1964

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Recommended Citation
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The Role of English Private International Law in Anglo-American Decedent Estates

By James Harrison Cohen*

During the years since the end of the Second World War, an increasing number of Americans have gone to England. Many of them have stayed for long periods, during which time they have invested in English securities, opened deposit and current accounts, and acquired considerable amounts of real property. While this little realized but important aspect of Anglo-American relations has helped contribute to increasing interdependence between our two countries, it has presented many problems on the personal level, principally in the field of estate planning. Because most American attorneys are unacquainted with English private international law, probate rules, and taxation schemes, it is difficult for them to deal properly with the English assets of their American clients in planning for the overall devolution of their entire estates. Although necessary reliance must, of course, be placed in the English lawyer, at least during the period of probate and administration, it would be to the decided advantage of the American attorney to become familiar with these aspects of English law in order to cope intelligently with the antecedent problems which arise during the planning stage. The purpose of this paper, therefore, is to confront the American attorney with some of the problems he faces in planning an estate consisting in part of English assets, and to present some of the answers which arise through the application of English law. To further this objective, I have created a fictitious person, Preston Peters III, whose circumstances in many ways

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typify the conditions under which the aforementioned problems arise: his partial affiliation with England suggests questions of domicile; his property comprises a suitable diversity of assets, presenting questions of situs as well as of administration; and the bi-national facet of his estate presents problems of overlapping taxation. Although different answers in certain instances may arise through the application of the law of Scotland or Northern Ireland, limitations of space require that this discussion be confined to England.

Preston Peters III is the only son of the late Preston Peters, Jr., Boston shipping merchant, and the late Judith Montgomery-Jones, daughter of Mr. and Mrs. John Montgomery-Jones, British subjects and residents of London. He was born in Boston in 1897, and lived there until 1917 when his father was accidentally drowned in a fishing disaster off the Massachusetts coast at Nantucket. Shortly after the end of the First World War, Mrs. Peters returned to England taking Preston with her. They lived in London in a house bought for Mrs. Peters by her father. Although Mr. Peters had already begun his university education in the United States, it was decided that he would not return and instead he matriculated at Judas College, Oxford, in the fall of 1919. In 1922, Mr. Peters married a girl from New York whom he had met while in America. Although they continued to live in London with Mr. Peters' mother, in 1924 Mr. and Mrs. Peters returned to the United States where Mr. Peters assumed an executive position with a company in New York City. While Mr. and Mrs. Peters frequently visited London during the next few years, after the death of Mr. Peters' mother in 1934 these visits ceased, and they have not been to England since that time. Mr. and Mrs. Peters have two children, the oldest having been born in London in 1923, the youngest in New York City in 1936. With the exception of a summer home in Nantucket, Massachusetts, all of Mr. Peters' American property is situated in New York. His English assets consist of the following:

1. Mr. Peters owns a leasehold in London, having acquired it under his mother's will when she died in 1934. The lease expires on December 31, 2010. The term has been valued at about .......................................................... 20,000 pounds

2. Mr. Peters has a 5,000 pounds deposit account with
Barclay's Old Bank in Oxford, the money being the balance of a gift made to him by his grandfather while he was an undergraduate at Judas. The deposit account pass book is in Mr. Peters' vault in New York City ................................. 5,000 pounds

(3) Mr. Peters owns ten thousand Ordinary "A" shares in the Rolls-Royce Motor Company, Ltd., which he acquired under the will of his grandfather upon his death in 1929. The certificates for these shares are also in Mr. Peters' vault in New York City. Currently selling at approximately 40s a share on the London Stock Exchange, Mr. Peters' interest is valued at about ...............

........................................................................................................ 20,000 pounds

(4) Mr. Peters is the life beneficiary of a trust created under his mother's will. The terms of the trust for the benefit of Mr. Peters direct the trustee to pay the income to him for life and then "to distribute the principal to, or for the benefit of, any one or more of my said son's issue as my said son shall by Will appoint; and in default of appointment to my said son's children in equal shares." The present value of the corpus is about 250,000 pounds, which consists of movable and immovable property situated in England. The trust is administered by Lloyd's Bank, London ................................................................. 250,000 pounds

ENGLISH PRIVATE INTERNATIONAL LAW AND THE
ASSUMPTION OF JURISDICTION

With this background, we can proceed to a discussion of the important problems which arise in handling the assets which comprise Mr. Peters' English estate. Foremost are those questions which concern devolution, taxation and administration. These, in turn, require an understanding of the English treatment of "domicile" and "residence"; situs of property; "real and personal," "movable and immovable," "tangible and intangible" property; formal and essential validity of wills; construction and revocation of wills; treatment of intestate succession; and exercise of general and special powers of appointment. Our attention will center upon Mr. Peters' position in relation to his property within England, and the way in which this is determined by the applicable English rule of law. Our point of departure is the outlook for Mr. Peters, and, of course, for his American attorney.
Of initial importance is a determination of Mr. Peters' domicile inasmuch as the application of appropriate law as well as the extent of English jurisdiction to tax will be controlled thereby. Although the term "domicile" is often applied loosely in the United States (frequently being used interchangeably and confused with transitory residence), a somewhat rigid definition has evolved in England. Inasmuch as the approach to the question of domicile is fundamentally different in England from that which obtains in the majority of American states, an English court of probate might conclude the matter in a manner which conflicts with the finding of the appropriate probate court in the United States. In order to understand English analysis of domicile, then, it must first be understood that under English law residence and domicile are wholly separate concepts, the terms being far from synonymous, and the one by no means constituting the other. While a variety of elements may indicate mere residence, such as maintenance of a home, exercise of voting privileges, and length of stay, domicile itself constitutes much more: namely residence, plus the intention to create a permanent residence. And when domicile at the date of death is alleged to differ from the domicile of origin, almost overwhelming evidence will be required to sustain the conclusion of change.\(^1\)

While the English rule has long been settled that questions effecting many aspects of estate planning, principally in the areas of descent and distribution of movables, are determined by the law of the place of domicile of the decedent, the method by which English law has arrived at a determination of domicile has itself undergone considerable change. One of the earliest cases to discuss the issue, *Whicker v. Hume*, relied primarily upon the empirical fact of where a man's home was established. "By domicile we mean home, the permanent home, and if you do not understand your permanent home, I'm afraid that no illustrations drawn from foreign writers will very much help you to it."\(^2\) But even under this overly simplified approach, the choice of a

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permanent home had to be the intentional result of a voluntary
decision, and "permanent" rather than "temporary" in the most
arbitrary sense of that term. And although the early cases rested
upon the flexible concept of "home," it was not long before this
case was elaborated to include not only the positive location
of that home but also the negative absence of any inclination to
return to a former home in the event of even the most remote
contingency. As a result of this development, English courts
do today give "permanent" a somewhat inflexible definition, seem-
ingly equate it with everlasting, and invariably conclude that no
change of domicile has been effected unless the intention is
unequivocally expressed to abandon irrevocably the old in favor
of the new.3 It would seem quite clear, then, that the determi-
nation of domicile rests rigidly upon the present intention to make
a place of residence permanent, which can exist "only where [a
person] has no other idea than to continue there, without looking
forward to any event, certain or uncertain, which might induce
him to change."4 From this analysis, it would appear that the
English conception of domicile corresponds "neither with what
the ordinary man understands by his permanent home nor with the
[American] criterion of habitual residence."5

Applying these criteria, and assuming that Mr. Peters dies
under the prevailing circumstances, it would be safe to conclude
that an English court would find his domicile to be located in
the state of New York. Although his domicile of origin was in
Massachusetts and he maintains a summer home there, the "over-
whelming evidence" required to establish the change to New York
is certainly present. Mr. Peters has lived in New York since 1924.
His business is in New York, and all his American assets except
the summer house are located in that state. In the event of his
death the principal administration of his estate would be taken
out in the Surrogate's Court of New York County, and ancillary
administration only would obtain in Massachusetts and England.

3 Even this may be insufficient. See Ramsay v. Liverpool, supra note 1, where
Scotland was deemed to be the place of domicile of the deceased, even though
he had spent the last thirty-six years of his life in England and had even expressed
his refusal to return to Scotland.

4 Moorehouse v. Lord (1863) 10 H.L.C. 272 at 285-286; but cf., Donaldson
illustrations of judicial construction of "intent" in a way which tends to mitigate
against the severity of the prevailing rule.

