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THE CONFLICT OF LAWS RULES GOVERNING THE FORMAL VALIDITY OF WILLS: PAST DEVELOPMENTS AND SUGGESTED REFORM

By DONALD G. CASSWELL*

A. INTRODUCTION

The main objective of this paper is to discuss the conflict of laws rules of the common law provinces and territories of Canada relating to the formal validity of wills. However, this will only be possible after an examination of the evolution of the law in this area and an analysis and evaluation of the various connecting factors and, therefore, laws, which can be used in conflicts rules governing the formal validity of wills. The major themes to be dealt with in this paper are the historical evolution of the relevant conflicts rules, a discussion and evaluation of the various connecting factors available, a discussion of the traditional distinction made between property classified as movables and property classified as immovables and a discussion and evaluation of the existing statutory provisions in the common law provinces and territories.

The various stages through which the law in this area has evolved — the common law, *Lord Kingsdown's Act*, the various versions of the *Uniform Wills Act*, etc. — will form the organizational basis for this paper. A detailed consideration of the rationales underlying and the problems involved with the various connecting factors available will be presented in conjunction with the consideration of the Hague Convention on the Form of Wills and the *Wills Act, 1963 (U.K.)*.

Two brief introductory comments are required, one relating to the scope of the paper and the other relating to the historical background of the problems discussed in this paper and a general theme which arises out of that historical background.

The subject matter of this paper, the conflict of laws rules relating to the formal validity of wills, must be kept clearly distinct from matters relating to the essential validity of wills, succession to property and administration of estates. These distinctions are important, particularly in view of the close, and often confusing, relationship between conflicts rules governing the formal validity of wills and the substantive rules governing succession to property. First, at common law, the rules governing these two subjects hap-

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pen to be the same.¹ Second, the necessity of distinguishing matters of formal validity and matters of succession arise in a consideration of the principles underlying the various connecting factors possible.² Third, the question of whether the *lex causae*, the law governing the succession to property, should be a recognized connecting factor for the purposes of determining the formal validity of a will will be considered.³ Fourth, an important distinction must be made between questions of construction arising in relation to problems of succession and the question of the formal validity of a will.⁴

A brief summary of the early history of the conflicts rules relating to the formal validity of wills will serve as the basis for exposing one of the general themes in this area of the law, namely, the recurring debate as to how many connecting factors should be allowed — particularly as to whether only one or more than one factor should be allowed. Originally, in the unified Christian world, there was one simple rule, that a will, as with other instruments, was formally valid if it conformed to the *lex loci actus*, i.e., the law of the place of execution; this was merely an expression of the canon law rule of *locus regit actum*, which first appeared in the 12th century. Gradually, this rule became an imperative one. The existence of an imperative rule such as this causes no difficulty in a world with uniform conflicts rules. However, the secularization of Europe resulted in a wide diversification of the existing conflicts rules, particularly between the common law and the law of continental Europe. Further, the conflicts rules established by the various states were usually imperative ones. As movement among countries and the owning of property in more than one country became more common, the debate arose as to whether conflicts rules concerning the formal validity of, *inter alia*, wills, should be imperative or permissive. Today, in view of the widespread movement of people from one country to another and the frequency of cases in which people own property in more than one country, it is fairly clear that many connecting factors contained in permissive rules, rather than one connecting factor contained in an imperative rule, are needed in order to serve the principle of *favor testamenti*.⁵

B. THE POSITION AT COMMON LAW

The common law conflict of laws rules relating to the formal validity of wills are, and have been for at least two centuries, clearly established. These rules are that the formal validity of a will of immovables is governed

¹ See text, *infra*, following note 6.

² Notably in connection with the *lex rei sitae*, consider text, *infra*, following note 88.

³ See text, *infra*, accompanying note 115.

⁴ See text, *infra*, following note 29.

⁵ *Infra*, note 57; with respect to the historical background, see A. E. von Overbeck, *L'unification des règles de conflits de lois en matière de forme de testaments* (Fribourg: Editions Universitaire, 1961) at 2-4, and E. G. Lorenzen, *The Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws* (1911), 20 Yale L.J. 427 at 427-30.

by the *lex rei sitae*⁶ and that the formal validity of a will of movables is governed by the *lex domicilii tempore mortis*.⁷

Thus, the rules governing the formal validity of a will at common law are a combination of the *lex situs* and the personal law of the deceased testator.

These same rules govern succession to property.

