuller exposition of the matter appears in the judgment of Sir *Thomas Plumer* M.R. in *Wall* v. *Bright* (5). The vendor is "in progress towards" trusteeship, and the incidents of trusteeship exist only if and so far as a Court of

(1) (1876) 2 Ch. D. 499, at p. 506.
(2) (1876) 2 Ch D 499.
(3) (1881) 18 Ch D. 1
(4) (1886) 32 Ch. D. 333
(5) (1820) 1 Jac. & W. 494 [37 E.R. 456].

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Equity would in all the circumstances of the case grant specific performance of the contract: *Howard* v. *Miller* (1); *Central Trust and Safe Deposit Company* v. *Snider* (2).

Thus there devolved upon the deceased's executor both a right to enforce the contract, which in substance was a right to receive payment of the purchase money, and also a beneficial interest in the land. A right to receive a payment of money is undoubtedly a movable. An interest in land, on the other hand, is an immovable. The private international law in force in Western Australia must choose from three possibilities what rules of municipal law are to govern the succession to the right and to the interest. One possibility is that the law of the domicile governs the succession to the right in respect of the money, but that the law of the *situs* governs the succession to the interest in the land. But the right and the interest are not independent of one another, and it seems inconceivable that private international law should treat them as if they were. If this possibility be put aside, both the right and the interest must be governed by the one municipal law, either the law of the domicile notwithstanding the immovable character of the interest in the land or the law of the *situs* notwithstanding the movable character of the debt. Thus an exception covering the case must be allowed either to the general rule that succession to immovables is governed by the *lex situs* or to the general rule that succession to movables is governed by the *lex domicilii*. There seems to be no clear authority on the point, strangely enough, but an analogy, not complete but sufficiently close, may be found in the case of a debt secured by a mortgage of land, and some degree of judicial consideration has been given to that case. The appellant relied particularly upon the judgments delivered in the Court of Appeal in *In re Hoyles* (3), and they require careful consideration. A testator domiciled in England gave by his will a share of his real and personal estate to charity. The estate included certain debts secured by mortgage of freehold lands in Upper Canada. By the law of England a testamentary gift of impure personalty to charity was void under the *Mortmain Act*, 1736, and by the law of Upper Canada such a gift was void under legislation which applied the provisions of the *Mortmain Act* to that country. The law of each country regarded mortgage debts secured on freehold property within the country itself as impure personalty. It was accordingly conceded that a bequest by a domiciled Englishman of a mortgage debt charged on land in

(1) [1915] A.C. 318, at p. 326.
(2) [1916] 1 A.C. 266, at p. 272.
(3) [1911] 1 Ch. 179.

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England to a charity would be invalid, and that a bequest by a person domiciled in Upper Canada of a mortgage debt charged on land there to a charity would have been invalid. The dispute which came before the English courts arose because the *Mortmain Acts* had only local application and a mortgage debt charged on land out of England was not regarded as impure personalty by English municipal law. The decision was that English law regarded the law of Upper Canada as applicable to determine whether English courts would hold void a gift of land (including impure personalty) in Upper Canada, and that since according to the Mortmain law of Upper Canada a gift of a mortgage debt charged on land there was a gift of impure personalty and consequently void if made to a charity, the gift in question should be treated in England also as void. Both *Cozens-Hardy* M.R. and *Farwell* L.J. approved the statement of *Story* in his *Conflict of Laws*, that "not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be, in the sense of law, immovables, and governed by the *lex rei sitae*". It may be that in this passage the word "mortgages" refers only to the mortgagee's interests in the mortgaged land, and in *In re Hoyles* (1) it was unnecessary for the purposes of the judgments to consider whether it refers also to the debt. The reasoning of the Court may, I think, be reduced to three propositions: (i) a mortgagee's interest in mortgaged land is no less an immovable than any other interest in land; (ii) the *Mortmain Act* of Upper Canada therefore invalidated a gift to charity of the interest of a mortgagee in mortgaged land in Upper Canada; and English law will for its own purposes give effect to that invalidation; and (iii) because (as *Cozens-Hardy* M.R. said) "a mortgagee cannot assign the mortgage debt effectually without also transferring the security upon the land" (2), a gift of a mortgage if invalid as a gift of the security should be held to fail as a whole. *Fletcher-Moulton* L.J., though joining in the decision, felt doubts about it, and *Farwell* L.J. expressed himself as guided by the policy of the *Mortmain Acts* rather than by any considered conclusion upon what he termed "a preliminary abstract question whether mortgages on land are movable or immovable" (3). To treat the case as an authority on that abstract question because of expressions occurring in the judgments but going beyond what the Court had actually to decide is to take a step that requires caution.

(1) [1911] 1 Ch. 179.
(2) [1911] 1 Ch., at p. 184.
(3) [1911] 1 Ch., at p. 187.

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In *In re O'Neill; Humphries* v. *O'Neill* (1) the New Zealand Supreme Court, in a judgment prepared by Sir *John Salmond*, held that it did not follow from *In re Hoyles* (2) that for all purposes mortgage debts were to be treated as immovable property. The Court decided that for the purposes of intestate succession such debts were to be treated as movables and accordingly as governed in regard to succession by the *lex domicilii*. The conclusion does not rest only upon the language used by the Privy Council in cases such as *Harding* v. *Commissioners of Stamps for Queensland* (3) and *Lambe* v. *Manuel* (4), which arose under taxing statutes and on that account have been put aside, perhaps somewhat too readily, by some writers. Fundamentally it rests upon the view that English private international law, having to choose between diverting the security from its prima facie destination in order to make it follow the debt and diverting the debt from its prima facie destination in order to make it follow the security, accepts as of general validity the ingrained principle of English municipal law—namely that the debt is the principal thing and the mortgagee's interest in the mortgaged property is an accessory only—and accordingly makes the security follow the debt. It was that ingrained principle, "absolutely settled and determined centuries ago", which had led *Palles* C.B. to the same conclusion in *Lawson* v. *Commissioners of Inland Revenue* (5); and the weight to which the opinion of that learned Judge is entitled is not lessened by the fact that what he said should no doubt be understood as confined to the case where the mortgage debt itself is to be considered as situate (e.g. because the specialty is there) in a country where the rules of English law apply. Sir *John Salmond* mentioned the contrast which is provided by the case of heritable bonds. Such bonds resemble mortgages when they contain both a charge of money upon land and a personal obligation. In Scottish courts, and consequently in English courts, such bonds, if they are situate in Scotland at the material time, are held to be immovables; but this is because Scottish law, rejecting the English principle that the debt is the principal thing, adopts the opposite rule that the land is to be considered "the principal debtor": *Drummond* v. *Drummond* (6) and that therefore the immovable "draws after it the moveable or personal security": *Jerningham* v. *Herbert* (7). There is here the clearest precedent for conceding that the rules

(1) [1922] N.Z.L.R. 468.
(2) [1911] 1 Ch. 179.
(3) [1898] A.C. 769.
(4) [1903] A.C. 68.
(5) [1896] 2 Ir. R. 418, at p. 436.
(6) (1799) 6 Bro. P. C. 601, at p. 628 [2 E.R. 1293, at p. 1311].
(7) (1828) 4 Russ. 388, at p. 398 [38 E.R. 851, at p. 855].

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in force in a country for the choice of law on the subject of intestate or testate succession may specially allow for the case of a movable and an immovable which are inherently connected with one another, and may select the law of that one which is considered the principal to govern the succession to them both.