5 Cheshire, Private International Law, op. cit. supra note 1, at 170.
It is, moreover, highly unlikely that an English court would conclude domicile to be in England, in view of Mr. Peters' fleeting residence there and his uninterrupted absence since 1934.6

B. Situs

In order for English jurisdiction to attach to any of Mr. Peters' property, the asset must be "situated" in England at the time of his death. Furthermore, once an asset is located within England, jurisdiction over it will not be destroyed by virtue of Mr. Peters' domicile elsewhere. Although English law employs the conventional division of property into the classifications of "real" and "personal" for purposes of its own domestic law, insofar as questions of private international law are concerned, the cases have relied upon the somewhat different concept of "movable" and "immovable" property instead.7 Although the domestic and international conceptions tend to overlap in some circumstances, they are by no means equivalent, and do not always coincide. While all movable property is personal, all immovable property is not necessarily real estate.8 Blackstone stated as early as the eighteenth century, that "... things personal, by our law, do not include things movable, but something more, the whole of which is comprehended under the general name of chattels."9 Furthermore, English private international law recognizes the concept of "tangible" and "intangible" property, the former consisting of movable and immovable, real and personal property, and the latter consisting of assets of a different nature such as debts and choses in action.10

Mr. Peters' leasehold in London is the least source of difficulty. Since it is located in England, it will be English law which will determine questions of testate and intestate succession to it.

6 Insofar as English income tax is concerned, the basis of jurisdiction is either residence or citizenship. Thus, a person resident in England, although domiciled in and a citizen of the United States, would be liable for United Kingdom income tax, but only with respect to income arising from sources in England. However, since Mr. Peters is neither a subject nor a resident, he would not be liable for tax on income from his English assets. 1952 Income Tax Act 15 & 16 Geo. 6 and 1 Eliz. 2 c.10 s. 132(2).
7 In re Hoyles (1911) 1 Ch. 179.
8 Freke v. Carbery (1873) L.R. 16 Eq. 461.
10 For further discussion, see Lalive, The Transfer of Chattels in the Conflict of Laws (1955).
Although a term for years is considered personal property—a chattel real—under English domestic law, insofar as English private international law is concerned it is deemed an immovable. As a result of this distinction, rights to the leasehold are governed not by the law which controls succession to movable property, but by the law of the situs of the real property which is the subject of the lease. In the case of Freke v. Carbery, supra note 8, a testator, a domiciled Irishman, bequeathed all his personal property, including a leasehold in England, to trustees with directions to accumulate the income for a period beyond the limitation permitted by the Thellusson Act, the English statutory rule against accumulations. Although the English statute did not extend to Ireland, the court held that the leasehold, although personalty insofar as the trust was concerned, was an interest in an immovable and, therefore, subject to English law. As a result of this conclusion, the provision for accumulation of income beyond the permissible period was invalid insofar as it applied to the leasehold.

With the exception of Mr. Peters' special power to appoint the remainder interest in the trust created under his mother's will, all the rest of his English property consists of intangible assets: shares and deposits accounts. Under English case law, specific rules have developed which are applied as part of English private international law. If the asset is transferable by delivery only, such as is the case with bonds in bearer form, negotiable instruments and bills of exchange, English law will consider it to be situated in the place where the paper representing the security is found. The reason behind this rule appears to be the notion that although bearer bonds, notes or bills are actually only evidences of debt, nevertheless they are in reality a form of chattel which can be exchanged for full value at the option of the holder. At present, no such assets comprise any part of Mr. Peters' estate. Where, however, the estate asset consists of shares in a company, the treatment of situs is considerably different. Unlike instruments which can be negotiated by delivery, shares of stock cannot be transferred without registration on company books. Because this is so, English law regards shares in a com-

pany as situated not where the certificates representing the asset are found, but in the country where registration must be effected between the shareholder and the company in order to transfer the interest.\textsuperscript{12} This rule appears to obtain even though the stock certificate may have been endorsed in blank and transferred by delivery, thereby giving the transferee a right of registration against the company.\textsuperscript{13} The English rule with respect to the situs of company shares differs considerably from the New York rule which emphasizes the tangible character of the certificate which represents the interest.\textsuperscript{14} As a result of these conflicting rules, Mr. Peters' attorney will find that both England and the state of New York will claim jurisdiction over his shares in the Rolls-Royce Motor Company, Ltd.: New York, because the certificates representing the shares are located in Mr. Peters' vault in New York City; England, because of the necessity for registration on the books of the company in England in order to effect transfer. For purposes of dealing with Mr. Peters' estate in England, we must conclude that his shares are present there, despite the actual location of the certificate in his vault in New York City. Since this is so, it will be necessary to include them in an English probate inventory, subject them to English death duties, and distribute them in accordance with the appropriate rules of English private international law.

A second potential asset of Mr. Peters' English estate consists of another form of intangible movable property, namely his deposit account in Barclay's Old Bank, Oxford. Because English law regards a deposit account as nothing more than a debt owed by a bank to its customer, it is necessary to obtain personal jurisdiction over the debtor in order to invest a court with the power to compel repayment.\textsuperscript{15} This can normally be obtained only where the debtor is found, that is, where he is actually physically present. Because of this requirement, the debt itself has come to be regarded as situated in the country where the

\textsuperscript{12} Brassard v. Smith (1925) A.C. 371: "Where could the shares be effectually dealt with?"; Erie Beach Co. v. Attorney General (1930) A.C. 161; Rex v. Williams (1942) A.C. 541.
\textsuperscript{13} Dicey, op. cit. supra note 11, at 507.
\textsuperscript{14} Hutchinson v. Ross, 262 N.Y. 381, 187 N.E. 65 (1933), motion for reargument denied, 262 N.Y. 643, 188 N.E. 102 (1933).
\textsuperscript{15} Re Maudslay Sons & Field (1900) 1 Ch. 602; Re Banque des Marchands de Moscou (1952) 1 All E.R. 1269; Dicey, op. cit. supra note 11, at 504.
debtor resides. The practical reasons behind this rule are even more apparent in the case of banks in view of their fixed and permanent location. Consequently, an English court of probate would hold a deposit account in an English bank to be property situated in England even though the pass book representing the deposit was in New York, and, therefore, physically located outside of the jurisdiction. An extension of this rule was necessitated by English banking practices. Because of the heavy emphasis on branch banking in England, all accounts kept at a particular branch are considered to be situated there.\(^{16}\) However, if a branch has defaulted in payment after having been served with timely demand, then the bank may be sued on the debt wherever it can be found. Insofar as these rules apply to Mr. Peters, we may conclude that his deposit account at Barclay's constitutes property in England, that the Old Bank in Oxford is primarily responsible for payment to Mr. Peters' administrators, but that should the branch fail, it would be possible to look for satisfaction to Barclay's Bank wherever it could be found.

Before leaving the question of situs, it is important to remember that an English court will be interested in the manner in which Mr. Peters may choose to exercise his special power of appointment by will. Although a power of appointment is not itself property over which a court would have necessary jurisdiction, nevertheless the circumstances surrounding the power held by Mr. Peters would subject his exercise to English law. The limitations of the trust providing for the special power of appointment were created under an English will; the trust corpus is situated in England and is administered there; and the terms of the power restrict its exercise to a testamentary instrument which must necessarily be admitted to probate in England. As a result of these circumstances, an English court will be properly interested in the manner in which the power is exercised both with regard to matters of formality as well as to the substance of any interests created thereunder.

**Testate and Intestate Succession to Mr. Peters' Property**

Where, as in the case of Mr. Peters, an estate crosses national borders, the laws in the several countries may give conflicting

\(^{16}\) Arab Bank, Ltd. v. Barclay's Bank (1954) A.C. 495.
answers to any given question. Especially in the case of intangible personal property, it is conceivable that several different jurisdictions may claim the nexus not only to impose death taxes upon the value of such property, but also to resolve important questions of testate and intestate succession thereto. Under current circumstances, for example, the state in which Mr. Peters is domiciled, the country of incorporation of the company whose shares he owns and the place in which the certificates of stock are located at the time of his death may all seek to impose their own particular rule of law in the event that he should die intestate. Before consideration can be given to the problems which arise in the event that Mr. Peters should decide to adopt a considered estate plan in respect of his English assets, it is necessary to examine the rules of law by which questions of descent and distribution to his property in England will be determined. Although the property is situated in England, it does not necessarily follow that an English court will impose English law only. Under the rules of English private international law, an English court will, under certain circumstances, apply the law of some other jurisdiction.