The common law rules centre on the dichotomy between movables and immovables, immovables being land and movables being all things other than land, including intangibles. This dichotomy must be used in characterizing property dealt with in a will in order to determine which conflicts rule applies to the case and therefore, in turn, which law is the competent law to be used in determining the formal validity of the will. The characterization of the property using the movables and immovables dichotomy must be done independently of any consideration of personalty or realty.⁸ As pointed out by Dean Falconbridge in his classic work, *Essays on the Conflict of Laws*,⁹ the movables and immovables and the personalty and realty dichotomies are distinct in two ways: first, they are substantially divergent in that some interests in immovables are personalty¹⁰ and, secondly, the movables and immovables dichotomy is a distinction between different kinds of things whereas the personalty and realty dichotomy is a distinction between different kinds of interests in things. That distinction *per se* is not a fundamental concern of this paper; what is a fundamental issue, though, is whether any such dichotomy, whether movables and immovables, personalty and realty, or any other, used in categorizing property should be employed with respect to the rules governing the formal validity of wills.

The common law rules set out above were imperative rules. The hardships which could be produced by these rules were significant. The inconveniences and injustices produced by the imperativeness of the *lex rei sitae* with respect to the formal validity of wills of immovables will be considered later in the context of the discussion concerning scission.¹¹ With regard to

⁶ *Coppin v. Coppin* (1725), 24 E.R. 832; 2 P. Wms. 291; *Adams v. Clutterbuck* (1883), 10 Q.B.D. 403; *Robinson v. Bland* (1760), 97 E.R. 717; 2 Burr. 1077; *Curtis v. Hutton* (1808), 33 E.R. 627; 14 Ves. 537; *Pepin v. Bruyere*, [1902] 1 Ch. 24.

⁷ *Stanley v. Bernes* (1830), 162 E.R. 1190; 3 Hagg. Ecc. 373; *Croker v. Hertford* (1844), 13 E.R. 334; 4 Moo. P.C. 339; *Bremer v. Freeman* (1857), 14 E.R. 508; 10 Moo. P.C. 306. This rule is merely an expression of the rule that *mobilia sequuntur personam*.

⁸ At one time there was doubt on this matter in Manitoba: see J.-G. Castel, *Private International Law* (Toronto: Canada Law Book Co., 1960) at 152-53. This has now been made clear by *The Wills Act*, S. M. 1964 (1st Sess.) c. 57.

⁹ J. D. Falconbridge, *Essays on the Conflicts of Laws* (2d ed. Toronto: Canada Law Book Co., 1954) at 507 [hereinafter cited as J. D. Falconbridge, 1954]; J. D. Falconbridge, *The Law of Mortgages of Land* (3d ed. Toronto: Canada Law Book Co., 1942) at 763-64.

¹⁰ E.g., leaseholds, *Re Grassi*, [1905] 1 Ch. 584, and freehold land subject to a trust for sale, *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

¹¹ See text, *infra*, following note 110.

the imperativeness of the *lex domicilii tempore mortis* in the case of the formal validity of wills of movables, consider the situation of a testator whose domicile changes between the time of the making of his will and the time of his death. Although the will may have conformed to the law of the testator's domicile at the time he made his will, it might nevertheless not conform to the law of his domicile at the date of his death. The following, by Professor Fratcher, appropriately evaluates the common law rules:

. . . [these] hoary common law rules under which the place of execution and the domicile or nationality of the testator at the time of execution have no bearing on the validity of a will . . . [resemble] the equally ancient common law rule that a deed which was fully effective when delivered might become void if the seal should later be eaten by rats. The common law rules are not well suited to a society in which ownership of property situated in several jurisdictions is common and change of domicile a frequent occurrence.¹²

C. LORD KINGSDOWN'S ACT

The *Wills Act, 1861*, commonly known as *Lord Kingsdown's Act*, was enacted for at least two reasons: first, the case of *Bremer v. Freeman*¹³ brought to the attention of the British Parliament the harsh results which could follow from the imperativeness of the *lex domicilii tempore mortis* with respect to the formal validity of wills of movables in cases in which the domicile of the testator changes between the time of the making of the will and the time of death;¹⁴ secondly, the difficulty of determining a testator's domicile the law of his domicile at the date of his death. The following, by Professor Fratcher, appropriately evaluates the common law rules:

An Act to amend the Law with respect to Wills of *Personal Estate* made by British Subjects.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards *personal estate*, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards *personal estate*, be held to be well executed, and shall be admitted in England and

¹² W. F. Fratcher, *The Uniform Probate Code and the International Will* (1968), 66 Mich. L. R. 469 at 471.

¹³ (1857), 14 E. R. 508; 10 Moo. P. C. 306.

¹⁴ This was *not* the fact situation in *Bremer* itself since there the testatrix probably had a French domicile even at the time of the execution of her will in English form, but the case nevertheless pointed out the harsher situations possible.

Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. [emphasis added]¹⁵

The clear intention of the legislature was to permit laws in addition to the *lex domicilii tempore mortis* to be competent in determining the formal validity of wills of movables: with respect to wills made outside the United Kingdom, three additional laws were to be competent and with respect to wills made within the United Kingdom, one additional law was to be competent. The imperative common law rule would have been supplemented by a number of permissive rules, thus serving the principle of *favor testamenti*. However, despite its meritorious intention, the Act was in fact highly unsatisfactory in view of the unnecessary distinctions contained therein, one of which in turn contained a serious drafting error.