The decision in *In re O'Neill; Humphries* v. *O'Neill* (1) accords with views expressed repeatedly in this country: *In re Ralston* (2) (per *Cussen* J.); *Livingston* v. *Commissioner of Stamp Duties (Q.)* (3) (per *Dixon* C.J.); *In re Young* (4) (per *Martin* J.) and *In re Williams* (5) (per the Full Court of Victoria). On the other hand, *In re Hoyles* (6) has been treated as an authority on the general question in one Australian case, *Re F. Donnelly* (7) (where *In re O'Neill* (1) was not cited), and it has been accepted also in a Canadian case, *Re Burke* (8), but cf. *Re Hole* (9). It was mentioned with apparent approval by two of their Lordships in *Macdonald* v. *Macdonald* (10), but there is no actual pronouncement by the House of Lords on the topic.

It will be observed from the foregoing that I have departed from the view of Sir *John Salmond* at the point where he said "the movable character of the secured debt extends to and attaches to the security itself" (11). His Honour's general reasoning would have been accurately reflected, I venture to think, by saying that because at the death of the deceased his interest in the mortgaged land possessed, according to the law of its *situs*, the legal character of a mere security for recovery of the debt, the succession to it should follow the succession to the debt notwithstanding that it was itself an immovable; that is to say (to adapt the expression used in relation to heritable bonds) that the movable draws after it the immovable security. On this view the question whether ultimately the succession to the movable or the succession to the immovable turns out to be the valuable thing—the former by receipt of the mortgage money or the latter by foreclosure—is not only unanswerable at the death of the deceased but is of no consequence so far as the right of succession is concerned. I must confess that I see no reason for holding that a mortgagee's interest in the mortgaged land is a movable; but while its character as an immovable may well be of crucial importance for some purposes, such as a determination of the legal validity of a disposition,

(1) [1922] N Z L R 468
(2) [1906] V L R 689, at p 694.
(3) (1960) 107 C L R 411, at p 421
(4) [1942] V L R 4
(5) [1945] V L R 213
(6) [1911] 1 Ch 179.
(7) (1927) 28 S R (N S W) 34
(8) [1928] 1 D L R 318.
(9) [1948] 4 D L R 419
(10) [1932] S C (H L) 79, at pp. 85, 88
(11) [1922] N Z L R, at p 475.

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inter vivos or by will—validity under a *Mortmain Act* no doubt provides a clear example—it seems to me that English law could not, consistently with its traditional attitude as to the relation of debt and security, apply to such a special class of immovable the same rule of private international law for the choice of the law to govern succession as it applies to immovables generally.

The analogy of a contract of sale with a mortgage is not a complete analogy, but the points of similarity are the very points which are important for our present purpose. The problem, as in the case of a mortgage, is to decide whether the land or the debt should be considered the principal thing. It seems to me that a system of law which views the rights and interests of a vendor of land as they were viewed in *Lysaght* v. *Edwards* (1) must, of logical necessity, accept the answer that the debt is the principal thing. The residual interest which the deceased had in the land at his death, which is commensurate with the amount of the purchase money then remaining unpaid, possesses according to the law of its *situs* the legal quality which Sir *George Jessel* referred to by using the words "lien" and "charge". It devolves upon the executor as an asset to be employed in getting in the purchase money. Without the ability to transfer it or to cause it to be transferred the right to the purchase money is no right at all. It is true that a determination of the contract would free the land from the interest of the purchaser, just as it is true that foreclosure of a mortgage of land under common law titles frees the land from the equity of redemption; and it may be contended that in that event the right of succession to the land would become the right to which effect must be given; but the answer, it seems to me, is that the legal relationship at the death of the deceased between the purchase money and the land was such that the right of succession to the money must carry with it the right of succession to the land. I am therefore of opinion, agreeing with *Wolff* C.J., that the succession to the lands so far referred to is governed by the right of succession to movables.

(2) Questions next arise in regard to certain parcels of land in Western Australia belonging to partnerships of which the deceased was a member at his death. There were two such partnerships, called respectively A. & N. Haque and A. Haque & Co., the business of each being carried on in Western Australia. The former partnership was dissolved by the death of the deceased: see s. 44 of the *Partnership Act*, 1895 (W.A.); but according to the judgment of *Wolff* C.J. there was a provision to the contrary in the partnership

(1) (1876) 2 Ch. D. 499.

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agreement of A. Haque & Co., in which it is said that there were numerous partners. The terms of the agreements are not before us, but so much is common ground. Moreover, throughout the case it has been tacitly assumed, and I therefore take it as the fact, that both partnerships were solvent at the death of the deceased. It is proper of course to put aside the provision in s. 32 of the *Partnership Act* that as between the partners (including the representatives of a deceased partner) land which has become partnership property is to be treated as personal and not real estate, for as is shown by *In re Berchtold; Berchtold* v. *Capron* (1) the distinction between personal and real estate does not coincide with the distinction between movable and immovable property, and the equitable doctrine of conversion to which s. 32 gives statutory effect has no counterpart in private international law. But in relation to both the partnerships with which we are concerned the preliminary question is: what asset of the estate is it material to consider for the purpose of deciding the right of succession? The deceased in his lifetime had, in relation to each partnership, rights of two kinds. On the one hand he had rights with respect to each individual item of partnership property, constituting an interest in each such item, which he was entitled to assert as against all the world: *In re Holland; Brettell* v. *Holland* (2); *In re Fuller's Contract* (3). On the other hand he had his share in the partnership as a whole, consisting of a right as against his co-partners—and this was his whole right as against them—to have the assets realized on dissolution of the partnership, to have the proceeds applied in discharging the debts and liabilities, and to have his share of the surplus paid to him: see *Partnership Act*, s. 33; *In re Ritson; Ritson* v. *Ritson* (4); *Rodriguez* v. *Speyer Brothers* (5). When he died, his beneficial interest in the individual assets no doubt devolved upon his executor, but the executor could not realize such an interest or dispose of it as if it were by itself an asset of the estate. The asset to be administered was (in the case of A. & N. Haque) the share in the partnership as a whole, and (in the case of A. Haque & Co.) the money which the partnership agreement provided should be paid to the estate by the surviving partners in satisfaction of the share. The question of succession therefore arises with respect only to the share in the partnership in the one case and the obligation of the co-partners in the other. These assets, being choses in action, are in my opinion to be classed as movables.

(1) [1923] 1 Ch. 192.
(2) [1907] 2 Ch. 88.
(3) [1933] Ch. 652, at p. 656.
(4) [1898] 1 Ch. 667; [1899] 1 Ch. 128.
(5) [1919] A.C. 59, at p. 68.

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(3) Then there were lands in Western Australia which had been assets of the partnership of A. & N. Haque but at the death of the deceased were subject to contracts of sale. It follows from what I have said already that no separate question of succession arises with respect to these lands, for the administration of the estate must proceed on the footing that the whole of the share of the deceased in the partnership is a movable.

(4) Next, there were certain rents owing at the death of the deceased to the partnership of A. & N. Haque, the demised premises in each case being partnership assets. Again it is only necessary to say that the share in the partnership is a movable.