A. INTESTACY AND THE CONCEPT OF SCISSION

In the event that Mr. Peters should die intestate, the succession to and the distribution of his estate in England would be determined by English law not because English domestic law would be the exclusive authority to which the court would look, but because it would be within the province of the English court to determine whether the law of some other jurisdiction should be controlling. Furthermore, the rules of private international law in England, unlike those which obtain in the United States, have become a reasonably certain guide as to what the court will do. Insofar as English private international law is concerned, the circumstances under which the English court will apply foreign rather than domestic law depends largely upon whether the property in question is regarded as “movable” or “immovable.” During the development of the law in this area, England adopted the principle of “scission” under which the succession to immovables is governed by rules different from those which control succession to movables. Consequently, Mr. Peters’ American attorney can expect English treatment of the leasehold in Lon-
don to differ from the practice developed for dealing with his shares, deposit accounts, and other forms of movable property. Traditionally, intestate succession to immovable property has been governed exclusively by the laws of the government within whose territory the property is situated, the so-called *lex situs*. In enunciating the scope of this rule, the court in *Nelson v. Bridport* declared that “the incidents to real estate, the right of alienating it, and the course of succession to it, depend entirely on the law of the country where the estate is situated.” Thus, should Mr. Peters die intestate, England will apply its own domestic law of succession to his leasehold in London regardless of the fact that he may have died domiciled elsewhere.

Insofar as Mr. Peters’ movable assets are concerned, however, an entirely different rule has been adopted, one based largely on convenience, and known under the traditional maxim *mobilia sequuntur personam*. This principle of almost two hundred years standing, was first decided in *Pipon v. Pipon*, where the court concluded that “... the personal estate follows the person, and becomes distributable according to the law or custom of the place where the intestate lived.” In the later case of *Freke v. Carbery*, the court reaffirmed its earlier acceptance of this principle, and explained the reasons for its formulation. “The doctrine,” *mobilia sequuntur personam*, it said, “depends upon a principle which is expressed in the Latin words; and that is the only principle of the whole of our law as to domicil when applicable to the succession of what we call personal estate.” Furthermore, it reasoned, such doctrine is accepted “not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally...” And finally, restating the rule clearly, and recognizing its application to a classification of property of which personality was but a part, the court concluded, “Where ‘mobilia’ are in places other than that of the person to whom they belong, their accidental situs is disregarded, and they are held to go with the person.”

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17 *Nelson v. Bridport* (1845) 8 Beav. 547.
19 *Pipon v. Pipon* (1744) Amb. 25.
20 *Freke v. Carbery*, *supra* note 8, at 466.
observed that the law of the place of situs must initially determine whether the property in question is movable or immovable. That this may be significant is best illustrated by reference to Freke v. Carbery, where the court determined that a lease, although ostensibly a chattel real and, therefore, personal property, was to be considered immovable and consequently subject in its disposition to the law of the situs. Additionally, even though the English court may determine property to be movable and, therefore, subject to the personal law of the decedent's domicile, reference must be made to the law as it stood at the date of the decedent's death, subsequent changes being disregarded by English courts for purposes of determining succession. Similarly, factors such as domicile of origin or place of birth or death are wholly immaterial. Once the law of domicile is invoked, however, it will be conclusive on all questions as to persons who take shares in the decedent's estate; what their proportionate shares are to be; the order of succession; the rights of a surviving spouse; the liability of a distributee for unpaid estate debts, and other related questions. Thus, where, as in the case of Mr. Peters, a decedent may die domiciled in the United States but leave movable assets in England, administration of those assets must be regulated by English law. But all questions of beneficial succession are to be answered by looking to the law of his domicile as it existed at the time of his death. In the event that Mr. Peters should die intestate, domiciled in New York, and leaving movable property in England, then, the English court would look to the New York law of succession in order to determine the proper disposition of these assets. If subsequent to his death but prior to the distribution of the estate the New York legislature should amend its decedent estate law to increase, for example, the share to which Mrs. Peters would be entitled, the English court would disregard this amendment and award the widow's share according to the law operative as of the date of Mr. Peters' death.

B. TESTATE SUCCESSION

In view of the fact that Mr. Peters will require a will in order to execute his special power of appointment, it is important to

21 Lynch v. Provisional Government of Paraguay (1871) L.R. 2 P. & D. 268: "The law of the place of domicile as it existed at the time of the death ought to regulate succession."
consider the role of English private international law insofar as it controls testate succession to property situated in England. Again, these rules have developed in accordance with the schismatic division of property into the categories of "movable" and "immovable." This dual system appears to be a feature of common law countries, and may result from the fact that in England freehold lands were not devisable until 1540, whereas this was possible with respect to movable property for many years prior to that date. In discussing testate succession in English private international law, then, it is again necessary to approach the problems which arise from the standpoint of "movables" and "immovables" and, therefore, in analyzing Mr. Peters' estate we shall adhere to this division. The primary problems Mr. Peter's attorney will face appear when he seeks to have Mr. Peters' will admitted to probate in England. Questions which arise at that time concern his capacity to make a will; the formal validity in England of a will executed in another jurisdiction; the material or essential validity of the dispositions Mr. Peters may seek to make; and the problem of revocation of an earlier will either by direct means such as physical destruction or by indirect means such as subsequent marriage. Although the same problems arise with respect both to wills of movables and to wills of immovables, the applicable law will not be the same and, consequently, the results will often be different. Very similar questions could arise with respect to the validity of inter vivos trusts of movable and immovable property in England. However, such trusts have not received much attention in English texts or treatises on private international law principally, one would suppose, because of the recent development of their use in England itself. For many years trusts had been created by will only, and as a result questions which arose dealt principally with the validity of the will rather than of the trusts created thereunder. Thus, while the inter vivos trust in conflict of laws has been the subject of considerable discussion in the United States and has given rise to frequent litigation here, quite the opposite has been the situation in England. In fact, with the exception of inter vivos trusts created upon marriage settlements, litigation involving inter vivos trusts

22 1540 Wills Act 32 Hen. 8 c. 1.
23 Van Grutten v. Digby (1862) 31 Beav. 516.
in private international law has been almost non-existent. Consequently, in our discussion of the aforementioned problems, we shall deal with the application of English private international law to wills only, bearing in mind that the rules applicable to Mr. Peters' will could, we expect, be extended to cover inter vivos trusts as well.

1. The Will Which Disposes of Immovables

As in the case of intestate succession to immovables in England, we find, not unexpectedly, that the appropriate rule of law controlling just about every aspect of a will of immovables is the law of the country in which the immovable is situated. The law of the decedent's last domicile—his personal law—is completely disregarded in determining questions dealing with such a will. The application by the English courts of the law of the situs extends with equal rigidity not only to matters of formality required under English law for proper execution, but also to questions dealing with the capacity of a testator to devise immovables; to the essential validity of interests he seeks to create; and to the effect of revocation.

When the immovable is situated in England, as is the case of Mr. Peters' leasehold in London, any will seeking to create interests therein will be subject without exception to the English rule against perpetuities, and even to the possibility that the interest sought to be created is one which is no longer legally permissible in England. An example of the latter contingency arose in In re Hoyles, where a testamentary gift of land to charity in excess of the amount legally permissible was invalidated, although it would have been upheld had the gift consisted of money. Of course, as in the case of Freke v. Carbery, supra note 8, where it lay within the jurisdiction of the English court to determine whether a leasehold was to be considered a movable subject to the law of the testator's domicile or an immovable and, therefore, subject to the law of its situs, the English court will in

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24 Nelson v. Bridport, supra note 17, at 547.
25 Coppin v. Coppin (1725) 2 P.Wms. 291; Pepin v. Bruyere (1900) 2 Ch. 504.
26 In re Hernando, Hernando v. Sawtell (1884) 27 Ch.D. 284.
27 Freke v. Carbery, supra note 8.
29 In re Hoyles, supra note 7; Mayor of Canterbury v. Wyburn (1895) A.C. 89.
the first instance determine whether a gift to a foundation located outside the United Kingdom, such as the New York City Community Chest, is a charitable institution under English law. This may be important not only with respect to the validity of the gift, but also insofar as the disposition may be exempt from United Kingdom estate duty as a charitable bequest. Of course, a determination with respect to the first issue may not necessarily be conclusive so far as the latter is concerned.