Three clearly unnecessary distinctions which have long been criticized as having no valid justification are the limitation of sections 1 and 2 to wills made by British subjects, the limitation of the availability of the domicile of origin as a connecting factor in section 1 to cases in which that domicile is within the British Empire and the distinction pursuant to sections 1 and 2 between wills made out of the United Kingdom and those made within the United Kingdom. The fourth distinction contained in the Act is the distinction between personalty and realty, resulting from the Act's limitation to wills of "personal estate". This distinction has long been criticized for its use of "personal estate" rather than "movables"; this drafting error codified the loose language of some previous text-writers and case law and gave statutory effect in the context of a conflict of laws problem to a classification of property which, though central to substantive property law, is totally anomalous to the conflict of laws. Thus, even though it is clear that the legislature intended the additional connecting factors provided by the Act to apply only to wills of movables, they have been held by the courts, construing the statute's use of "personal estate" literally, to apply also to certain interests in immovables which are by the substantive law of property classified as personalty. For example, leasehold interests in land, which are personalty, are governed by the additional connecting factors provided in the Act in addition to the *lex situs* available under the common law. Recently, the desirability of having any kind of distinction creating a system of scission in the rules governing the formal validity of wills has been questioned. Thus, this distinction is criticizable not only for the drafting error contained therein but also, possibly, for its existence as a distinction *per se*.¹⁶

¹⁵ *Lord Kingsdown's Act, The Wills Act 1861*, 24 & 25 Vict., c. 114.

¹⁶ With respect to the purposes of, provisions of, and defects in *Lord Kingsdown's Act*, reference may be had to the following: G. Bale, *The Demise of Lord Kingsdown's Act* (1964), 29 Sask. Bar Rev. 179 at 179-82; J.-G. Castel, *supra*, note 8 at 177-78; J. D. Falconbridge, *A Revised Version of Lord Kingsdown's Act* (1954), Can. Bar Rev. 426 at 429-31 [hereinafter cited as J. D. Falconbridge, *A Revised Version*]; J. D. Falconbridge (1954) at 532-33, 542-46; W. F. Fratcher, *supra*, note 12 at 472-73; J. H. C. Morris, *Comment on Fourth Report of the Private International Law Committee (Formal Validity of Wills)* (1959), 22 M.L.R. 65 at 65.

D. WORK OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA UP TO 1953

The shortcomings of the common law conflicts rules with respect to the formal validity of wills, the defects in *Lord Kingsdown's Act* and the adoption by many of the provinces to some extent or other of that Act, indicated as early as the time of the establishment of the Conference of Commissioners on Uniformity of Legislation in Canada¹⁷ that reform in this area of the law was required. This is evidenced by the fact that at the first meeting of the Conference, in 1918, a Committee was appointed to begin work on the drafting of a model Act regarding wills.¹⁸ The need for reform was compounded by the diversity of legislation among the provinces.

The work of the Conference in this area proceeded for several years¹⁹ and, based largely on the work of Dean Falconbridge, led to the 1929 version of the *Uniform Wills Act*. Part II of this model Act dealt with the conflict of laws. The provisions of that Part were as follows:

IMMOVABLE PROPERTY.

34. (1) In this Part:

- (a) Immovable property includes real property and a leasehold or other interest in land;

MOVABLE PROPERTY.

- (b) Movable property includes personal property other than a leasehold or other interest in land.

LEX LOCI REI SITAE.

- (2) The manner of making, the validity and the effect of a will, so far as it relates to immovable property, shall be governed by the law of the place where the property is situate.

LEX DOMICILII.

- (3) Subject to the provisions of this Part, the manner of making, the validity and the effect of a will, so far as it relates to movable property, shall be governed by the law of the place where the testator was domiciled at the time of his death.

WILLS OF MOVABLE PROPERTY MADE WITHIN THE PROVINCE.

35. (1) A will made within the province, whatever was the domicile of the testator at the time of the making of the will or at the time of his death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate, if it is made in accordance with the provisions of Part I, or if it is made in accordance with the law in force at the time of the making thereof:

- (a) Of the place where the testator was domiciled when the will was made; or
 (b) Of the place where the testator had his domicile of origin.

WILLS OF MOVABLE PROPERTY MADE OUTSIDE THE PROVINCE.

- (2) A will made outside the province, whatever was the domicile of the

¹⁷ That conference is now styled "The Uniform Law Conference of Canada."

¹⁸ Proceedings of the First Annual Meeting of the Conference of Commissions on Uniformity of Legislation in Canada (Montreal: 1918) at 5-6.

¹⁹ For details regarding proceedings, reports of committees, and various documents, see the Cumulative Index in the Proceedings of the Fifty-sixth Annual Meeting of the Conference of Commissioners.

testator at the time of the making of the will or at the time of his death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate, if it is made in accordance with the provisions of Part I, or if it is made in accordance with the law in force at the time of the making thereof:

- (a) Of the place where the testator was domiciled when the will was made; or
- (b) Of the place where the will was made; or
- (c) Of the place where the testator had his domicile of origin.