(5) Finally, the schedule treats as a separate item what it describes as the interest of the deceased in the goodwill, fixtures and fittings in a certain shop in Western Australia, the shop being held at the death by the partnership of A. Haque & Co. under lease. The language used in this connexion in the schedule was chosen, as I gather, because when the partnership acquired the lease it paid the lessor or a former tenant a sum for the benefit of a goodwill attaching to the premises and for certain fixtures and fittings that were there. The reference, however, is to a partnership asset, and it is only necessary to repeat that the interest of the deceased in the partnership as a whole was a movable.

I should perhaps add that I have throughout accepted the assumption which was made by the parties in the arguments presented to us, that the executorial duties have all been completed long since, so that we are dealing with the right of beneficial succession to property held by the executor as trustee.

In the result I am of opinion that the answers given by the order of *Wolff* C.J. to the questions as framed by the parties were correct and the appeal should be dismissed.

MENZIES J. Care must be taken in formulating the two problems with which the Court is really presented in this appeal. Abdul Haque deceased was at the time of his death a member of partnerships carrying on business in Western Australia. Among the assets of each partnership there was land in Western Australia. The first problem is whether the assets in the deceased's estate consisting of his share in each of the partnerships are, to any and what extent, immovables. The same deceased had during his lifetime sold certain lands in Western Australia by contracts of sale under which money was still owing when he died. He remained, of course, the registered proprietor of the land. The second problem is whether the assets in the deceased's estate consisting

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of the unpaid balances of purchase moneys for these lands are, to any and what extent, immovables. In neither case is the question whether an interest in land is an immovable.

A share in a partnership seems to me, by its nature, to be a movable in that there is nothing to fix it unchangeably in any particular place, regardless of the will of the partners, or of the place or the places where they may choose to reside or carry on their partnership business. Since *Commissioner of Stamp Duties (Q.)* v. *Livingston* (1) there can be no doubt that, when a partnership is dissolved by the death of a partner and is being wound up, the personal representative of the deceased partner has no proprietary interest in the specific assets belonging to the partnership. His right is to a share of the surplus ascertainable only when the partnership is wound up. Accordingly, the fact that there is land among the partnership assets which, in winding up, would have to be realized does not inevitably give the interest the character of an immovable. Of course, in such a case the land itself would be an immovable and, if the legal title to it were to be effected by the death of the partner, that title would devolve according to the *lex situs*. We are not, however, concerned here with the title to land; we are concerned with the beneficial rights of the estate of a deceased partner by virtue of the deceased's membership of the partnership. The position would seem to be not unlike that of a person possessed of an interest in a trust fund. The mere fact that there is land subject to the trust would not result in the beneficiary's interest in the fund being an immovable in the place where the land is situated. The interest in the fund is situated in the country which is the forum of administration of the trust or whose law is the proper law of the trust: *Ewing* v. *Orr Ewing* (2). An interest in a partnership is not to be fragmented into as many different interests as the partnership has assets with the consequence that each fragment should be treated as located where the asset with which it is concerned might happen to be. We are here concerned with the interest of the personal representative of a deceased partner in the partnership assets as a whole. What, then, is the consequence of the fact that among the assets of the partnership there is land? Does this give the interest of the personal representative the character of an immovable? I think not. Even if the rights of the personal representative were to be regarded as secured upon the land, the authorities to which I will refer hereafter upon the question whether a mortgage debt is a movable or immovable seem to me to require

(1) (1964) 112 C.L.R. 12.
(2) (1883) 9 App. Cas. 34.

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the conclusion that a right to participate in a partnership surplus to be derived in part from land comprised in the partnership assets is nevertheless a movable.

The question whether the balance of purchase money under an uncompleted contract for the sale of land is a movable or immovable is, so it seems to me, to be determined according to the same principles which determine whether a mortgage debt is a movable or immovable for, upon analysis, each is of the same character, a debt secured upon land. Payment of such a balance is a personal right secured by the land, the title of which remains in the creditor until payment in a similar way to which the title to land subject to a common law mortgage remains in the mortgagee until repayment of the mortgage. Notwithstanding the decision of the Court of Appeal in *In re Hoyles* (1) and the decisions following it in Canada and in New South Wales (i.e. *Re F. Donnelly* (2)), I am satisfied that *In re Williams* (3), where the contrary was decided, is in accord with decisions of the Privy Council which were not referred to in *In re Hoyles* (1). These decisions are *Harding* v. *Commissioner of Stamps for Queensland* (4); *Payne* v. *The King* (5); *Lambe* v. *Manuel* (6) and *Toronto General Trusts Corporation* v. *The King* (7). These cases are discussed in the judgments in *In re Williams* (3) and to what is there said I do not wish to add anything. The decision in *In re Williams* (3) is supported by an earlier decision of the Supreme Court of Victoria in *In re Ralston* (8), per *Cussen* J. (9), by the decision of the Supreme Court of New Zealand in *In re O'Neill* (10) and by the observations of *Dixon* J. (as he then was) in *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (11). These authorities, while treating mortgage debts as movables, recognize that in some circumstances the debt and the accessory security may have to be regarded separately and differently, for, of course, there is no doubt that in itself a security upon land is an immovable. I have carefully considered the criticism of *In re Williams* (3) by Professor *Falconbridge* in chap. 26 of his *Essays on the Conflict of Laws*, 2nd ed. (1954), at pp. 573-580, but I am unable to accept his view that decisions of the Privy Council in the taxation cases to which I have referred to the effect that mortgage debts are movables have no application in succession cases. In none of the decisions did the characterization of the mortgage debt as a movable depend upon the statutory

(1) [1911] 1 Ch. 179.
(2) (1927) 28 S.R. (N.S.W.) 34.
(3) [1945] V.L.R. 213.
(4) [1898] A.C. 769.
(5) [1902] A.C. 552.
(6) [1903] A.C. 68.
(7) [1919] A.C. 679.
(8) [1906] V.L.R. 689.
(9) [1906] V.L.R., at p. 694.
(10) [1922] N.Z.L.R. 468.
(11) (1936) 55 C.L.R. 483, at p. 493.

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provision that was under consideration. In each case it was necessary to determine the true character of the debt as a movable or immovable for the purpose of applying the material tax law to it.

Here, where there is no suggestion that resort to the land as security will have to be had in either the cases of the partnerships or of the contracts of sale, it is, I think, sufficient to decide that the assets consisting of the deceased's interests in the partnerships and the debts owing upon uncompleted contracts for the sale of land, are movables.

In my opinion the appeal should be dismissed.

WINDEYER J. As a sequel to the decision of the Court in *Haque* v. *Haque* (1), we have now to decide whether certain items of property, part of the estate of Abdul Haque deceased, are to be considered as movable property or as immovables. I have found the case very troublesome. None of the many decisions that I have read seems to me to provide conclusive and authoritative answers to the questions raised, and academic writers differ somewhat on matters of basic principle involved.

As I see the matter, three questions arise in the classification of property as movable or immovable. First, what is the thing to be classified, what is the *res litigiosa* ? Secondly, where, for the purpose of the relevant law, is that *res* ? Thirdly, is it considered movable or immovable by the law of that place ? The three questions are separate but each has a bearing on the others.

(i) *The res* It is, of course, critical to decide what are the things that are to be classified, or, if one prefers the expression, characterized. Are we here concerned primarily with the right of a vendor to be paid the contract price for land he has sold, or with his interest as landowner in land that he has agreed to sell ? Is the thing in dispute a share in a partnership business, or the interest of a partner as co-owner of land that is partnership property ? Counsel sought to get over some of the difficulties of this stage of the inquiry by saying that in each instance the property in question should be regarded as the aggregate of rights that one person has in relation to another or others. But this view, however satisfying in jurisprudential analysis, seems to me not to accord with the premise, perhaps unsophisticated, on which the distinction between things movable and immovable is founded. That distinction can really relate only to the physical

(1) (1962) 108 C.L.R. 230.

