ORIGINAL CIVIL.

Before Mr. Justice Markby.

1876 *July* 1.

MILLER *v.* THE ADMINISTRATOR-GENERAL OF BENGAL.

Succession Act (X of 1865), ss. 4 and 44—Husband and Wife—Parties with English Domicile married in India—Succession to Moveable Property.

H M, a British subject, having his domicile in England, married in Calcutta, in April 1866, *C*, a widow, who at the time of the marriage had also an English domicile. *C*, after her marriage with *H M*, became entitled as next-of-kin to shares in the moveable properties of her two sons by her former marriage: these shares were not realized nor reduced into possession by *C* during her life. *C* died in 1872, leaving her husband, but no lineal descendants. In March 1874, *H M* filed his petition in the Insolvent Court, and all his property vested in the Official Assignee. In April 1875, letters of administration of the estate and effects of *C* were, with the consent of *H M*, granted to the Administrator-General of Bengal, by whom the shares to which *C* became entitled as next-of-kin of her sons were realized. In a special case for the opinion of the Court under Ch. vii, Act VIII of 1859, *held*, that the domicile of the parties being in England, the English law was to be applied, and therefore the Official Assignee as assignee of the estate of *H M* was entitled to the whole fund realized by such shares in the hands of the Administrator-General.

S. 4 of the Succession Act does not apply in respect of the moveable property of persons not having an Indian domicile.

THIS was a special case stated for the opinion of the Court under Ch. VII of Act VIII of 1859, by the agreement of the Official Assignee and assignee of the estate and effects of one Howard Mark, an insolvent, as plaintiff, and the Administrator-General of Bengal, as defendant.

The facts as stated in the case were as follows:—

"On the 7th of April 1866, the said Howard Mark, a British born subject, having his domicile in Great Britain, and not in India, intermarried with Caroline Augusta, the widow of one W. B. Harvey deceased. The said marriage took place in Calcutta. The said Caroline Augusta had previously to, and at the time of, her said marriage, a domicile in Great Britain,

and not in India, and such domicile continued down to the time of her death: Caroline Augusta Mark died in Bengal on the 30th of September 1872 intestate, leaving her surviving her husband the said Howard Mark, but no lineal descendants. Howard Mark, on the 2nd March 1874, filed his petition in the Court for the Relief of Insolvent Debtors at Calcutta, and his estate and effects became thereby vested in the plaintiff as the Official Assignee of the Court. Howard Mark died on the 28th February 1875. Caroline Augusta Mark, subsequently to her marriage with Howard Mark and before her death, became, on the respective deaths of W. B. B. Harvey and D. Harvey, her two sons by her marriage with her former husband W. B. Harvey, entitled to share in the respective estates of her two sons as one of their next-of-kin. The said shares were not realized or reduced into possession by her during her lifetime, nor by Howard Mark, but were realized by the Administrator-General under the letters of administration hereinafter mentioned. On the 11th of September 1875, letters of administration to the estate and effects of Caroline Augusta Mark were, with the consent of Howard Mark, granted by the High Court to the Administrator-General of Bengal, and there is now in the hands of the defendant as Administrator-General and administrator of the estate and effects of Caroline Augusta Mark a sum of Rs. 6,224-10-9, being the proceeds of the shares aforesaid."

The question for the Court was whether, in the events that have happened, A. B. Miller, as assignee of the estate and effects of Howard Mark, was entitled to the whole of the said fund now in the hands of the Administrator-General of Bengal as administrator of the estate and effects of Caroline Augusta Mark.

Mr. *Kennedy* and Mr. *Ingram* for the Official Assignee.

Mr. *Evans* for the Administrator-General.

Mr. *Kennedy* contended that the Official Assignee was entitled to the whole fund. It is admitted by the Adminis-