CHANGE OF DOMICILE.

36. No will 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.²⁰

The objectives of Part II were, as clearly stated by its chief draftsman, Dean Falconbridge,²¹ the elimination of some of the unnecessary limitations included in *Lord Kingsdown's Act* and the removal of the drafting error referring to "personal estate" rather than "movables." This last objective was obviously achieved since sections 34 and 35 of the model Act referred to "movables" and "immovables," those terms being defined in subsection 34(1) in terms of their generally accepted conflict of laws meanings. Subsections 34(2) and 34(3) merely codified the common law. Subsections 35(1) and 35(2) retained a distinction between wills made within the province and those made out of the province and retained a classification of property based on the movables and immovables dichotomy. The provisions in *Lord Kingsdown's Act* limiting its application to wills made by British subjects and limiting domiciles of origin available to those within the British Empire were removed.

However, it should be noted that the distinction retained between wills made within the province and wills made out of the province was of no practical significance. An examination of the provisions reveals the following. Under subsection 35(1), a will made within the province and in accordance with Part I of the particular provincial Act, i.e. made in accordance with the law of that province, is formally valid. This merely means that a will is valid if it is in accordance with the *lex loci actus*, which is precisely what paragraph 35(2)(b) provides with respect to wills made out of the province. Since the remaining provisions of subsections 35(1) and 35(2) are identical, the result follows that the connecting factors available under each of subsections 35(1) and 35(2) are the same. This is quite different from the situation under *Lord Kingsdown's Act*, in which three additional connecting factors were made available for wills made out of the United Kingdom whereas only one additional connecting factor was made available for wills executed within the United Kingdom.

²⁰ *Uniform Wills Act* (1929), Proceedings of the Twelfth Annual Meeting of the Conference of Commissions on Uniformity of Legislation in Canada (Quebec, 1929) at 37.

²¹ J. D. Falconbridge, *A Revised Version*, *supra*, note 16 at 426; J. D. Falconbridge, *A Canadian Redraft of Lord Kingsdown's Act* (1946), 62 L. Q. R. 328 at 328 [hereinafter cited as J. D. Falconbridge, *A Canadian Redraft*].

In summary, it is clear that the 1929 version of the *Uniform Wills Act* did not attempt to go beyond the objective of *Lord Kingsdown's Act* but rather was directed at the elimination of certain unnecessary distinctions and the drafting error contained in that statute.²² The 1929 version of Part II of the *Uniform Wills Act* could best be described, using Dean Falconbridge's words, as a "revised version of *Lord Kingsdown's Act*."²³

Dean Falconbridge subsequently suggested further changes to the *Uniform Wills Act*, relating to the classification of property contained therein. The movables and immovables dichotomy was to be replaced by an "interests in movables" and "interests in land" dichotomy. This was accepted by the Conference in the 1953 version of Part II of the *Uniform Wills Act*. The key provisions of this version were as follows:

34. (1) In this Part,
 - (a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;
 - (b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.
 - (2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is situated.
 - (3) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the law of the place where the testator was domiciled at the time of his death.
35. As regards the manner and formalities of making a will, so far as it relates to an interest in movables, a will made either within or without the Province is valid and admissible to probate if it is made in accordance with the law in force at the time of its making in the place where,
- (a) the will was made; or
 - (b) the testator was domiciled when the will was made; or
 - (c) the testator had his domicile of origin.²⁴

Further, the distinction made between wills made within the province and wills made out of the province, which had been retained in the 1929 version but which was in any event superfluous, was removed from section 35. Thus, the 1953 version of Part I of the *Uniform Wills Act* achieved that, and only that, which the British Parliament had intended to accomplish when it enacted *Lord Kingsdown's Act* in 1861.²⁵

²² For comments on the 1929 version of Part II of the *Uniform Wills Act*, see the following: J. D. Falconbridge, *A Canadian Redraft* at 328 (reproduced in J. D. Falconbridge, 1954 at 547-48); G. Bale, *supra*, note 16 at 188.

²³ J. D. Falconbridge, *A Revised Version* at 434.

²⁴ *Uniform Wills Act* (1953).

²⁵ For comments on the 1953 version of Part II of the *Uniform Wills Act*, see the following: J. D. Falconbridge, *A Revised Version* at 429-30, 434; G. Bale, *supra*, note 16 at 188; J. D. Falconbridge, *A Canadian Redraft* at 328 (reproduced in J. D. Falconbridge, 1954 at 547-48); J.-G. Castel, *supra*, note 8 at 178-80.

The subsequent work of the Conference in this area will be considered after the Hague Convention and the *Wills Act, 1963 (U.K.)* have been considered.