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quality of tangible things—to chattels on the one hand and land upon the other. But, even in countries where for the purposes of the local law it is a basic division of property, it has necessarily had to be elaborated by law. Some tangible things that are movable in fact have been immobilized in law because of their relation to land. In French law, for example, horses and cattle or equipment kept for the service and working of a farm are said to be not immovable by nature but immovable by destination. Whether a particular thing is a movable or immovable thus depends upon the particular system of law by which the question is to be resolved. Moreover it is only by legal artificialities that an incorporeal thing can ever be said to be either movable or immovable. The civil law did not apply the distinction to *res incorporales*. And the *German Civil Code*, I think, does not, because for it a thing is a tangible thing. But our law, and as I understand it the law of France, gives a quality, movable or immovable, to incorporeal things. But it is not to be thought of as a distinction based upon the rights that one person has in relation to another person. It continues to be based upon a distinction between two sorts of things in relation to which, or in or over which, rights exist. This was pointed out by the late Professor Cook in his helpful and thought-provoking work, *Logical and Legal Bases of the Conflict of Laws* (1942). The character of a thing is the determinant of the character of rights in relation to it. And this is possible because, whatever be the position in ultimate analysis, English law, and also the laws of other countries, speaks of a legally enforceable claim that one person has against another as itself a thing that can be the subject of ownership. Coke said that " a debt is a thing consisting merely in action " : *Co. Litt.* 292 b. But in later times the phrase " chose in action " has enabled us to think and speak of a debt as a thing which can have both a local habitation and a name, a thing the ownership of which can be transferred from one person to another, a thing to which one person may succeed on the death of another. English law never baulked at the idea of an incorporeal thing. Maitland said that " mediaeval law was rich in incorporeal things ". And incorporeal hereditaments were readily fitted into the common law of real property : see *Challis, Real Property*, 3rd ed. (1911), Sweet's note pp. 48-58.

The distinction between immovables and movables that must be made in cases involving a conflict of law is not the same as the distinction that the common law makes between realty and personalty. But the common law concept of an incorporeal hereditament to which the heir succeeded, and which thus had something

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of the character of an estate in land to which it was often appendant or appurtenant, has made it easier for English law to treat all rights in, or in relation to, land as immovable simply because they take their quality from the thing in relation to which they exist. Whenever there is a corporeal thing to which rights can be so related that one can say they create an interest in that thing, then it seems that the question of mobility or immobility of that interest should depend upon the quality of that thing.

I turn now to the rules by which, for the purposes of the law of Western Australia, the *situs* of a thing corporeal or incorporeal is determined.

(ii) *The situs of the res*: If the thing be land the question of course admits of only one answer. Land is where it lies. It can never be moved. And any interest in or over the land must, it seems to me, also be considered as a thing having its *situs* where the land is. For only by the aid of the law of the country where the land is can such possession of it be had as is ultimately requisite to an enforcement of that interest. A chattel, on the other hand, is a movable, and at any given time it is where it then in fact is. When we go from the field of corporeal things, lands and chattels, and rights and interests related to them, to purely incorporeal things, questions of *situs* become artificial. Such things can have no actual place anywhere. But law for its own purposes puts all its incorporeal creatures in their proper places. The conventional rules that have been adopted to this end had their beginnings in early ecclesiastical law. It was necessary to determine, for purposes of administration of the goods of a deceased, which ordinary had jurisdiction, and that meant deciding within which province or diocese debts owing to a deceased were *bona notabilia*. The rules are old. The first statement of them seems to be the notes in the margin of *Dyer's Reports* 305 a. It is enough to quote here a passage from the judgment of Lord *Abinger* C.B. in *Attorney-General* v. *Bouwens* (1) as follows:

"Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them in pios usus. As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute; but to prevent conflicting

(1) (1838) 4 M. & W. 171 [150 E.R. 1390].

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jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found" (1).

These rules of ecclesiastical law found their way into English private international law. They were, at an early date, cited when there were conflicting laws governing succession, the first case of that kind being, perhaps, *Pipon* v. *Pipon* (2). Modern statements of these rules by which choses in action are notionally localized for legal purposes are to be found in the judgment of *Jordan* C.J. in *Ex parte Coote* (3) and see *Jabbour* v. *Custodian of Absentee's Property of State of Israel* (4). The rule that a simple contract debt is where the debtor resides has been explained as relating it to the place where it can most readily be enforced: see *Commissioner of Stamps* v. *Hope* (5) and *New York Life Insurance Co.* v. *Public Trustee* (6). But to-day that may be not much more than a rationalization, since execution is no longer to be had against the person of a debtor and his wealth and property may be not where he resides. Moreover the rule has its exceptions: a debt that is made payable at a particular place may sometimes be regarded as being located in that place, but only it seems when the debtor has a residence there: *Re Helbert Wagg & Co. Ltd.* (7).

How far the locality of a secured debt is affected by the place where the security is does not seem to have been expressly decided as a general proposition. Yet as the question has a bearing upon some of the arguments that we heard in this case I proceed to a brief consideration of it. There is no difficulty when the debtor is resident in the country where the land lies and the security documents are there too. It is only when debtor, document and land are not all within the same jurisdiction that the subject becomes complicated and debatable. In *Walsh* v. *The Queen* (8),

(1) (1838) 4 M. & W., at pp. 191, 192 [150 E.R., at p. 1393].
(2) (1744) Amb. 25, 799 [27 E.R. 14, 507].
(3) (1948) 49 S.R. (N.S.W.) 179; 66 W.N. 28.
(4) [1954] 1 All E.R. 145.
(5) [1891] A.C. 476, at p. 482.
(6) [1924] 2 Ch. 101, at p. 119.
(7) [1956] Ch. 323.
(8) [1894] A.C. 144.

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a case concerning the locality of debts due to a company resident outside Queensland secured on land in Queensland, it was argued that, as the securities were accessory to the debts, the locality of the debts was unaffected by the locality of the security documents. But Lord *Watson*, delivering the judgment of the Privy Council, said: "it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only" (1); and later: "The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon an estate within the Colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the Colony. Such an interest is certainly property of the company, and property in the Colony, because it affects the estate which is admittedly situated there". And see *Toronto General Trusts Corporation* v. *The King* (2), and *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society* (3). In *Royal Trust Co.* v. *Provincial Secretary-Treasurer of New Brunswick* (4) (a case concerning succession duty), *Duff* J. discussed the matter at some length. He said:

"The asset in each case, from the economic or business point of view, is, of course, the security in its entirety; the personal obligation to pay money, plus the charge upon the mortgaged property to pay money, plus the charge upon the mortgaged property by which the payment is guaranteed. But from the legal point of view, the personal obligation is for many purposes regarded as distinct from the charge, although the relation between them is such that the mortgagee cannot effectively transfer the personal debt while retaining ownership of the charge, or enforce payment of the debt without releasing the mortgaged property, or, by appropriate proceedings, converting it into money applicable in reduction of the debt. The mortgage does, unquestionably, create an interest in the mortgaged property in the jurisdiction where the property is situate . . ." (5). Nevertheless, constrained by the decision in *Commissioner of Stamps* v. *Hope* (6), he treated the location of the mortgage instruments as decisive for the case before the Court. Whatever be the position when the question is as to the construction and reach of taxing statutes it seems that when the question is whether a debt secured by mortgage of land is to be considered as a movable or immovable

(1) [1894] A.C., at p. 148.
(2) [1919] A.C. 679, at p. 684.
(3) [1938] A.C. 224, at p. 238.
(4) [1925] 2 D.L.R. 49, at p. 53.
(5) [1925] 2 D.L.R., at p. 53.
(6) [1891] A.C. 476.