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trator-General that the Official Assignee is entitled in any event to one-half. The wife was admittedly domiciled in England, not in India. Succession to her moveable property would be therefore regulated by the law of England by s. 5 of Act X of 1865, which would entitle the husband to the whole; the domicile being admitted, s. 19 of that Act does not apply. It is said that, by virtue of s. 4, the Administrator-General is entitled to the moveable property left by Mrs. Mark: but in such a case as this, where the parties were domiciled in England, s. 4 will not apply. That section is not dealing with right of succession to property; that question is dealt with later in the Act. It only deals with the creation of rights *inter vivos*. Rights arising out of marriage are regulated by the *lex loci contractus*, except in special cases. But the rights of the parties with respect to any moveable property are still governed by the law of the domicile: for instance, persons married in France, but domiciled in England, are not subject to the Code Napoleon. An exception is made by the Indian Legislature, but that exception is not the present case. The intention is clearly shown by s. 44, by which the 4th section is interpreted. If a person domiciled in England marry an Eurasian woman in India, the section would apparently apply; but how would the Courts in England deal with the wife in such a case suing in her own name on a promissory note made in England? it is doubtful whether such an action would be held to be maintainable; I mean irrespective of the Married Woman's Property Act. If an Eurasian went to England and married there, I think s. 4 would apply, but s. 44 would not, because marriage in India would not have occurred. [MARKBY, J.—You mean s. 4 would apply here.] Yes, in the Courts here; the sections relating to marriage do not apply where the domicile is in England, see Story's Conflict of Laws, ss. 186, 193. S. 4 was not intended to apply to any one not domiciled in India; it was intended to leave persons domiciled elsewhere than in India in the position in which they were before, on marriage: see note to s. 44; see also s. 283 as to payment of debts.

By s. 5, succession to moveable property is to be regulated by the law of domicile; the right of the husband in the property

of his deceased wife is succession within the meaning of that section. In former times the Ordinary was absolutely entitled to the property of intestates, and was not liable to account to any one; subsequently the Ordinary was enabled to depute the administration to the "next and most lawful friend of the deceased" who was accountable to the Ordinary. But the Civil Courts had to obtain statutes to effect this; see 31 Edw. III., c. 11., and 21 Hen. VIII., c. 5, s. 3; see also 22 & 23 Car. II., c. 10, and 29 Car. II., c. 3, s. 25. The husband was entitled as administrator, not as next-of-kin: see also *Fortre* v. *Fortre* (1) and *Proudley* v. *Fielder* (2): these cases show that in any case the husband takes the property of the wife deceased as administrator. After the Statute of Distributions, it was expressly declared by 29 Car. II, c. 3, s. 25, that the husband's right to succeed to his wife's property should not be affected by the Statute of Distributions. If the husband died without taking out administration, the Courts would grant administration to the next-of-kin of the wife, but such administrators were regarded as trustees for the representatives of the husband—2 Wms. on Executors, 7th ed., 1488, and the case of *Humphrey* v. *Bullen* (3). [MARKBY, J.—Was that right of the husband the *jus mariti* or the *jus successionis*?] It was true succession: see 2 Wms. on Executors, 7th ed., 410, and Bacon's Abridgment, Title Executors and Administrators, F., page 479.

Mr. *Evans* for the Administrator-General.—S. 4 is not restricted to persons domiciled in India, nor is the Succession Act itself so limited; see the provisions as to making wills; it has never been contended that a person making a will in India would not be bound to make it according to the Indian Act; there is a difference, for instance, as to attesting a will, see s. 50. S. 225 shows another difference: administration is now always granted under the Succession Act in all cases. The argument on the other side would limit it to persons domiciled in India: then by what law are persons in India with an English domicile to have administration granted to them, or of their estates?

(1) 1 Showers, 327. (2) 2 M. & K., 58.

(3) 1 Atkins, 458.

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The only limitation of s. 4 is in s. 331 of the Act which makes it inapplicable to any marriage made before 1866: see the preamble to the Married Woman's Property Act (III of 1874), and the last paragraph of s. 2, which show that the Legislature was of opinion that s. 4 was so largely applicable that if not restricted it would have applied to Hindus, Mahomedans, &c. Supposing the husband does not take by succession but by the *jus mariti*, then if s. 4 takes away the *jus mariti* in India, it would be doubtful whether s. 5 as to succession would be operative in all cases. It is submitted that s. 4 is of general application; the Act is a general law for the whole of British India. It is not subject to the law of domicile; it deals itself with the law of domicile. The only exception to it is by implication in s. 44. The framers of the Act appear to have been of opinion that there would be a difference in cases of marriage in India when one party was domiciled in England and one in India. Again, all persons would be entitled to have their marriage rights saved according to the law of the country in which they had their domicile: those would be saved just as much as those of persons domiciled in England. If the Legislature had intended it to be excepted they would have said so in express words, as they have in other cases, for instance, as to domicile. S. 44 is not sufficient to create a limitation by implication of a general section in a general Act.