E. THE HAGUE CONVENTION; GENERAL PRINCIPLES; CHOICE OF CONNECTING FACTORS AND, THEREFORE, OF COMPETENT LAWS

While the following discussion of the general problems involved in the conflict of laws regarding the formal validity of wills is obviously set in an international context, the principles and problems considered therein are equally relevant in an interprovincial context within a federal state such as Canada. Thus, whenever reference is made to the international context, it should be inferred that both the international and interprovincial contexts are being included.²⁶ On the other hand, reference to rules or whatever as being "generally accepted" should be limited to indicating general acceptance by the countries which are members of The Hague Conference on Private International Law.²⁷

At the 8th Session of the Hague Conference, a Special Commission was established, largely at the behest of the United Kingdom, to draft a Convention relating to the formal validity of wills. In presenting its report to the 9th Session, held at The Hague in 1960, that Commission set out the problem in general and its key objectives as follows:

Le souci qu'avait exprimé la Délégation anglaise était d'éviter qu'un testament devienne nul en la forme par suite d'un changement de nationalité ou de domicile du testateur, quand la forme du testament est soumise à la loi de la nationalité ou du domicile du testateur au moment de son décès. La convention peut avoir un but plus général, elle doit viser à éviter les divergences de solutions dans les Etats contractants. Les systèmes existants sont en effet notablement divergents sur les règles de forme en matière de testaments. Ils concilient selon des formules diverses le souci d'assurer la liberté du testateur, et celui d'obtenir une certitude suffisante sur la réalité de ses intentions. Cette divergence des lois internes se double d'une divergence des règles de conflit: . . .

La Commission spéciale . . . a estimé que le premier objectif de la convention devrait être la faveur à la validité du testament (*favor testamenti*). Il importe de poser des règles qui permettent de valider autant que possible le testament en la forme. Une seconde préoccupation de la Commission a été de chercher qu'un seul

²⁶ For example, "the purposes to be served by an international Convention on the conflict of laws rules governing the formal validity of wills" should be taken as an abbreviation of "the purposes to be served by an international Convention or by uniform interprovincial legislation on the conflict of laws rules governing the formal validity of wills."

²⁷ "General acceptance" refers to general acceptance by the countries which are members of the Hague Conference on Private International Law and is not to be taken as indicating general acceptance within Canadian law or even within the common law in general. For example, "the law of nationality is generally accepted as a competent law with respect to the formal validity of wills" should be taken as an abbreviation of "the law of nationality is generally accepted by the countries which are members of the Hague Conference as a competent law with respect to the formal validity of wills".

testament suffise autant que possible à disposer de la succession entière. . . . Enfin, la convention devra chercher à obtenir une uniformité de décisions.²⁸

Thus, the two principal purposes to be served by an international Convention concerning the formal validity of wills are the goals of *favor testamenti* and uniformity of decisions.²⁹

1. *Favor testamenti*

The principle of *favor testamenti* refers to giving as much effect to the intention of the *de cuius* as possible, the "as much as possible" constraint referring to the necessity of having some indication that the required formalities evidence some degree of seriousness on the part of the testator and a realization of the significance of the act of making a will.

In assessing the connecting factors in the context of *favor testamenti*, it is always necessary to distinguish questions of construction from questions relating to formal validity. With respect to the formal validity of a will, a will is either formally valid or not: there is no "halfway house" in this matter. Thus, the gravity of the determination of the formal validity of a will and the fact that in such a determination no question as to the effect of the will is involved must be borne in mind in assessing the competence of a connecting factor for the purposes of determining formal validity. In essence, in the interests of *favor testamenti*, one should not be overly cautious or slow in admitting new connecting factors. As von Overbeck states:

. . . à la question de la validité formelle il faut répondre par oui ou par non.
Mais la question [de la validité formelle] devra-t-elle être posée à une seule loi?

²⁸ Conférence de la Haye de Droit International Privé, *Actes et Documents de la Neuvième Session, Tome III, Forme des Testaments* (La Haye: Imprimerie Nationale, 1961) at 18 [hereinafter cited as Actes, III]; see also Actes, III, at 159-60; H. Batiffol, *La neuvième session de la Conférence de la Haye de droit international privé* (1961), 50 R. critique de droit international privé 461 at 464; G. A. L. Droz, *Les nouvelles règles de conflit françaises en matière de forme des testaments* (1968), 57 R. critique de droit international privé 1 at 4-5; A. E. von Overbeck, *supra*, note 5 at 36-37.

The passages in French in the body of this article will be translated, sometimes in their entirety and sometimes only in summary, in the notes. To distinguish these translations from the rest of the notes, they have been italicized.

Trans.: *The Convention relating to the formal validity of wills should aim at avoiding different results among the signatory countries. Different legal systems possess widely varying rules with respect to the form of wills. These differences among internal substantive laws is further complicated by differences in conflict of laws rules.*

The Special Commission felt that the primary objective of the Convention should be favor testamenti. It is essential to have rules which, as far as possible, recognize wills as formally valid. Further, the Commission sought rules which would allow one will to suffice for the disposition of an entire estate. This second objective was referred to as 'uniformity of decisions'.