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the *situs* of the *res* is taken to be where the land is. *In re O'Neill*; *Humphries* v. *O'Neill* (1), a case to which I shall make further reference later, accords with that view, for there it was held that whether a mortgage debt is movable or immovable depends upon the law of the place where the mortgaged land lies. I mention this at this point because it was strongly argued that the interest of an unpaid vendor could be likened to that of a mortgagee: and therefore that we could be guided to a decision on one aspect of the case by considering whether a mortgage debt is properly to be called a movable or immovable. To that question I shall come. On the preliminary question of the *situs* of the things to be classified it is, I think, of no consequence in this case. For here both the lands, the subject of contracts of sale, and the purchasers who had to pay for them were in Western Australia at the date of the death of the deceased. And as to the other items of property in question, namely lands that were partnership property, a share in a partnership is situate where the business is carried on: *Commissioner of Stamp Duties* v. *Salting* (2). That was in Western Australia, and the partnership lands were there too.

The things in dispute, however they be described, were thus all in Western Australia when the deceased died. They must therefore be classified as movable or immovable according to the law of Western Australia.

(iii) *Is the res a movable or immovable by the law of Western Australia?* The statement that the movable or immovable character of a thing is to be determined by the *lex loci rei sitae* is, as has been pointed out by several writers, not free from ambiguity and difficulty. The *lex loci rei sitae* is commonly said to mean the rules by which the local law would determine the same question arising in a similar case of local concern and consequence. But the law of Western Australia never has to make a distinction between movables and immovables in such a case. It is not a distinction that is known to it for any domestic purpose. How, by the law of Western Australia, can things be classified by differentia that that law does not recognize? It was argued that authority and analogy supply answers and disperse the difficulties. I shall consider in turn the main items of property that are in question.

(a) *The three parcels of freehold land*: These had been sold by the deceased in his lifetime, but the time for completion of the contracts had not arrived. In each case the purchase money,

(1) [1922] N.Z.L.R. 468.
(2) [1907] A.C. 449.

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or part thereof, was still unpaid when the deceased died. The contracts are not in evidence, but it seems they provided for payment by instalments. I shall assume that the purchasers had in fact been let into possession by the deceased. The rights of the vendor and purchaser respectively in the land the subject of a contract of sale depend upon the combined effect of the terms of the contract and doctrines of law and equity. The purchaser's interest in the land arises because, pending the time for completion, equity will restrain the vendor from dealing with the land in any manner inconsistent with his contract; and will, when the time arrives and subject to discretionary defences, compel him to perform it. For private international law it matters not whether the purchaser's interest in the land is the creature of law or of equity. It is no doubt a proprietary interest, not a merely contractual right. It is a *ius in personam ad rem*. But it is less than ownership. Contract is not the equivalent of conveyance. Whatever the terms of the contract, the legal estate in the land remains in the vendor until conveyance. Until he be paid in full he has more than a bare legal estate. Even after conveyance he has a lien upon the land if he had not in fact been paid in full. As I see it the *res* that has to be classified as movable or immovable is the land, or the interest of the deceased in the land. It was argued that it should be regarded as simply a debt owed by the purchasers to the deceased for land that he had sold, the vendor's interest in the land being merely a security for the due payment of the debt. In support of that view we were asked to treat an unpaid vendor as in virtually the same position in reference to the land the subject of the contract of sale as a mortgagee is in reference to the mortgaged land. But the differences in legal consequences of the positions of a mortgagee and a vendor are not inconsiderable; and the differences in economic purpose between an investment of money on mortgage and a sale of lands are, generally speaking, great. I do not regard the two situations as sufficiently alike in legal result or practical purpose to make decisions concerning the movable or immovable quality of mortgage debts and mortgage interests decisive of this case. But they are close enough to it to make it important to consider them.

All the decisions and dicta concerning the quality, movable or immovable, of the interest of a mortgagee cannot, I think, be satisfactorily reconciled. This, perhaps, is partly because many of the cases cited dealt primarily with the scope of Acts imposing taxation in one way or another by legacy, succession or probate duties; and it was found necessary to confine by construction

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the operation of unrestricted words in some of the statutes. Cases on whether or not particular assets fell within the range of dutiability thus do not necessarily determine absolutely their quality as movable or immovable. And therefore textbook writers have ignored or deprecated the decisions in *Harding* v. *Commissioners of Stamps for Queensland* (1) and *Lambe* v. *Manuel* (2), and been content to say that *In re Hoyles* (3) determines that mortgages are immovables. That view has been accepted in Canada in at least three cases: *Royal Trust Co.* v. *Provincial Secretary-Treasurer of New Brunswick* (4); *Re Burke* (5); and *Re Hole* (6). But in Australia and New Zealand it has been strongly challenged in a line of cases that begins with the judgments of *Cussen* J. in *In re Ralston* (7), and of *Salmond* J. in *In re O'Neill* (8). The cases are arrayed in *In re Williams* (9), and the opinion they assert, that a mortgage is a movable, was accepted as correct by *Dixon* C.J. in *Livingston* v. *Commissioner of Stamp Duties (Q.)* (10). It is founded upon the principle that a mortgagee holds his interest in mortgaged land merely as a security for the recovery of his debt. That, of course, is old law. In *Martin* d. *Weston* v. *Mowlin* (11) Lord *Mansfield* said: "A mortgage is a charge upon the land: and whatever would give the money, will carry the estate in the land along with it, to every purpose". But that statement really says nothing as to the distinction between movables and immovables. It is concerned with the distinction between personalty and realty, with principles that are succinctly stated in *Cruise's Digest*, vol. ii, p. 89, as follows: "Although the mortgagee enters into possession, yet as long as the right of redemption exists the mortgage is only considered as personal estate; the debt being the principal, and the land the accessory. And, if the mortgagor does not redeem, the personal representatives of the mortgagee will be entitled to the land".

But the distinction between realty and personalty, which for English law governs, or used to govern, the succession to property as between heir and executor, is not the same thing as the distinction between immovables and movables by which when a question of foreign law arises English law determines what law should govern the succession to property. There is, however, much similarity between the distinction that, for its own purposes,

(1) [1898] A.C. 769.
(2) [1903] A.C. 68.
(3) [1911] 1 Ch. 179.
(4) [1925] 2 D.L.R., at p. 53.
(5) [1928] 1 D.L.R. 318, at p. 320.
(6) [1948] 4 D.L.R. 419, at p. 433.
(7) [1906] V.L.R. 689.
(8) [1922] N.Z.L.R. 468.
(9) [1945] V.L.R. 213.
(10) (1960) 107 C.L.R. 411, at p. 421.
(11) (1760) 2 Burr 969, at p. 978 [97 E.R. 658, at p. 663].