The only aspect of any will Mr. Peters may make which, although disposing of immovable property in England is governed by the law of New York, is the construction of terminology he has employed. In order to uphold the intent of a foreign testator so far as is possible, the English court would probably depart here from its rigid application of the law of situs. In so doing, it would look to the law of Mr. Peters' domicile at the date the will was executed. For example, should Mr. Peters devise his leasehold in London to "My son Preston Peters IV and his heirs, but if he should die without issue to the All Saints Church, London," the term "die without issue" might be construed according to the law of New York as it existed as of the date the will was drawn. Since "die without issue" means "indefinite failure of issue" in New York but "definite failure of issue" in England, the application of the one rule of law rather than the other would be of considerable significance. In the light of Studd v. Cook, the only definitive English authority on this question, it is not unreasonable to presume that the English court would apply the law of New York. Even though the property is in England, it is not essential that English law be applied in the face of Mr. Peters' apparent intention. This view has been adopted by some of England's most prominent authorities. Similarly, should Mr. Peters devise his immovable property "to my intestate heir," it is likely that his intention to use the word "heir" in accordance with the meaning most familiar to him,

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30 Camille & Henry Dreyfus Foundation, Inc. v. I.R.C. (1956) A.C. 39. Although charitable bequests are not deductible for estate duty purposes in the United Kingdom, if an inter vivos transfer is made to a charity more than one year before the donor's death, the amount of the gift will not be included in the donor's gross estate for purposes of the United Kingdom estate duty.

31 Studd v. Cook (1883) 8 App. Cas. 577.

32 Dicey, op. cit. supra note 11, at 528, Exception No. 6; Cheshire, op. cit. supra note 1, at 607.
namely as defined by the courts of New York, will be respected. In view of Chancery’s historic effort to carry out the intentions of a testator so far as they can be ascertained, it would seem sensible to apply the law of the decedent’s domicile at the date the will was drawn to questions of construction, except in those cases where to do so would be contrary to strong English public policy.

2. The Will Which Disposes of Movables

In drawing a will, Mr. Peters’ attorney will want to remember that entirely different standards apply in the event that the will seeks to dispose of movables. Whereas in order to be effective to dispose of his immovable property in England Mr. Peters’ will must conform to the laws of England, when he seeks to devise his movable property situated in England this is not at all the case. As could probably have been anticipated from the discussion of intestate succession to movable property in England, questions concerning the formal execution of Mr. Peters’ will of movables as well as those dealing with the essential validity of any devise he may make therein are answered by reference not to the law of the situs of the property, but by reference to the law of the place of Mr. Peters’ last domicile. With respect to Mr. Peters’ testamentary capacity and the construction of terminology he may employ, the English court will probably refer not to the law of Mr. Peters’ last domicile, but rather to the law of his domicile at the time the will was executed. In view of this fact, it might be to Mr. Peters’ advantage to employ two wills: one conforming to the requirements of the English statute of wills in order to dispose of his immovable property in England, i.e., his leasehold, and another conforming to the requirements of New York which could be useful in disposing not only of his American property not otherwise provided for, but also his movable property in England such as his shares in the Rolls-Royce Motor Company, Ltd., his deposit account at Barclay’s Old Bank, Oxford, and his special power of appointment. Of course, the

33 Enohin v. Wylie (1862) 10 H.L.C. 1, at 15.
36 In the Goods of Maraver (1828) 1 Hagg. Ecc. 498.
38 1837 Wills Act 7 Will. 4 & 1 Vict. c. 26.
decision to employ two wills must be arrived at in the light of the form which Mr. Peters' overall estate plan will take, utmost care being required in the drafting of revocation clauses lest unforeseen and wholly undesirable consequences result.

The initial question of Mr. Peters' testamentary capacity will arise when his attorney seeks to have Mr. Peters' will admitted to probate. Regardless of what the English court might have decided with respect to his will of immovables, the question will be independently examined and determined solely upon the basis of the law which obtained in the place of Mr. Peters' domicile at the time he executed his will. Thus, it is entirely possible that, by virtue of his domicile in New York, Mr. Peters may be deemed to possess sufficient testamentary capacity to execute a will affecting movable property in England even though he would not be able to do so if his domicile were English, and for the lack of which his will of immovables may already have been denied probate. While it must be borne in mind that the rule governing the question of capacity is subject to dispute, substantial authority regards the law of Mr. Peters' domicile at the time the will was executed as being dispositive.

The law of last domicile, however, is emphasized insofar as questions of formality of execution are concerned. In order to be valid in England, Mr. Peters' will of movables must be valid in New York. This would suppose either that it be executed in conformity with the New York statute of wills, or, in the event of execution elsewhere, that it could be saved in New York through the application of an appropriate rule of New York conflict of laws. The exclusive authority of the law of last domicile was first established in Stanley v. Bernes, where the court, reversing a decision on appeal, held a will of movables made according to English law by a British subject domiciled in Portuguese Madeira to be invalid in England because not in conformity with the laws established in Madeira for the execution of wills. Similarly, should Mr. Peters execute his will in conformity with the laws of New York but subsequently acquire domicile in England, the

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30 In re Lewal's Settlement Trusts (1918) 2 Ch. 391.
40 Dicey, op. cit. supra note 11, at 600, Rule 114; Cheshire, op. cit. supra note 1, at 561.
41 Stanley v. Bernes (1830) 3 Hagg. Ecc. 373. See also Thornton v. Curling (1824) 8 Sim. 310. This rule was applied in Bremer v. Freeman, supra note 34, at 506.
validity of the document would have to be determined under English law, and not under the law of New York. The danger inherent in a rule which looks only to the last domicile was made manifest in the Bremer v. Freeman case. That result, which jeopardized wills executed by British subjects in colonies all around the world, was quickly overruled by Parliament with the passage of Lord Kingsdowne’s Act. Sections One and Two of this Act allowed a wider choice of form than that of the testator’s last domicile for wills of personal estate made within or without the United Kingdom. But these two sections are confined to wills of British subjects and thus do not apply to Mr. Peters’ will. It has been suggested that Section Three of the Act can be construed to cover aliens as well as subjects, but this view seems internally inconsistent with the general purpose of the statute. A more plausible but still speculative suggestion holds that Section Three of the Act applies to the will of an alien in the event of his death while domiciled in England. We can assume, therefore, that the common law rule in its most rigid sense would be applied to Mr. Peters’ will of movables upon its submission to probate, and that its validity in England would depend solely upon its validity in the place of his last domicile.

After Mr. Peters’ will of movables has been admitted to probate in England, questions will then arise which deal solely with the validity of the testamentary dispositions themselves, with what has been termed the “essential validity” of his bequests. Under the heading of “essential validity” are included such varied problems as simultaneous deaths; lapsed legacies; questions of election; the effect of restraints upon alienation; and compliance with the rule against perpetuities. Under the rule established over one hundred and twenty five years ago in the case of Thornton v. Curling, supra note 41, questions dealing with the

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42 1861 Wills Act 24 and 25 Vict. c. 114.
43 1861 Wills Act, op. cit. supra note 42, § 3: “No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.” In Re Groos (1904) P. 269, Section Three was applied to the will of an alien.
45 In re Cohen (1945) Ch. 5.
46 In re Cunningham, Healing v. Webb (1924) 1 Ch. 68.
47 In re Ogilvie (1918) 1 Ch. 492.
essential validity of wills of movables can be answered with but
one exception, only by looking to the law of the place of last
domicile. Thus, if the law of New York would regard one of Mr.
Peters' testamentary dispositions as essentially invalid, the Eng-
lish court will direct that the property be distributed according to
New York law.