As to the position of the husband, the correct view is laid down in Bacon's Abridgment, Title Executors and Administrators, F. 480. If s. 4 does apply in this case, then it puts a stop to the principle which was the origin of the position of the husband. He must now get administration here under the Succession Act, in which there is no provision for him to convert the effects to his own use; he has to distribute them according to the Act. The position of the husband on his wife's death by English law was by virtue of his right during her life; but if these rights are taken away here by s. 4, his position cannot be the same.

Mr. *Kennedy* in reply.—"Succession" is applicable both to testamentary and intestate estates. The intention of the Succession Act is not to conflict with the law of domicile. As to a

married woman taking out letters of administration, see ss. 183 and 189: she needs the previous consent of her husband. Taking ss. 5 and 207 in connection, it would appear that, as to moveable property, the Court in India would be the Court of administration, but the succession would follow the law of the domicile. If two portions of a statute are inconsistent, the later section would prevail, as in wills a later clause would invalidate a preceding inconsistent one.

Cur. adv. vult.

MARKBY, J. (after stating the facts, continued):—It is admitted between the parties that the Official Assignee as such Assignee is entitled to half of the said fund.

The argument before me has turned entirely upon the construction of the Succession Act, especially of s. 4, and it has been assumed throughout the argument that the questions which arise relate to moveable property. S. 4 of the Succession Act provides that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried." It is contended for the plaintiff, that that section must be read as if it had run thus: "No person having a British Indian domicile shall by marriage acquire, &c." Mr. Evans for the defendant contends that the section governs every marriage in India. There has not been, as far as I am aware, any previous discussion as to the meaning of this section, and I must therefore be guided by the general frame and scope of the Act. In order fully to understand this, it seems to me necessary to consider, from a somewhat general point of view, how marriage in a foreign country affects the moveable property of the parties thereto.

Now what was the law before the Succession Act was passed? The law of India would not be easy to ascertain. It was probably the law of England, except so far as a personal law could be claimed by the members of any particular class; or some persons might say that there was no law of India—no *lex loci* at all. But it is not necessary now to inquire which of these

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two views is correct. It is more important to consider what was the law of Europe and America, for it is clear that the Succession Act was based upon the general principles current among persons of the Christian faith.

Now where, as in the present case, a man and woman having the same domicile marry during a temporary sojourn in a foreign country, and do not evince any intention to change their domicile, the law of all Christian countries is unanimous as to the interest which they acquire in the moveable property of each other. It is that interest which is given them by the law of the country wherein they are domiciled at the time of the marriage. Upon this point, all the authorities are, as far as I am aware, absolutely concurrent. This is in fact a branch of the more general proposition that moveables are always in contemplation of law supposed to be situate in the country where the owner has his or her domicile; and that principle can, in the present case, be applied without difficulty, because we are not embarrassed in the present case by any distinction between the domicile of the husband and the domicile of the wife, or by any change of domicile at or after the marriage. All these complications are avoided in the simple case which we are considering. I need only observe that the rule of law is not that moveables have no *situs*. They have a *situs*, but that *situs* is the domicile of the owner. This is, I believe, the true mode of stating the principle. The authorities in support of this proposition amongst the Civilians (as they are usually called) are innumerable; they will be found collected in Burge on Colonial and Foreign Laws, Vol. I, p. 632, where also the American authorities are referred to. For the English law, I may refer to *Enohin* v. *Wylie* (1) and the remarks of Lord Westbury at page 15. He was there speaking of succession. But the rule is general; the rights which arise upon all occasions, whether upon marriage or succession, whether by the act of the parties or by the operation of law, are as to moveable property governed by the law of the domicile where, in contemplation of law, the moveables are situate.

It would, indeed, be unnecessary to insist upon this, which is

(1) 10 H. L. C., 1.