²⁹ A very thorough analysis of the general principles to be discussed is contained in Dr. Alfred von Overbeck's *L'Unification des règles de conflits de lois en matière de forme des testaments*, *supra*, note 5; the organizational structure of that work has been imitated in this part of this paper.

Ne pourrait-on pas au contraire prévoir la compétence alternative de plusieurs lois, dont il suffirait qu'une dise oui?

[Au sujet de] la seule forme des testaments, . . . nul besoin de choisir le système légal qui déterminera les effets des déclarations de dernière volonté dans toutes leurs conséquences. . . . Il s'agit simplement de voir si la disposition satisfait à cette première exigence que toutes les législations s'accordent à poser pour la validité d'une disposition testamentaire: l'accomplissement de formalités déterminées. . . .

En ce qui concerne la réalisation de l'exigence de forme, la plupart des lois internes mettent à disposition une série de procédés assez différents entre eux: . . . De cette constatation il n'y a qu'un petit pas de plus pour admettre que la forme du testament pourra être empruntée à une autre loi qu'à celle qui régit le fond. Car, comme le dit très bien E. Rabel: . . . *the local differences are devoid of any territorial, moral, social, or other justification and plainly apt to irritate the people involved*. Une fois admis que la loi applicable à la forme n'est pas nécessairement celle régissant le fond (*lex causae* = loi successorale), pourquoi ne pas concéder un choix entre les formes de plusieurs lois? Nous avons vu que l'évolution du droit allait dans ce sens.

. . . l'aboutissement logique du raisonnement qui vient d'être fait serait d'admettre qu'un testament est valable pourvu qu'il soit conforme à un ordre juridique quelconque, éventuellement avec la restriction que cet ordre doit connaître des formes suffisamment sûres. . . . il suffira [pour un juge] de reconnaître la compétence des lois avec lesquelles le testateur a un des liens "raisonnables" au sens que nous définirons, aller plus loin conduirait à des validations dues au hasard ou à un recours abusif aux lois les moins exigeantes quant à la forme.³⁰

The more general problem of whether only one law or several laws should be competent was considered earlier by von Overbeck, in the context of an overview of various existing legal systems, with the conclusion that the modern trend is away from the imperativeness of one connecting factor and the resulting competence of one law and instead towards several competent laws.

Having stated in a very general way how the principle of *favor testa-*

³⁰ A. E. von Overbeck, *supra*, note 5 at 38-41.

Trans.: . . . *to the question of formal validity, the only answers are "yes" or "no". But must the question of formal validity be determined by one law? Is it not possible to recognize the alternative competence of several laws, of which only one need say "yes"?*

In determining the formal validity of a will, there is no need to choose the legal system which will determine the effect of the contents of that will. It is a question only of determining whether the disposition meets that first requirement which all legal systems put before testamentary dispositions: the carrying out of certain specified formalities.

*Once it is admitted that the law governing the form of a will is not necessarily that governing the construction of the will (the *lex causae*), why not allow a choice among the forms of several laws?*

The logical conclusion of this reasoning is that a will should be formally valid if it conforms to any legal system which requires adequate formalities. It would be sufficient for a judge to recognize the competence of laws with which the testator had a "reasonable" connection; to go farther would allow wills to be formally valid by accident or by recourse to laws which were the least demanding with respect to formalities.

menti relates to the consideration of laws competent in determining the formal validity of a will, it is then necessary to consider a number of more particular problems which arise. First, should the connecting factors, and therefore the competent laws, be chosen on a subjective basis, such as the law or laws to which the testator considered himself subject, or on some objective basis, such as the law or laws with which the testator had some reasonable connection? The evidentiary problems involved in the former clearly indicate that the latter should be used and this leads to a *prima facie* consideration of such laws as the *lex domicilii*, the *lex patriae*, etc., as having "actual reasonable connection" with the testator and the *lex loci actus* as having a "constructive reasonable connection." "Constructive reasonable connection" refers to the fact that, because of the widespread acceptance of the *lex loci actus* and the widespread knowledge of that acceptance, it is sensible to conclude that a testator can have a "constructive reasonable connection" with the *lex loci actus*. As will be indicated, such verbal gymnastics are probably unnecessary if it is admitted that the *lex loci actus*, when accepted as a competent law, is not so accepted on any firm theoretical basis but rather because it has traditionally been employed as a competent law in many countries.³¹