To what extent the law of the place of last domicile will not be
applied to questions of essential validity is as yet unclear. To date
the only example of exception to the general rule arose in a case
dealing with a foreign rule against perpetuities. Because the
impediment to the gift was based upon a reason deemed clearly
local in nature, the English court refused to apply the law of the
place of last domicile and thereby invalidate a disposition which
was not to take effect in England anyway.\footnote{Fordyce v. Bridges (1848) 2 Ph. 497.} Although such
reasoning does not appear to present legitimate grounds for
departure from the general rule, the exception for foreign rules
against perpetuities would seem to be quite well established.
This exception could be of considerable importance to Mr. Peters.
Although the New York rule against perpetuities has been re-
cently amended to conform to the English period of lives in
being plus twenty one years, it still must be satisfied not only with
respect to remoteness of vesting but also to suspension of aliena-
tion as well. Should one of Mr. Peters' dispositions fail to fulfill
this latter requirement, however, it would not be necessarily
invalid. The English court would apply its own rule against
perpetuities which concerns itself with remoteness of vesting only, and dispose of the question of essential validity in the light
of this single standard. Suppose, therefore, that Mr. Peters should
create a residuary trust in his will of movables with directions
to the trustees to pay the income "to my son Preston Peters IV
for his life, and upon his death to pay the income to his first born
son for life, and upon his death to pay over the principal to the
American Red Cross." While every interest in this disposition
must vest within the period prescribed by the New York rule, the
life interest in Mr. Peters' unborn grandson would fail in New
York nevertheless. Under New York Personal Property Law,
Section 15, all income trusts are spendthrift by definition; that is,
the income beneficiary may neither assign his interest in anticipa-
tion, nor may his creditors reach it in satisfaction of their claims. Since the gift to Mr. Peters' grandson contemplates an interest in a person unborn as of the date of Mr. Peters' death, the possibility exists that the period during which the alienation of the trust could be suspended will exceed a period measured by twenty one years after the death of lives in being as of the date the will became effective. Since this is so, the second imperative of the New York rule will not have been satisfied. However, in view of substantial English authority, it would be reasonable for us to presume that the trust contemplated in this illustration, together with all the interests created thereunder, would be fully valid in England.\textsuperscript{49}

As would be the case with Mr. Peters' will of immovables, the English court will construe language employed in a will of movables not according to the law of Mr. Peters' last domicile, but according to the law of Mr. Peters' domicile at the time the will was executed.\textsuperscript{50} Once again, the object is to afford the widest possible latitude in insuring an accurate interpretation of Mr. Peters' language. In the recent case of Philipson-Stow v. Inland Revenue Commissioner, supra note 37, Lord Denning emphasized at page 727 that while there was no doubt that the proper law regulating the ultimate disposition of movables was the law of the testator's last domicile, "there is perhaps an exception in regard to the construction of his will: for if a question arises as to the interpretation of the will and it should appear that the testator has changed his domicile between making his will and his death, his will may fail to be construed according to the law of his domicile at the time he made it: though in all other respects it would be governed by the law of his domicile at the date of his death." Of course, the law of the property's situs will be invoked where to do otherwise would have the effect of validating a disposition neither permitted in England nor in accordance with its strong public policy.\textsuperscript{51} And, contrary to the rule which obtains in New York, there is but slight authority in England that Mr. Peters could displace the law which would otherwise obtain by

\textsuperscript{49} Fordyce v. Bridges, supra note 48, at 497; Dr. J. H. C. Morris and W. Barton Leach, The Rule Against Perpetuities 21-22 (1956), citing Re Mitchner (1922) St. R. Qd. 252; Dicey, op. cit. supra note 11, at 610-611; Cheshire, op. cit. supra note 1, at 375-376.

\textsuperscript{50} Enohin v. Wylie, supra note 33, at 15.

\textsuperscript{51} Nelson v. Bridport, supra note 17; In re Miller (1941) 1 Ch. 511.
3. Revocation of Wills

Before leaving the problem of Mr. Peters' will or wills, it is necessary to discuss briefly the question of revocation. English private international law regards the question of revocation as a matter of succession, and as such it is governed by principles which relate in the usual way to movables and immovables. Revocation, itself, may be in the form either of the deliberate act of the testator as by destruction of an old will and the execution of a new one; or it may come about by operation of law, such as through the testator's subsequent marriage. Should Mr. Peters seek to revoke a will through a deliberate act, validity and effect would probably depend upon the law of his last domicile insofar as the will related to movable property, and upon the law of England insofar as it related to immovable property. Should Mr. Peters decide upon the execution of two wills, great care must be exercised in drawing not only revocation clauses but also subsequent codicils as well. The result of faulty draftsmanship is illustrated by In the Estate of Yahuda, where the testatrix, who died domiciled in Connecticut, left four wills each disposing of movable property situated in different countries including the United States and England. The will bequeathing the English movables was admitted to probate in England solely because it had been previously proved in Connecticut. On this ground, the court was able to avoid the cogent argument that the earlier English will had been effectively revoked by a clause in the subsequent Connecticut instrument. Had English probate practice been otherwise, it is not unlikely that an intestacy would have resulted with respect to Mrs. Yahuda's English property.

\[52\] In re Price, Tomlin v. Latter (1900) 1 Ch. 442.

\[53\] In the Estate of Alberti, supra note 28, (where an unattested holographic will valid by the law of the testator's last domicile was held ineffective to revoke an English will of immovable property situated in England). See also In the Estate of Wayland (1951) 2 All E.R. 1041.

\[54\] In the Estate of Yahuda (1956) P. 388.
Mr. Peters’ attorney will want, therefore, to examine carefully the effects of a revocation clause before he sees it effectuated.

Issues concerning revocation by operation of law are less easily resolved. Where the question is whether a will has been revoked or rendered null and void by subsequent marriage, English law raises the distinction between the law of succession and the law of domestic relations. With respect to Mr. Peters’ will of movable property, it has been held in England that the effect of any subsequent marriage is to be determined by the matrimonial law of his domicile at the time of the marriage, and not as a matter of testamentary law to be controlled by the law of his domicile at the time of his death. It is not clear what the English court would do with respect to a will of immovables, however, although it would seem that the law of the situs would be dispositive. In England, marriage automatically revokes a will unless, since 1925, the will had been made in contemplation of marriage. Unlike the somewhat more simplified issue of remarriage, the problem of change of domicile presents considerably greater difficulty. While there is no relevant authority, text writers such as Dicey and Johnson suggest that the mere change of domicile should not be permitted to nullify retroactively an act which was valid under the only law to which the testator had been previously subject and to undo what had been lawfully and intentionally effected in the past. This view is based upon an interpretation of Section Three of the 1861 Wills Act which provides that “No will or other testamentary instrument shall be held . . . to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.” However, as discussed above, there is considerable doubt as to whether this section of the Act may be construed to apply to non-resident aliens. The fact that a liberal view would have the effect of saving many wills disposing of property in England might per-

55 In re Martin, Loustalain v. Loustalain (1900) P. 211.
56 But cf., Dicey, op. cit. supra note 11, at 530-531.
57 1837 Wills Act 7 Will. 4 and 1 Vict. c. 26 s. 18; 1925 Law of Property Act 15 Geo. 5 c. 20 s. 177.
58 Dicey, op. cit. supra note 11, at 835.
59 Johnson, The Conflict of Laws 102-114 (1933).
60 This, of course, is precisely the effect of change of domicile upon the formal validity of wills of movables.
suade the court to construe the relevant section to be of general application to any will before it. However, prevailing textual opinion appears to be irreconcilable with the conventional construction of Section Three.

C. EXERCISING POWERS OF APPOINTMENT

Before ending discussion of testate succession to Mr. Peters' English estate, it is important to discuss the problems which arise in respect of the trust created under his mother's will, of which he is the income beneficiary and over whose corpus he enjoys a power of appointment. Primarily because exercise of Mr. Peters' special power will involve no adverse tax consequences in the United States, but also because of the financial benefits which will accrue to the appointees, Mr. Peters would be well advised to exercise his special power of appointment. In so doing, however, his attorney should not lose sight of the many conflict of laws problems which will arise not only because the donor and the donee of the power were not domiciled in the same jurisdiction, but also because the appointive assets are located in a jurisdiction other than that in which Mr. Peters will have died domiciled. When, for example, the problem for consideration is whether the exercise of the power violates the rule against perpetuities, a determination can be made only in the light of the appropriate law. Furthermore, should Mr. Peters decide not to exercise the power, or should he exercise it in an improper way, the question will then arise as to the selection of proper takers in default of appointment. Although the terms of the instrument provide for this contingency in the designation of Mr. Peters' "children," a determination of whether such persons would include adopted children can be made only after the appropriate law has been selected.61

For purposes of English private international law, the power of appointment has developed within the framework of very definite conceptions. In exercising a special power, the donee is treated not as though he were disposing of his own property, but rather as though he were disposing of the donor's. This rule is distinguished from that which applies to the exercise of general

61 Dr. J. H. C. Morris has suggested to me that these questions would be determined by English law. See Re Fergusson (1920) 1 Ch. 483.
powers of appointment, in which case the donee is considered to be disposing of his own property. In discussing English treatment of powers of appointment, it is necessary to distinguish between questions of capacity, formality of execution, and essential validity of exercise. The problem of construction, which arises in connection with Section 27 of the 1837 Wills Act, need not be discussed here. Although Section 27 has been held to extend to wills of testators domiciled abroad, the issue of whether a general residuary bequest operates to include property over which a testator had a power of appointment applies only to general and not to special powers.