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English law regularly makes between realty (and things that savour of the realty) and personalty and the distinction that, for purposes of the conflict of laws, it has occasionally to make between immovables and movables. And it is not surprising that in some early cases the maxim *mobilia sequuntur personam* was taken as referring to personalty as understood in English law. Expressions which treat *bona mobilia* and personal estate as synonymous are not uncommon in cases of the time when the respective spheres of the *lex situs* and the *lex domicilii* were still under debate: see in particular *Balfour* v. *Scott* (1) and appendices, and *Thomson* v. *Advocate-General* (2). The matter was not clarified until *Freke* v. *Lord Carbery* (3). Now when the choice of the law which should govern a succession is between the laws of two jurisdictions both of which accept the English division into realty and personalty, and treat all personalty (other than chattels real) as governed in respect of succession by the law of the domicile of the deceased, it may be that the question of movable or immovable need not arise. Nevertheless it is still necessary to remember at times, and I think in this case, that the classification of some right or interest in property as personalty for English domestic law does not necessarily mean that it is a movable for the purpose of English doctrines of the conflict of law: see *Re Gauthier* (4), and annotation thereto.

Ever since Lord *Nottingham's* judgment in *Thornborough* v. *Baker* (5), it has been established that on the death of a mortgagee both the right to recover the mortgage debt and the mortgagee's interest in the security pass as personalty, not as realty: "The reason is because the money came first out of the personal estate and so naturally returns thither again". But that does not mean that a mortgagee has not an interest in land. *Stirling* L.J. in *Taylor* v. *London and County Banking Co.* (6) said: "Although a mortgage debt is a chose in action, yet where the subject of the security is land, the mortgagee is treated as having 'an interest in land', and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. The reason is thus stated by Sir *William Grant* in *Jones* v. *Gibbons* (7): 'A mortgage consists partly of the estate in the land, partly of the debt. . . . The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has

(1) (1793) 6 Bro P.C. 550 [2 E.R. 1259].
(2) (1845) 12 Cl. & F. 1 [8 E.R. 1294].
(3) (1873) L.R. 16 Eq. 461.
(4) [1944] 3 D.L.R. 401.
(5) (1675) 3 Swans. 628, at p. 629 [36 E.R. 1000, at p. 1001].
(6) [1901] 2 Ch. 231, at pp. 254, 255.
(7) (1804) 9 Ves. Jun. 407, at pp. 410, 411 [32 E.R. 659, at p. 661].

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in effect the debt; as the estate can never be taken from him except by payment of the debt'." This was said of a mortgage in the old common law form, which differs in law from a mortgage under the Torrens System, although not substantially in equity. I quote it to emphasize again that the mortgagee has an interest in land. The heir to the mortgagee's estate in the land would hold it in trust for the successor to his personalty: *In re Loveridge; Drayton* v. *Loveridge* (1). But that does not affect the present question.

For the proposition that the interest of a mortgagee in the debt and the security together is a movable the respondents rely heavily upon the judgment of *Salmond* J. in *In re O'Neill* (2). A deceased domiciled in Victoria at the date of his death had invested a considerable sum on mortgages in New Zealand. The law of Victoria and New Zealand as to the distribution of personalty upon intestacy differed. *Salmond* J. dealt with the problem thus created by the following steps. First, the destination upon intestacy of the mortgage debt, the chose in action, and of the right to enforce it against the mortgaged land must be the same. They must devolve as a single *res*. Secondly, what law is to govern the devolution of that *res* depends upon whether it be a movable or an immovable. Thirdly, that depends upon the principle enunciated in *Westlake's Private International Law*, 6th ed. (1922) p. 209, that "when security is given on immovables for a debt which is also personally due the *lex situs* of the immovables decides whether the debt is to be considered an immovable, that is, as an alienation of so much of the value of the immovables on which it is secured or as a mere debt with collateral security". This proposition makes what is an immovable in fact, namely the land, the dominant element which attracts the law that is to determine the quality, movable or immovable, of the debt that it secures. That law is, as I have said, thus taken to be the *lex situs* of the whole *res*. But does it follow, as a general proposition, that an interest in land is not an interest in an immovable because that law, for the purpose of the distinction between realty and personalty, regards it as accessory only to a right over a movable? This seems to subordinate the distinction between immovables and movables to the distinction between realty and personalty. The difficulty was not critical in that case as both New Zealand and Victorian law make the latter distinction in the same way.

The contrast between the position of heritable bonds under the law of Scotland and mortgages of land under the law of England

(1) [1902] 2 Ch. 859.
(2) [1922] N.Z.L.R. 468.

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seems to me to illustrate the problem, but not to provide, even by way of contrast, an answer. The *lex situs* of a heritable bond is the law of Scotland when the land infefted as security is there. The question of the movable or immovable quality of the *res* is thus referred to a system of law, the *lex loci rei sitae*, in which the fundamental division of property is into immovables (called heritables) and movables. Because immovables formed part of the heritage and not of the executry, the terms used are heritable and movable; but together, as I understand it, they comprehend in the law of Scotland all things and rights, the quality of any incorporeal right or interest as heritable being determined by its relation to a thing that is corporeally heritable. The law relating to heritable bonds was modified in 1868 (31 & 32 Vict. c. 101), but until then such bonds were, as their name indicates, heritable not movable: see *Erskine*, Bk. 2 t. 2 (20th ed. pp. 122-126). The case of *Drummond* v. *Drummond* (1) is instructive as to the nature of a heritable bond at that time. But it is not concerned with succession to the interest of a mortgagee, but with succession to the mortgagor's property, to use English terms. It established that the heir to land in Scotland, which by heritable bond and infeftment had been made the security for a debt of the deceased, took the heritage encumbered. Although the deceased had been domiciled in England, the heir could not require the encumbrance to be paid off at the expense of property passing to the executor, as before *Locke King's Act* he could have done had the matter been governed by English law. The case is thus another example of the dominance of the *lex situs* in a matter concerning rights and interests in land and of the answer that the *lex situs* gives in a system which distinguishes immovables and movables for its own purposes. But neither it nor other Scottish cases that I have read provide guidance, I think, in a case when the *lex situs* is silent upon that question because it is not one that for its own purposes it has to answer except in cases involving a conflict of laws.

If it were permissible to look to systems of law which for domestic purposes do classify property as movable and immovable, then it may well be that support might be found for the general proposition of *Salmond* J. that "the guiding principle is derived from the distinction between principal and accessory". For example, French law recognizes the accessory character of the hypothec in relation to securities over immovables, as is briefly and conveniently explained in Doctor Ryan's *Introduction to the Civil Law* (1962), pp. 187-191. See too *Burge, Colonial and*

(1) (1799) 6 Bro. P.C. 601 [2 E.R. 1293]

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Foreign Law, vol. 4, Pt. 1 (1914), pp. 668, 669, and also vol. 3 (1910), p. 487 where the following statement based on Pothier appears: "A debt, notwithstanding it be secured by a mortgage on immovable property, is personal; for, although the mortgage gives the creditor *jus in re*, a right in immovable property, yet it is only accessory to, and therefore follows, the quality of the principal demand, which is personal, according to the rule, *accessorium sequitur principale*". Nevertheless the question whether by French law a mortgage of land is to be considered a movable because it is accessory has been a subject of controversy.