Secondly, how should the problems created by changes in connecting factors between the date of the making of a will and the date of death of the testator be dealt with? In the earlier references to changes in connecting factors with time, consideration was given to the problems raised by the imperative common law rule that the *lex domicilii tempore mortis* governed the formal validity of wills of movables and that a will which was made in accordance with the *lex domicilii tempore testamenti* might nevertheless be formally invalid if the testator's domicile changed before his death. Here, however, in the context of the principle of *favor testamenti* and the conclusion that the laws considered competent should be chosen on the objective basis of reasonable connection with the testator, consider the case of a will which conforms at the time of death with one or more of the then available competent laws and is, therefore, formally valid, but which did not at the time of its making conform with any of the then available competent laws. In such a case a will which was made in accordance with the formal requirements of a law with which the testator had no reasonable connection as at the date of the making of the will might nevertheless be formally valid as at the testator's death. Thus, there are theoretical difficulties in hastily adopting a connecting factor both *tempore testamenti* and *tempore mortis* as an acceptable connecting factor. However, since many jurisdictions accept such possibilities, notably the common law rule with respect to movables, and since the law so held to be competent may be the *lex causae*, there are practical reasons for allowing such connecting factors.³² As always, when in doubt, *favor testamenti* should be applied in favour of accepting the connecting factor. As von Overbeck states:

Au sein de la Commission spéciale . . . l'opinion a prévalu que les avantages de

³¹ *Id.* at 41-43.

³² The fact that the *lex causae* is not generally accepted as a connecting factor in this area of law will be considered, *infra*, at text following footnote 115.

l'extension du cercle des lois compétentes par la reconnaissance de rattachement existant au moment du décès l'empêchaient sur ces inconvénients. . . .

Il convient d'ailleurs d'ajouter que les cas où un testament correspondra "par hasard" à une loi ne devenant compétente qu'après sa rédaction et totalement inconnu à ce moment semblent devoir être assez rares. Au contraire on peut concevoir des hypothèses où les lois compétentes au moment du décès ont aussi été choisies par le testateur. Ainsi en est-il lorsque celui-ci s'est rendu compte de la nullité originaire de son testament, mais s'est fié à la validation par un changement prévu de sa nationalité ou de son domicile.³³

As a theoretical justification for the acceptance of such "rattachements supplémentaires pris au moment du décès,"³⁴ von Overbeck offers the following: at the time of the making of his will, the testator ensured that it conformed with a particular law, even though he, at that time, had no reasonable connection with that law; subsequently, he established such a connection with that law, this act having the effect of "ratifying" the testator's compliance therewith.³⁵

A third general problem in the choice of connecting factors is whether there should be different factors available in respect of different kinds of property. Though a general problem, this question arises in the context of the consideration of the *lex rei sitae* as a competent law in determining the formal validity of wills. The competence of this law with respect to wills of immovables is widely accepted; the problem arises with respect to its use regarding wills of movables. Von Overbeck introduces the scission problem generally by saying:

Nous verrons que la compétence de la *lex rei sitae* soulève des difficultés en relation avec le problème de la scission, et que le moyen de les éviter serait une solution *maxima* dans le sens de la *favor testamenti*: La forme de la loi du *situs* d'un immeuble compris dans la succession suffirait pour les dispositions sur celle-ci dans son ensemble.³⁶

2. Uniformity of decisions

In addition to the principle of *favor testamenti*, a second principle which must be considered is the objective of uniformity of decisions. "Uniformity of decisions" refers to two types of uniformity or consistency. These are uni-

³³ A. E. von Overbeck, *supra*, note 5 at 45-46.

Trans.: *The majority of the Special Commission were of the opinion that the advantages of recognizing connecting factors existing at the time of death outweighed the disadvantages of so doing. Further, the number of cases in which a will would conform "by chance" with a law which became competent only after the execution of the will and which was totally unconsidered at that time would probably be very few.*

³⁴ *Id.* at 46.

Trans.: *Additional connecting factors acquired at the time of death.*

³⁵ *Id.* at 46-47.

³⁶ *Id.* at 47.

Trans.: *We shall see that the competence of the *lex rei sitae* raises difficulties in relation to the problem of scission and that the means of avoiding them would be a "solution maxima" towards *favor testamenti*: the form required by the law of the *situs* of any immovable contained in the estate would be competent for all the property contained in the estate.*

formity of decisions among different jurisdictions upon a given legal question and the uniform treatment of wills of different kinds of property within a single given jurisdiction. In the case of the former, total uniformity could only be attained if there was uniformity in the laws of succession. As von Overbeck states:

[Il y aura des problèmes a cet egard] jusqu'au jour, probablement lointain, où les conflits de lois en matière de loi successorale et de compétence seront régis par une convention.