Under the rule established in In re Lewal's Settlement Trusts, supra note 39, Mr. Peters' capacity to exercise a power created by an English instrument will be tested in the first instance by the law of his domicile at the time of execution. This, however, is not necessarily conclusive as complications arise in the event of his incapacity under such law. Because English law regards the donee of a special power as a mere agent for the donor of the power, ultimate authority must rest with the law under which the instrument creating the power is subject. Consequently, although Murphy v. Deichler, supra note 64, is limited to questions of formal validity, it may be legitimately inferred that the exercise of the power will be upheld if Mr. Peters has capacity under English law if not under the law of his domicile at the time of execution. Thus, even though Mr. Peters may be deemed to lack capacity in New York, he would not necessarily be barred from exercising his special power of appointment.

It should not be forgotten that Mr. Peters' will of moveables will derive its formal validity from the law of a foreign jurisdiction. However, the formal validity of a will exercising a special power of appointment depends on considerations which differ from those of any other will. Again, this difference is based upon the view that the donee of the power is disposing not of his own property, but rather that of the donor. Consequently, the formal

62 Re Price (1900), supra note 52.
63 In re Lewal's Settlement Trusts, supra note 39.
64 D'Huart v. Harkness (1865) 34 Beav. 324; Re Price, supra note 52; Murphy v. Deichler (1909) A.C. 446.
65 Pouey v. Hordern (1900) 1 Ch. 492; In re Pryce (1911) 2 Ch. 286; Re Waite's Settlement (1953) Ch. 100.
66 Re Price, supra note 52; Re Waite's Settlement, supra note 65.
67 Morris, op. cit. supra note 44, at 455.
validity of Mr. Peters' testamentary exercise of his power will be sustained, if possible, under English law in the event that it should fail under the law of his last domicile. Although *Re Price*, *supra* note 52, decided that a will executed in accordance with the formalities prescribed by the law of the testator's last domicile is a good exercise of a power to appoint movables, in *Murphy v. Deichler*, *supra* note 64, the court admitted a document to probate in England for the purpose of the appointment only, even though it could not be proved as a will since it failed to conform to foreign statutory requirements. In sustaining its validity for the limited purpose, the court said at page 446, "It is a proper exercise of an English power to appoint by will if it be exercised by a will in the English form even though the person appointing be domiciled abroad and the will be not validly executed according to the law of domicile." This is, again, another example of liberal English treatment with respect to testamentary dispositions and of the practice of sustaining, if at all possible, the intentions of a decedent.68

Insofar as questions of substance are concerned, the English character of Mr. Peters' special power of appointment means that the essential validity of any dispositions he may create will be governed by English and not by New York law. This decision was reached in *Pouey v. Hordern*, *supra* note 65, where the court held substantive rules of law of the testator's last domicile inapplicable to property subject to a special power of appointment created by an English instrument. Again, the ruling was based on the theory that the donee was not dealing with his own property, but was acting as an agent carrying out the wishes of the donor. While such treatment could be extended to cover general powers of appointment as well, this would appear to be unjustified inasmuch as property subject to a general power of appointment is unquestionably regarded as belonging to the donee of the power and should be distributed accordingly.69

Thus, Mr. Peters' special power over funds in England given by an English instrument may be exercised in a manner contrary to the law of his last domicile.

Although discussion of substantive rules of English property

68 See also Tatnall v. Hankey (1838) 2 Moo.P.C. 342.
69 In *re Pryce*, *supra* note 65; see also Dicey, *op. cit. supra* note 11, at 643-644.
and testamentary law are beyond the scope of this paper, it is necessary to depart from this limitation with respect to the rule against perpetuities. Because there is no absolute ownership in Mr. Peters, exercise of the power is read back into the will of the donor, his mother. If this were not so, that is if the period of the rule were held to run not from the date of the creation of the power but from the date of its exercise, "property could be appointed from settlement to settlement in perpetuity without ever coming under the control of an absolute owner." Under the English rule, then, even if the power itself is valid, an interest created under it may be too remote if it might not vest within the period of the rule measured from the date of the creation of the power. The period of the rule continues to be twenty-one years after the death of lives in being ascertainable from the date when the instrument creating the power took effect, and interests created through exercise of the power must vest if they are ever going to vest within the period of the rule. The only significant departure from the traditional application of the rule permits facts in existence at the time the appointment is made to be taken into account in testing the validity of the exercise. Consequently, an interest which would have been void for remoteness had it been created by Mr. Peters' mother will be upheld under an appointment made by Mr. Peters if the facts which made hypothetical remoteness conceivable in the former case no longer possible in the latter. The Law Reform Committee, in its Fourth Report published in London in 1956, considered revision of the English rule against perpetuities. Insofar as the rule affects powers of appointment, however, no changes were recommended. In discussing the so-called "wait and see" aspect of the rule with respect to powers of appointment, the committee held that "Measuring the period of the rule from the date of the creation of the power, and taking into consideration all facts known as of the date of exercise, if the appointee's interest must vest if it is ever going to vest within the period of the rule, then the appointment is good even though had it been made by the donor of the

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70 Morris and Leach, op. cit. supra note 49, at 140.
71 Jarman on Wills 329-331 (3d ed. R. Jennings 1951); Re Brown & Sibley's Contract (1876) 3 Ch.D. 156; Re Thompson (1906) 2 Ch. 199.
72 Wilkinson v. Duncan (1861) 30 Beav. 111.
power it would have been too remote." With respect to powers of appointment, then, embarrassing situations created by the "fertile octogenarian" and the "unborn widow" may be fully avoided.

ADMINISTRATION AND TAXATION

A. ADMINISTRATION

In England, the only person entitled to wind up the affairs of Mr. Peters' estate would be a personal representative to whom a grant of probate or letters of administration had been made by an English court. Unlike the continental system which imposes the duties of administration upon the heir or legatee, in England (as in the United States) these responsibilities fall to either the executor (if one has been appointed by will), the administrator cum testamento annexo (in the event of failure to make an appointment), or to an administrator (in the event of intestacy). The principal duties of administration include collecting the assets of the estate, discharging its debts and obligations, and distributing the remaining balance to the appropriate beneficiaries. Because Mr. Peters will have died domiciled in New York, the principal administration of his estate will have to be taken out in the Surrogate's Court of New York County. While it would be preferable to have but one administration for all of Mr. Peters' estate regardless of its location, this is not currently possible. Under English law, the title of an administrator appointed by a foreign court relates only to property within the jurisdiction of the appointment, and carries no rights with respect to property in England. Consequently, a separate grant of administration will have to be obtained from the English court before anyone may deal with the assets whose situs we have determined to be in England. Although Mr. Peters' principal administrator cannot expect to obtain an English grant solely on the strength of his New York appointment, it has been the usual rule to award the English grant to the principal administrator because he has been authorized under the laws of the

74 The main principles of grant of administration are found in Non-Contentious Probate Rules, 1954, contained in the Annual Practice of the Supreme Court.
76 In the Goods of Briesemann (1884) P. 260.
decedent’s last domicile. In *In the Goods of Earl*, the court stated what has been the basis of English practice for almost one hundred years: “... the court... ought to make a grant... to the person who has been clothed by the court of the country of domicile with the power and duty of administering the estate, no matter who he is or on what ground he has been clothed with the power.” While this rule is subject to numerous exceptions, and is based on purely discretionary grounds, a grant of authority to the principal administrator has seldom been denied. The current rule of law was established in *In the Goods of Hill*, the court there stating that “... where the court of the country of the domicile of the deceased makes a grant to a party... [the English court] ought, without further consideration, to grant power to that person to administer the English assets.” Nevertheless, the normal practice is for the principal administrator to apply for the appointment of an Attorney Administrator of the assets in England, rather than to take out ancillary probate himself.

