Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Douglas-Menzies v. *Umphelby and others, from the Supreme Court of the State of New South Wales; delivered the* 12*th February* 1908.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

James Henry Douglas, who died on 6th May 1905, was a domiciled Scotchman. He was survived by his wife (who will be called the Respondent) but he left no issue. He died possessed of estate of great value, both real and personal, in Great Britain and in Australia. His testamentary dispositions are contained in two instruments in Scotch form, executed on the same day, each of which is a trust disposition and settlement. The one relates exclusively to British estate, and the other exclusively to Australian estate. (Codicils were subsequently executed to each trust disposition, but these do not affect the questions now to be considered.) Each trust disposition sets up a separate body of trustees, as was highly convenient where the one estate was in one hemisphere and the other in another. Each instrument successfully aims at equipping an independent administration of the estate dealt with by it, according to local

I (22) 52303. 120.—2/08. Wt. 1199. E. & S. A

[10]

conditions. In the British deed the testator declares that "whatever may be my domicile " at the date of my death, these presents shall " be construed and administered according to " the law of Scotland." In the Australian deed the words are, "And I direct and declare that " these presents shall be interpreted, and that " this trust shall be administered according to " the laws of New South Wales."

What is material to observe about these two instruments is that, taken together, they form a complete disposal of the testator's estate.

The next matter to be ascertained is, what were the rights of the Respondent, as a Scotch widow, *vis-à-vis* to this testamentary disposal of her husband's estate. Alike under the British and the Australian deeds, very large bequests were made to her if she chose to take them. On the other hand, she had the right to reject those bequests and betake herself to her legal rights as a Scotch widow. These legal rights may be, and very often are, renounced at marriage, conventional provisions being accepted in place of them, but this was not the case of the Respondent, the conventional provisions being expressly stated not to be in full of terce and *jus relictae*. It is superfluous to say that this only reserved to the Respondent her right to claim her legal rights, and in no way affected the consequences of such claim being made.

Now the legal right of the widow of James Henry Douglas, there being no children, was to one-half of his personal estate and to a life interest in one-third of his real estate. The Respondent chose to assert her legal right, and she has taken a decree of the Court of Session establishing it. She has now gone on to claim the bequests made to her in her husband's Australian will; and the judgment of the Supreme Court of New South Wales, now under

appeal, is a finding that she is not estopped from claiming the beneficial dispositions in her favour made by the testator in his Australian will, and that she is entitled under the Australian will to an estate for life in the sum of 100,000*l.* mentioned in the said will, notwithstanding the claim of the Respondent in the Scotch Court and the judgment of the Court of Session.

In considering the merits of the decision appealed against, it is well to remember what is the doctrine of Approbate and Reprobate invoked by the Appellant. Although the name is different, the principle (as was laid down by Lord Eldon in *Ker* v. *Wauchope*, 1 Bligh, 1) is the same as that of the English law of election. It is against equity that anyone should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing. If anyone has the right by law to take a share of a testator's estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits.

All this is so plain in principle and so easy of application that it is difficult to hear of the decision under appeal without surprise. The learned Judge has stated his reason with perfect clearness, so that it is easy to judge of its validity. He thinks that the testator made two wills and separated his British and Australian estates for the purposes of administration and succession. He thinks that it would be defeating the objects of the testator if part of the property situated in Australia should be distributed by Scotch and part by New South Wales law.

To their Lordships it appears that this view is fallacious. In the first place it attaches to the existence of the "two wills," and to one clause in the Australian will, an importance which does not belong to them; and it loses sight of the

true principle of the doctrine of Approbate and Reprobate.

Now, if the two wills be examined, cursorily or carefully, it will be seen that they might perfectly well and with unimpaired effect have had all their provisions incorporated in one continuous document. The only inconvenience would have been that each body of trustees would have carried about with them a great deal of writing with which they had no concern. If, then, the matter which now forms two instruments had taken the form suggested and been one will, the argument of the Respondent would be impossible, and thus owes its existence to the merest matter of form.

Nor does the judgment find more substantial support from the clause about Australian law. The scheme of the testator was simply that the administration of each part of his estate should be local and unhampered by the necessity of crossing the seas to solve questions of administration as they arose. The clause founded on is merely one of machinery.

Even supposing, however, that the two trust dispositions be treated as separate and independent to the fullest extent, there remains unanswered by the Respondent the real and radical objection to her case. Whether a man leaves one testamentary writing or several testamentary writings, it is the aggregate or the net result that constitutes his will or, in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form parts of the ultimate will or effective expression of his wishes about his estate. In this sense, it is inaccurate to speak of a man leaving two wills;

he does leave and can leave but one will. And when the law of Approbate and Reprobate is applied, it is this, the net result of the testamentary writings, which the doctrine protects from invasion.

Applying this principle to the present case, it is manifest that the two testamentary writings of Mr. Douglas form a coherent scheme of intention, and that the Respondent having defeated it in part cannot claim to take under it.

An attack was made on the *locus standi* of the present Appellant. He takes beneficially under the Scotch but not under the Australian disposition. It is, however, quite clear that if the principle of Approbate and Reprobate applies, then so does the correlative rule of equitable compensation, and the Appellant is therefore interested to protect the Australian estate. In truth the question of *locus standi* is really the same question in another form.

Their Lordships will humbly advise His Majesty to allow the Appeal and to make an Order in terms of the following Minutes, which are framed in accordance with the Order of the House of Lords in *Codrington* v. *Codrington* (L.R. 7 E. & I. App., at p. 868):

Discharge the Order of the Supreme Court;

Declare that the Respondent Sibella Susan Douglas was bound to elect between her rights under Scottish law as widow of the testator and the benefits given to her by the testator in the general disposition of his estate contained in the instruments described as the British will and the Australian will;

Declare that the said Respondent having claimed her legal rights in the Court of Session in Scotland, and having established her claim by the decree of that Court, is to be considered as having elected to take

against the general disposition made by the testator of his estate, and that consequently she is not entitled to the income of the £100,000 to be provided as mentioned in the Australian will or to any other interest under that will, but that all the interest to which, if she had not so elected, she would have been entitled under the Australian will ought to be applied in making compensation to the persons disappointed by her election of the benefits of which they respectively have been or will be deprived by her election so far as the same shall extend and until such compensation shall be fully made;

Liberty for any of the parties and any persons interested under the last preceding declaration to apply to the Supreme Court for such inquiries and directions as may be necessary in order to give effect to the same, and generally as they may be advised.

Costs of all parties of and incident to the Appeal to be dealt with and disposed of by the Supreme Court.