an elementary proposition, were it not that in the case of marriage, Story, by representing the disagreement amongst lawyers as to the incidents of marriage to be far more extensive than it really is, and by not separating those propositions upon which they are agreed from those upon which they are not agreed, has thrown the matter into some confusion. The subject of our present consideration is laid down by Story for discussion in s. 135 of the Conflict of Laws, and is taken up again in s. 143. In s. 144, he narrows it to the cases where there has been no change of domicile. But even here he appears to find himself unable to draw any certain conclusion whatsoever from the multitude of authorities which he proceeds to quote. The passage relied upon by Mr. Kennedy in his argument (s. 186) is only put forward by Story as the doctrine maintained in the State of Lousiana, which, Story thinks, would *probably* be adopted in other parts of America. This exaggeration of the difficulties of the subject is mischievous. There are difficulties and conflict, but not upon all points. The exact state of the authorities is far more clearly stated by Burge in the work already referred to (ch. vii, s. 8). It will be there seen that where there is no change of domicile, the conflict of authority is confined almost entirely to the question whether the *communio bonorum* operates upon property situate in a country where the law does not recognize that incident of marriage. But neither this controversy, nor any controversy of an analogous kind, arises as to moveable property where husband and wife have the same domicile. The difficulty lies in extending the marriage laws of a country beyond the limits of that country. But in the case under consideration, this difficulty does not arise, for as Pothier says (speaking both of moveables and immoveables): "Toutes ces choses qui ont une situation réelle ou feinte sont soujettis à la loi ou coutume du lieu ou elles sont situées ou censées d'être." And further on, after describing what are moveables, he says: "Toutes ces choses suivent la personne à qui elles appartiennent, et sont par consequent régies par la loi ou coutume qui régit cette personne, c'est à dire par celle du lieu de son domicile." (Poth. Obl., ch. i, ss. 2, 23, 24.) Mr. Burge quotes a number of civilians to the same effect: the only shadow of a

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difference being whether this rule belongs to real law or to personal law; but the distinction, important as it is sometimes, for our present purpose need not be considered.

Bearing these plain and incontestable principles in mind, there is (as it appears to me) no difficulty in comprehending the frame and scope of the Succession Act. It was impossible in dealing with the rights which arise upon death to ignore the consideration of the rights which arise upon marriage. For the rights which arise upon marriage, only assume their real importance when the marriage tie is dissevered. And the first and most necessary thing to be done by the Succession Act in reference to marriage was to declare the *lex loci* of India as to the interest acquired upon marriage by the parties thereto in the property of each other. Until that was declared, no sound legislation could take place. This is done by the 4th section. That section contains the *lex loci* of India. And I may observe that it was placed exactly where it is placed now by the very learned persons who originally framed that Act. But it is not (as it appears to me) necessary, in order to prevent the operation of this section upon the moveable property of parties not having an Indian domicile to add any words to that section. It does not operate upon that property any more than the marriage laws of England operate upon the moveable property of parties not having an English domicile. The *lex loci* of India, like the *lex loci* of all other countries, is applicable to the immoveable property of foreigners sojourning but not domiciled here, but not to their moveable property. It was not necessary for the Legislature, when laying down the *lex loci*, to reserve in express terms a principle of law which is universally recognized. That this general principle was not intended to be disturbed is clearly shown by s. 44, which resolves in a particular way an old standing dispute as to the application of the principle. The preponderance of authority had been in favor of making the domicile of the husband, or at least that of the marriage, govern the rights of the parties where the domicile of the husband and wife were different. The Succession Act, where either of the parties has an Indian domicile, very reasonably submits all their rights both as to moveables and immoveables, to the territorial

law of India. To that extent the *jus gentium*, or common law of nations, has been set aside or modified. From this point of view, it is easy to see why s. 4 and s. 44 are kept apart. The two sections deal with different subjects. The former declares the general *lex loci* of India; the second lays down a special rule to govern a particular case. It is not a modification of the *lex loci*, but a declaration of the law in a particular case.

From this point of view, nothing remains for the decision of the present case but to apply to this property the law of England, where, in contemplation of law, the property is situate; and there is no dispute that by the law of England the husband would be entitled to the whole. Whether this, strictly speaking, be *jure mariti* or *jure successionis*, is immaterial. S. 283 merely repeats and applies to a particular case the rule of law to which I have referred, and it might, perhaps, have been better omitted from the Act as in the original draft in fact it was.

I therefore consider that Howard Mark was entitled at his wife's death to the whole of the immoveable property of his wife, and that the funds, now in the hands of the defendant, belong entirely to the plaintiff as assignee of Mr. Mark's estate.

The plaintiff, therefore, as Official Assignee, is entitled to recover the same, and there will be the ordinary money-decree for the amount. The costs on scale No. 2 will be paid out of the estate.

Judgment for plaintiff.

Attorneys for the plaintiff: Messrs. *Dignam* and *Robinson*.

Attorneys for the defendant: Messrs. *Chauntrell, Knowles*, and *Roberts*.