**B. THE ENGLISH ESTATE DUTY**

When Mr. Peters dies, his estate will be taxed by several jurisdictions. Consequently, it is necessary to review the question of Mr. Peters’ multiple tax liabilities, and the extent to which he is relieved from the burden of double taxation by the credit afforded under 1954 Internal Revenue Code Sec. 2014 for taxes paid to a foreign country, and by the *Double Taxation Relief Convention of 1946* between the United States and the United Kingdom. Of course, it is the nature of the English estate duty which will determine the maximum usefulness of the latter two saving devices.

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77 In the Goods of Earl (1867) L.R. 1 P.&D. 450.
78 See, for example, In the Goods of Her Royal Highness The Duchess D’Orleans (1850) 1 Sw. & Tr. 253 (where the court denied powers of administration to an infant).
79 In the Goods of Hill (1870) 62 P. & D. 89.
80 For further authority on aspects of administration, see *In re Lorrillard* (1922) 2 Ch. 638; 1922 *Administration of Justice Act* 22 & 23 Geo. 5 c. 55 s. 2(1) amending the 1925 *Supreme Court of Judicature (consolidation) Act* 15 & 16 Geo. 5 c. 49; Re Northcote’s Will Trusts (1949) 1 All E.R. 442; *Probate Practice Directions Relating to Conflict of Laws in Administration*, Direction of 5 May 1953, 2 Ali E.R. 1154; In the Estate of Yahuda, *supra* note 54; *Non-Contentious Probate Rules*, 1954, Nos. 18, 29, 30, 34, 42, 52 and 53, set out in Webb & Brown, A Casebook on the Conflict of Laws 418-420 (1960); Tristram & Coote, *Probate Practice* (20th ed. 1955).
Unlike the comprehensive gift tax scheme which prevails in the United States, the English death duty is not buttressed by a complementary system of inter vivos gift taxation beyond a very insignificant ad valorem stamp duty payable according to the value of the property conveyed or transferred and determined as of the date of the disposition. Aside from this, the only duties imposed on gifts occur in the event that they should be made less than five years before the death of the donor in which case they are included in the property which passes on death for the purpose of levying the estate duty, and resemble the “gift in contemplation of death” found in Sec. 2035 (a) of the 1954 Internal Revenue Code. As a result of the 1960 Finance Act, however graduated provisions now exist which reduce the value of the gift on a progressive basis, e.g., over two years, by fifteen per cent, over three years, by thirty per cent, and over four years, by sixty per cent. Under ordinary rules of common law, of course, any incomplete gift, that is, one where bona fide possession and enjoyment to the exclusion of the donor is not assumed immediately upon the gift and fully retained thereafter, remains property of the donor and for purposes of the death duty, therefore, is taxable as “property passing” on his death. From this discussion, then, Mr. Peters would be well advised to give away the bulk of his English estate so as to avoid the burden of what will be shown to be a very heavy English estate duty. Only the renunciation of Mr. Peters’ life estate requires certain technical treatment; however, as the trust is drawn, this would not be difficult to achieve.

81 1891 Stamp Act 54 & 55 Vict. c. 39; 1909-1910 Finance Act 10 Edw. 7 and 1 Geo. 5 c. 8 s. 74; 1942 Finance Act 5 & 6 Geo. 6 c. 21 s. 44.
82 Gifts to charity are brought back into the English estate only when made within one year of the donor’s death.
83 1960 Finance Act 8 & 9 Eliz. 2 c. 44 s. 64.
84 Moreover, 1952 Income Tax Act 15 & 16 Geo. 6 and 1 Eliz. 2 c. 10 s. 404, imposes tax liability upon the donor for income derived from property in which he has retained an interest or power of revocation.
85 1940 Finance Act 3 & 4 Geo. 6 c. 29 s. 43; 1959 Finance Act 7 & 8 Eliz. 2 c. 53 §§ 43 and 44. These sections seek to eliminate the avoidance of estate duty by the purported surrender of a life interest. The kind of scheme aimed at is one whereby the life tenant and the remainderman surrender their interests to a company for shares, the remainderman taking the shares and the life tenant taking a life income from the company in the form of directors fees: in the result, the life tenant would receive an income for life equivalent to what he would have had in respect of his life estate, but the property would have escaped estate duty because it passed during the lifetime of the beneficiary and not on his death. The above sections, however, are in terms wide enough to cover cases of disposition or (Continued on next page)
Inasmuch as the gifts proposed could be brought back into Mr. Peters' estate under the English five year rule, it is necessary for us to see how they will then be treated. The heart of the English estate duty is contained in the first section of the 1894 *Finance Act* which provides for a graduated duty "In the case of every person dying after the commencement of this Part of the Act, [which] shall . . . be levied and paid upon the principal value . . . of all property, real and personal, settled or not settled, which passes on the death of such person . . . called "Estate Duty. . . ."\(^8\) The important concept of "passing" is not specifically defined, but Section 2(1) of the 1894 *Finance Act* does provide not only for property of which the decedent was "competent to dispose," but also property in which the decedent or any other person had an interest which ceased upon his death (*e.g.*, life estates *per autre vie*). Case law has contributed little to a more comprehensive definition of "passing," but we are given to understand that it may be taken to mean, simply, "changing hands," and appears to denote some actual change in the title or possession of the property which takes place as a result of death.\(^7\)

With respect to settled property liable for estate duty, a definition of "settled" may be found in the 1925 *Settled Land Act*\(^8\) as well as in the 1894 *Finance Act*. Unlike the Federal estate tax which does not tax the value of life estates, the English estate duty requires a tax to be paid on the principal value of settled property to the extent of the decedent's interest in the income. Again, the basis for such taxation lies in the concept of "passing," the value of the benefit to the remainderman accruing from the termination of a prior interest which is deemed to "change hands" upon the death of the life beneficiary.\(^8\) Thus, while Mr. Peters' life interest in the trust created under his mother's will would not be taxed in the United States, it would be fully liable for estate duty in the United Kingdom. And, as Mr. Peters is the sole income

\(^8\) 1894 *Finance Act* 57 & 58 Vict. c. 30 ss. 1 and 2(1) (passing); see also 1939 *Finance Act* 2 & 3 Geo. 6 c. 109 s. 29; 1940 *Finance Act*, op. cit. supra note 85, ss. 43 and 46.

\(^7\) Nevill v. Inland Revenue Commissioner (1924) A.C. 385 at 398; Attorney General v. Milne (1941) A.C. 765 at 779.

\(^8\) 1925 *Settled Land Act* 15 & 16 Geo. 5 c. 18 s. 1.

\(^8\) 1894 *Finance Act*, op. cit. supra note 86, s. 7(7).
beneficiary, the full value of the corpus, 250,000 pounds, would be deemed property taxable under Section 1 of the 1894 Finance Act. This difference in treatment between the United States and the United Kingdom with respect to estate taxation of life interests in trusts has important consequences both with respect to the credit allowed by the United States for foreign taxes paid, as well as for the application of the Double Taxation Relief Convention of 1946.