Some of the judgments that are said to be contrary to the proposition that a mortgage debt is an immovable—among them the decision of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland* (1) when it is read in conjunction with the decision there under appeal reported (2)—treated the movable or immovable quality of the assets in question as governed not by the *lex loci rei sitae* but by the *lex fori*. This departure from general principle occurred because the question was as to the ambit of local enactments imposing taxation. In *Lawson* v. *Commissioners of Inland Revenue* (3), a case concerning legacy duty, it was not contended that the mortgage debts were immovables according to the law of the countries (Switzerland and Victoria) where the mortgaged land was. Therefore *Palles* C.B., although he recognized that this question is for the purposes of private international law ordinarily one for the *lex loci rei sitae*, treated the *situs* of the land as irrelevant and said:

"In result, then, the only matter of law for our determination is whether, according to our law, a debt secured by a mortgage of land in a foreign country is movable or immovable property. And we determine this the moment we determine whether the property is in character a debt with an accessory right to resort to the land for payment, or is in character an estate in land, measured by the amount of the debt. Now this cannot depend upon the locality of the land upon which the debt is charged. The character must be the same, whether the land is situate in a foreign country or here. This brings the matter to a point which is absolutely settled, and was determined centuries ago, when it was held that the beneficial interest in a mortgage in fee passed, upon the death of an intestate, to his administrator, and not to his heir" (4). The decision of the learned Chief Baron in that case thus depended simply on the rules of English law as applied for the purposes of

(1) [1898] A.C. 769.
(2) (1896) 7 Q.L.J. 126.
(3) [1896] 2 Ir. R. 418.
(4) [1896] 2 Ir. R., at pp. 435, 436.

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succession to realty and personalty, the deceased mortgagee having been domiciled within the jurisdiction of the court at the time of his death.

In this state of the authorities, I do not feel able to say more about the matter of a mortgage and a mortgage debt than that, if that were the matter we had to decide, I would follow the Australian cases in preference to *In re Hoyles* (1), because they have had the approval of this Court in the past and because most of my brothers think them correct, rather than because I have a firm conviction.

But that is not the matter that we have to decide. *Maugham* J., as he then was, said in *In re Anziani; Herbert* v. *Christopherson* (2), speaking of *In re Hoyles* (1): "That is a case which decided that a mortgage of land is an immovable. Careful attention to the judgment in that case shows, I think, not only that the question is one of some difficulty, but that the decision is based upon the fact that the mortgagee is for many purposes regarded as the owner of the land" (3). Whatever the position of a mortgagee, the deceased here was, it seems to me, the owner in a relevant sense of the lands in question. I think that his interest in those lands in that character was an immovable, simply because the thing he owned, land, was immovable. That is not altered by his having contracted to sell the land. The equitable doctrine of conversion, which arose to modify the consequences of the distinction between realty and personalty, has no place in the law of Western Australia when that law has to say whether a particular thing is a movable or an immovable. This proposition may be debatable, but it is in accord with the views that *Russell* J., as he then was, expressed in *In re Berchtold; Berchtold* v. *Capron* (4), and see *In re Cutcliffe's Will Trusts*; *Brewer* v. *Cutcliffe* (5). The position would, it seems, be different if the land were in Scotland. By the law of Scotland a contract of sale does transform a heritable into a movable, as appears from the elaborate discussion of the matter in *Heron* v. *Espie* (6). But that merely illustrates once again that rules distinguishing movables and immovables are peculiar to particular systems of law, not universal. My conclusion is that the interest of the deceased in, or in relation to, the three parcels of land at the time of his death is to be considered an immovable. So much of the proceeds of the sales of those lands as, since the date of death, has been or will be actually

(1) [1911] 1 Ch. 179.
(2) [1930] 1 Ch. 407.
(3) [1930] 1 Ch., at p. 423.
(4) [1923] 1 Ch. 192, at p. 206.
(5) [1940] 1 Ch. 565.
(6) (1856) 18 D. 917.

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gathered in belongs I consider to the persons entitled to the immovables: cf. *Philipson-Stow* v. *Inland Revenue Commissioners* (1). I pass to the other items in question.

(b) *Lands that were partnership property*: These fall into two main categories because the deceased was a partner in two separate firms, one known as A. & N. Haque, the other as A. Haque & Co. I shall deal with them separately. But the fundamental considerations are common.

The question as formulated in the judgment under appeal refers to "lands owned by the partnership". And counsel for the respondents spoke of what he called looking behind the partners' share to the partnership assets. But property is not owned by a partnership. It is owned by the partners. As it is put in *Lindley on Partnership*, 10th ed. (1935), p. 147, "the law, ignoring the firm, looks to the partners comprising it . . . what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities". The term "partnership property" as used in the *Partnership Acts* (in the Western Australian Act No. 23 of 1895, s. 34) does not alter this. Nor is it material for present purposes that the Acts (s. 32 of the Act of Western Australia) apply the equitable doctrine of conversion to partnership property. A share in a partnership is the interest that a partner has in the surplus of assets over liabilities upon realization. A partner has no separate interest in any particular part of the partnership property. Yet his interest, subject to the claims of the creditors of the partnership business, is it seems to me not, for present purposes, unlike the interest that an owner of an undivided interest in property has. In my view of the matter, the *res* in question here is the deceased partner's interest in the lands that the partners owned. The land is the tangible thing by reference to which the quality of that interest must, I think, be determined. Being partnership property in a business conducted in Western Australia, the partner's interest in the land is, as between himself and his representatives and the other partners, personal estate by the law of Western Australia and will devolve accordingly if that law governs its devolution. But that does not, for me, answer the preliminary question, is its devolution governed by the municipal law of Western Australia or by the *lex domicilii* of the deceased. If A and B be simply co-owners of a tract of land, their interests therein must be considered as immovables. Suppose then that they decide to commence some business as partners for the exploitation

(1) [1961] A.C. 727.

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of their land, say by cutting the timber on it, or mining for minerals, the land becoming partnership property. I do not see that, for purposes of international law, this transforms the character of their interests in it from immovable to movable. In the same way, if land be bought by persons carrying on in partnership the business of dealing in land so that it becomes part of the stock in trade of their business, as in *Darby* v. *Darby* (1), it seems to me that their interests in it are still interests in an immovable and are to be considered as immovable for the purposes of private international law, although personalty for the purposes of local law. That the *lex situs* of the immovable, the land, subjects it to the debts of the partnership and provides for the realization of it along with other partnership property on a winding up, does not in my view of the matter affect its quality or that of the partners' interests in it as immovable. That the right of a partner as co-owner in equity of land held for partnership purposes remains an interest in land, although for many purposes converted into personalty, is illustrated by the judgments of *Neville* J. in *In re Holland; Brettell* v. *Holland* (2), of *Luxmoore* J. in *In re Fuller's Contract* (3), of *Cussen* J. for the Supreme Court of Victoria in *Duckett* v. *Collector of Imposts* (4); cf. *Brannigan* v. *Brannigan* (5), and see the comments of Mr. Higgins in his book *The Law of Partnership in Australia and New Zealand* (1963), p. 145. It would, no doubt, be possible for the Legislature of Western Australia to provide that land, locally situate, which is partnership property should for all purposes of devolution be a movable. That would be the converse of the case of *In re Cutcliffe's Will Trusts* (6) and *Re A. S. Crook (Deceased)* (7), where the statutory directions were that a movable should be considered as land. But it has not done so. The provision of the *Partnership Act* that partnership property is personalty falls short of that.

We were, however, pressed with the decision in *Forbes* v. *Steven* (8). There it was held that English legacy duty was payable upon the share of a deceased partner in the proceeds of sale of certain warehouses in Bombay that had been partnership property. The case turned upon the doctrine of conversion, the question being taken to be whether the property was exigible as personalty. No attention was there given to the question of movables or immovables. This was pointed out in *Re Stokes*;

(1) (1856) 3 Drew. 495 [61 E.R. 992].
(2) [1907] 2 Ch. 88.
(3) [1933] Ch. 652.
(4) [1927] V.L.R. 457.
(5) [1954] N.Z.L.R. 858, at p. 865.
(6) [1940] 1 Ch. 565.
(7) (1936) 36 S.R. (N.S.W.) 186.
(8) (1870) L.R. 10 Eq. 178.

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Stokes v. *Ducroz* (1), a case concerning legacy duty upon a gift by a testator of his share as a partner in a sheep property in New Zealand. *North* J. recognized the force of the criticism of the earlier decision, but nevertheless he held that he must follow it. Perhaps the best comment on *Re Stokes* is that of Lord *Radcliffe* in *Philipson-Stow's Case* (2) where he said: "Mr. Vaughan Hawkins, whose arguments for the Crown in this and other cases seem to have formed no small part of the law on the subject, maintained: 'The case of *Forbes* v. *Steven* (3) cannot be distinguished. It has never been doubted, always followed in practice, and it is incontestably right in principle'. *North* J. agreed or succumbed" (4). Whether or not these two cases were for purposes of the conflict of laws right in principle or in result, they do not bear directly upon the present question. In *Halsbury's Laws of England*, 3rd ed. vol. 7, p. 29, it is said of them: "There have been cases where the proceeds of sale of foreign land have been regarded as personalty in the eyes of English law. However, these cases may not, strictly speaking, constitute an exception to the general rule . . . , because the distinction in English law between real property and personal property is not the same as the distinction for the purposes of the conflict of laws between immovable property and movable property, and because in certain of such cases, the question that arose was whether the property was caught in the net of a taxing statute".

The material before us concerning the partnerships in question in this case seems incomplete. But from findings in the first judgment of *Wolff* C.J. in this matter and from documents filed in the Probate Jurisdiction of the Supreme Court of Western Australia, copies of which appear in the appeal book in that case, I collect the main facts as follows.

The firm known as *A. & N. Haque* consisted until 1953 of the deceased and his brother Nural, the appellant. Then, as *Wolff* C.J. noted, "it is said Nural's wife, who was in India, and Adbul's first wife (also in India) each took a quarter share". But it was stated to us that in fact the deceased and Nural were the only members of the firm and that they were partners in equal shares. For present purposes it matters not which statement be correct. What is undisputed is that the partnership agreement, dated 31st March 1937, provided that, in the event of dissolution of the partnership by death or otherwise, the assets should be realized, the liabilities paid and the balance divided in equal shares. The

(1) (1890) 62 L.T. 176.
(2) [1961] A.C. 727.
(3) (1870) L.R. 10 Eq. 178.
(4) [1961] A.C., at p. 756.

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business of the partnership was dealing in land. At the date of the death of the deceased the partnership assets consisted of several house properties unsold. Four of these stood in the name of the deceased as registered proprietor, another was held by the two partners as joint tenants, and two others as joint tenants. The total value of this unsold land and buildings appears to have been about £35,000. In addition there were moneys due from purchasers under uncompleted contracts of sale, a small amount of rents due, some furniture and about £1,300 cash on deposit. In all, the assets amounted to over £40,000. The only liability was a debt due to an electrician, £239. In these circumstances it seems to me the property of the partners consisted of both immovables and movables, mainly immovables. Suppose that the electrician's bill had been paid before the death of the deceased so that in fact there were then no partnership liabilities, the mere fact that, by the partnership agreement and the Act, all the partnership assets would have to be sold and the proceeds divided in equal shares would not, I think, have made movable those things which were in fact immovable or altered the quality or character of the partners' interests in them. The existence of the unpaid debt does not, I think, alter this position. The debt is no doubt payable out of the whole of the assets as a blended fund. And the land being in Western Australia and the partnership business conducted there, any proceedings for the dissolution of the partnership and the payment of the partnership debts would be within the jurisdiction of the Western Australian court. But an immovable does not cease to be an immovable because by the law of the place where it is it may be taken in execution for a debt or is charged with a debt.

In the result, I think that the interests of the deceased in the unsold lands were all immovables.

So too, I think, was his share or interest in the balance of purchase moneys accruing due upon the contracts of sale uncompleted at the date of death.

Rents received after the date of death would also, I think, belong to the persons entitled to the immovable interest in the lands in respect of which they were paid. I say this because in law rent is a profit arising out of the land demised: its recovery is enforceable by the landlord by distress (where not abolished); and if it remains unpaid the landlord may recover possession. The cash and chattels were movables. The cash appears to be the proceeds of sales of land or of rents received. But, whatever its source,

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it had been gathered in and was in hand as movables. This is not in dispute.

Turning to the other firm known as *A. Haque & Co.* This was a family partnership. There were twenty partners, including the deceased and his brother Nural. This firm had conducted at North Fremantle a drapery business originally established by the father of the deceased. In September 1955, that is two years before the deceased died, the drapery business was sold, but with the intention of buying another similar business elsewhere. The new business had not been opened when the deceased died, although some moneys had been paid out for the acquisition of shop premises and goodwill. The main items of partnership property at the date when the deceased died were debts due to the estate upon the sale of the business, money in banks, and the leasehold of the new shop with fixtures and fittings. There was also a freehold, a block of flats apparently, bought it seems as an investment of partnership moneys. This property had a value, it is said, of £12,325. The total value of the partnership assets at the date of death appears to have been about £25,000. The partnership liabilities amounted to about £3,000. This partnership was not dissolved by the death of the deceased. By the terms of the partnership agreement his executors might permit his share to remain in the business. If they did not I assume that the continuing partners were to buy out his interest. This it seems is what was done, or is to be done. The full terms of the partnership agreement are not before us and the information about the matter seems incomplete. But on the facts, so far as I have been able to collect them, this case seems to differ significantly from that of the other partnership. It seems that, by reason of the agreement the deceased partner had made in his lifetime, his estate ceased to have any interest in the partnership property on his death, having instead a claim upon the continuing partners; and, so far as appears, this claim was not secured by a charge or lien that the law of Western Australia would enforce upon any immovable. It seems to me, therefore, that the difference between the two partnership agreements does produce a different result, and that in respect of the partnership of A. Haque & Co. the appeal fails.

On the case as a whole other members of the Court take different views from those that I have expressed. I need hardly say that this much increases the misgivings that in any event I would feel in this difficult and unfamiliar topic. I have, however, reached the conclusion that the interest of the deceased in relation to the

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various items mentioned in the notice of appeal should be classified as follows: Those in paragraphs (a), (b), (c) and (d) as immovables: Those in paragraphs (d), (e) and (f) as movables. To that extent I would allow the appeal.

OWEN J. I agree with the order proposed by *Kutto* J. and with his reasons for judgment.

Appeal dismissed with costs.

Solicitors for the appellants, *Ilbery Toohey & Barblett.*

Solicitors for the respondents, Saiful Haque and Farida Haque by their guardian ad litem Mohamed Ali Bux and Azra Haque, *John H. O'Halloran & Co.*

Solicitors for the respondents, Bibi Kulsum, Sufia Ahmed and Jabonnessa Begum, *Robinson, Cox & Co.*

G. A. K.