Although it has been English practice, in the case of decedents dying domiciled outside of the United Kingdom, to subject to estate duty only property situated (as determined by English law) within the United Kingdom, liability for estate duty may be imposed even though succession to movable property in England is determined by the application of foreign law.90 This voluntary limitation on its potential power to tax is codified in the 1949 Finance Act, which confirms that property situated out of the United Kingdom will not be subject to English estate duty if it can be shown that the proper law regulating its devolution or disposition is the law neither of England nor of Scotland, and either that the decedent did not die domiciled in any part of Great Britain, or that the property is "immovable" under the law of its situs.91 Since 1962, however, foreign immovable property of persons dying domiciled in the United Kingdom has been subject to estate duty.92 As we shall see, in cases governed by the double taxation convention, the general rules for determining situs are replaced by special situs codes although only for the purpose of determining estate duty and not for determining questions of descent and distribution. Since Mr. Peters will have died domiciled in New York, and since such questions of situs will be determined by the appropriate provisions of the Anglo-American double taxation convention, he is fully within the protection of Section 28(2) of the 1949 Finance Act. When such questions have been finally determined, Mr. Peters' administrators, under current rates, will be liable for a tax varying from one per cent should his estate exceed the value of 5,000 pounds, to eighty per cent in the

90 See, for example, Winans v. Attorney General, supra note 1, where a domiciled American was taxed on the value of bearer bonds situated in England.
91 1949 Finance Act 12, 13 & 14 Geo. 6 c. 47 s. 28(2).
92 1962 Finance Act 10 & 11 Eliz. 2 c. 44 s. 27.
event that it is greater than 1,000,000 pounds. Under the "marginal relief" rates established in the 1914 Finance Act, an estate will never be liable for more estate duty than the maximum amount payable at the rate next below that which is appropriate, plus the amount by which the estate exceeds the turning point in the scale. For example, if the taxable estate was 302,000 pounds, the duty thereon at sixty-five per cent (the rate for an estate exceeding 300,000 pounds but not 500,000 pounds) would be 196,300 pounds. The highest amount of duty at the next lower rate, i.e., sixty per cent on estates exceeding 200,000 pounds but not 300,000 pounds is 180,000 pounds. This, with the addition of the 2,000 pounds excess value, makes 182,000 pounds in all the amount which is to be paid. If we assume, therefore, that Mr. Peters' English estate will include his leasehold, deposit account, company shares, and equitable life estate, its gross value will approximate 310,000 pounds. Reducing this amount by 8,000 pounds for expenses of administration, claims against the estate and any indebtedness owing to English creditors, the balance of 302,000 pounds will be taxed at the rate of sixty-five per cent, and will be liable for 196,300 pounds. After the application of the marginal relief rates, the final tax to be paid will be 182,000 pounds. No legacy or succession duty is payable to Her Majesty's government, these having been abolished in the 1949 Finance Act.

C. The American Credit

Against the estate tax imposed by the 1954 Internal Revenue Code on citizens (including domiciliaries) of the United States, a credit is allowed for estate, inheritance, legacy or succession taxes actually paid to any foreign country on property situated within the foreign country and included in the decedent's gross estate. This credit, however, is not altogether effective to prevent double taxation. Since the credit is limited to property included in the gross estate, the bulk of Mr. Peters' English assets will be

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93 1963 Finance Act 11 & 12 Eliz. 2 c. 25 s. 52.
94 1914 Finance Act 4 & 5 Geo. 5 c. 10 s. 13 (1).
95 1949 Finance Act, op. cit. supra note 91 s. 27(1).
96 Int. Rev. Code of 1954 Sec. 2014. This credit may be partially lost when marital deduction or charitable gifts are involved in the estate plan, unless there is excluded from such gifts property eligible for the foreign death tax credit.
ineligible. Regardless of whether Mr. Peters chooses to exercise his special power of appointment, the value of the trust corpus will not be included in his gross estate for Federal estate tax purposes.97 Similarly, any English estate duty levied on Mr. Peters' shares in the Rolls-Royce Motor Company, Ltd. will be unavailable for the credit, since the duty will have been levied on property not recognized to be situated in England.98 Therefore, despite the very heavy English estate duty which his estate will be required to bear, Mr. Peters will be entitled only to a small credit against his Federal estate tax. Under Sec. 2014(b), the credit may not exceed an amount which bears the same ratio to the amount of the English estate duty actually paid, as the value of the property "situated within" England, subject to the English estate duty, and included in the gross estate for Federal estate tax purposes bears to the value of all property subject to the English estate duty. Furthermore, the allowable credit may not exceed an amount which bears the same ratio to the total Federal estate tax, as the value of the property "situated within" England, subject to the English estate duty, and included in the gross estate for Federal estate tax purposes bears to the value of the entire gross estate subject to the Federal estate tax. To illustrate this formula, let us suppose an English estate of 900,000 dollars, the estate duty on which is eligible for credit against the Federal estate tax only in part because certain property subject to the English estate duty is not includible in the gross estate tax for Federal estate tax purposes. If the full estate duty actually paid to the English government is 546,000 dollars, and the creditable estate duty is levied on property valued at 150,000 dollars, then the maximum credit available is only 91,000 dollars, or 16⅔ per cent of the estate duty. However, if we assume additional property valued at 850,000 dollars, there will be a total gross estate of 1,000,000 dollars for Federal estate tax purposes. If the entire Federal estate tax is 100,000 dollars, then the original credit of 91,000 dollars will have to be further reduced, resulting in a final allowable credit of only 15,000 dollars, or something under three per cent of the estate duty. Consequently, although an estate duty of 546,000 dollars will have been paid

97 Int. Rev. Code of 1954, Sec. 2041(a).
98 Hutchinson v. Ross, supra note 14.
to the English government, only 15,000 dollars of this amount can be used to offset the estate tax payable to the United States.

D. THE DOUBLE TAXATION RELIEF CONVENTION OF 1946

In 1946, the United States and the United Kingdom concluded a convention and protocol called The Double Taxation Relief (Estate Duty), for the purpose of eliminating the heavy burden of double estate taxation. It was not the objective of the convention to prevent either the United States or the United Kingdom from taxing non-domiciliary property situated within its territory. Indeed, it was agreed that such taxation would continue. Furthermore, in the case of United States citizens dying domiciled in any part of the United Kingdom, it was agreed that, in determining the amount or rate of the estate tax, property situated outside of the taxing territory would be included. It would seem that a convention which failed to limit the taxing powers of countries with respect to multi-national estates would be of little value. Similarly, inasmuch as it is within the sovereignty of each country to abstain unilaterally from taxing property of its decedent domiciliaries located in foreign countries, such a treaty would indeed appear to be unnecessary. The heart of the Convention and the reason for its being is found in Article V, Section (1) which provides that ".... where one Contracting Party imposes tax by reason of a decedent's being domiciled in some part of its territory or being its national, that Party shall allow against so much of its tax . . . as is attributable to property situated in the territory of the other Contracting Party, a credit . . . equal to so much of the tax imposed in the territory of the other Party as is attributable to such property." What the treaty achieves, therefore, is bilateral agreement with respect to the situs of property, something which neither party is unilaterally competent to do. Thus, each country may continue to apply its own domestic law for purposes of estate taxation as well as for determination of questions of descent and distribution. But if a tax extends to property whose situs, as determined by the treaty, is outside the bounds of its territorial jurisdiction, then it must be offset by a credit measured by the duty levied in the country of situs. The

99 Article IV, Section 2(a) and (b).
application of the treaty can be illustrated by recalling certain of the tax liabilities which will be imposed on Mr. Peters' estate. Under the broad taxing powers of the United States, an estate tax will be levied on Mr. Peters' deposit account in Barclay's Old Bank, and on the value of his shares in the Rolls-Royce Motor Company, Ltd. Furthermore, as we have seen, although this property will be liable for English estate duty, no credit will be available because neither asset is recognized to be situated in England. Under the terms of the treaty, however, this burden is eased through the application of the situs codes found in Article III. Mr. Peters' deposit account, recognized to be a simple debt, is deemed to be situated "at the place where the decedent was domiciled at the time of death". Mr. Peters' shares are deemed to be situated "at the place in or under the laws of which [the] corporation was created or organized." Thus, with respect to the deposit account, ultimate authority to tax rests with the United States, and a credit must be allowed against the English estate duty. And with respect to the shares, the English nationality of the company compels the United States to allow the credit which it had previously denied. Credit under the Convention as well as under Section 2014 is now available with respect to Mr. Peters' leasehold, since interests in real property situated outside the United States are now includible in the gross estates of citizens of the United States.

Unfortunately, no provision was made for the taxation of trusts. If Mr. Peters' power of appointment should become taxable in the United States, it would seem that the spirit of the treaty would require a credit to be allowed either against the United States estate tax, or against the English estate duty. In the absence of any express provisions, such a credit could be computed by invoking the situs provisions of Article III and applying them to each asset in the trust corpus, valued as of the date of Mr. Peters' death.

100 Article III, Section (2)(c).
101 Article III, Section (2)(d).
102 Revenue Act of 1962, Section 18.