En attendant, une codification des seules règles de conflits sur la forme pourra apporter un remède dans des cas assez fréquents.³⁷

The latter type of "uniformity of decision" referred to is concerned with the ubiquitous scission problem. While there is a general trend away from scission, the fact that it still exists in many important countries, particularly in the common law countries, led von Overbeck to conclude that the problem should at least be considered in drafting an international Convention but that special provisions with respect thereto should not be included in such a Convention.³⁸ The Hague Convention as finally adopted did not include any form of scission, an indication that the draftsmen thereof were confident that scission was a dying phenomenon. In summary, if both types of uniformity were achieved:

Le principe du traitement uniforme de la succession signifie donc que tous les juges examineront la forme d'un testament selon les mêmes lois, et que la décision qu'ils prendront sur sa validité vaudra pour l'ensemble de la succession.³⁹

Von Overbeck says that any conflicts rules adopted must be exact rules, not generalities, and that "hybrid forms" of wills should not be allowed, i.e. a will to be formally valid must conform in its entirety with one of the competent laws.⁴⁰

With respect to the relationship between the principle of *favor testamenti* and that of uniformity of decisions, von Overbeck states:

Les deux principes de la *favor testamenti* et du "traitement uniforme" entrèrent parfois en contradiction. Le premier veut que la volonté du testateur soit respectée dans la mesure du possible, donc du moins partiellement si elle ne peut être entièrement suivie. Le deuxième veut au contraire "tout ou rien": validité du testament pour la succession entière, dans tous les pays, ou nullité. On tendra vers le "tout", mais là où il est inatteignable, on préférera parfois "rien" à des solutions de compromis . . . qui peuvent complètement déformer la volonté du testateur. Le souci du traitement uniforme l'emportera ici sur la *favor testamenti*

³⁷ *Id.* at 48.

Trans.: *There will be problems in this area until the day, probably far-off, when the conflict of laws rules with respect to matters of construction and matters of essential validity are governed by an international Convention. In the meantime, such a Convention on the conflicts rules of formal validity will solve many of the problems.*

³⁸ *Id.* at 49.

³⁹ *Id.*

Trans.: *Uniformity of decisions means that all judges would determine the formal validity of a will using the same laws and that one result would govern all the property in the estate.*

⁴⁰ *Id.* at 50.

qui laisserait subsister des dispositions tronquées et souvent complètement déformées.⁴¹

As an interesting comparison with the contemporary analysis set out above, consider the following excerpts from an article published in 1911, Professor Ernest G. Lorenzen's *The Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws*:

Two principal questions are suggested by the preceding comparison of the law of England, the United States, France, Italy, Spain and Germany.

1. Which is the law governing upon principle, wills, deeds, and contracts in the matter of formal requirements?
2. Is it practicable and, if so, to what extent, to allow the parties a choice in this regard between different laws? . . .

. . . Upon principle, therefore, only one law should govern the validity of legal transactions in the matter of form. An exception to this rule has been recognized on the continent of Europe, however, on grounds of necessity, so that an act executed in the form prescribed by the *lex loci* might be valid everywhere. Without such a concession a person living in a foreign country may be actually deprived of his right to dispose of his property by will. . . . In view of the fact that the rules in the Conflicts of Laws are designed to facilitate international relations compliance with the *lex loci* should, as far as practicable, be allowed. . . .

There would appear to be no sufficient reason why the rule *locus regit actum*, with certain provisos, should not be adopted by legislation with regard to the formal execution of . . . wills disposing of personal property. Compliance with the *lex loci* should be allowed whether the will be executed in one of the United States or in a foreign country, provided the will be in writing and subscribed by the testator. . . .

A reasonable doubt may be felt in regard to the extension of the rule *locus regit actum* to . . . transfers of land. . . .

[However, if the law of real property of the foreign country was similar to that of the United States], the *lex loci* could be safely adopted with respect to wills of land. . . .

There is no reason why in certain cases the legislator should not go beyond the views above expressed and allow compliance with the *lex domicilii* and the *lex fori*. . . .

It is far better that a legislator shall lay down the most liberal rules with respect to mere matters of form in the Conflict of Laws, than that courts, as a result of too stringent rules, should attempt to sustain legal transactions by resorting to the pernicious *renvoi* doctrine.⁴²

Thus, though Professor Lorenzen's viewpoint initially appears to be one in favour of imperative rules establishing exclusive connecting factors with respect to the formal validity of, *inter alia*, wills, he is actually very much in favour of expanding the number of available connecting factors, albeit that

⁴¹ *Id.*

Trans.: *The principle of favor testamenti and that of "uniform treatment" will occasionally conflict. The first indicates that effect should be given to the testator's wishes, even if only partially. The second, on the other hand, requires "all or nothing": validity of the will for all property in the estate in all jurisdictions or nullity. The "all" is to be sought wherever possible but where this cannot be achieved, the "nothing" is sometimes preferable to partial validity, which can have the effect of grossly distorting the testator's intentions. In such an exceptional case, the principle of "uniform treatment" prevails over the otherwise dominant principle of favor testamenti.*

⁴² E. C. Lorenzen, *supra*, note 5 at 453-61 *passim*.

he repeatedly states that this is not done "upon principle" but rather on grounds of "necessity" in order to "facilitate international relations." Professor Lorenzen's insistence that the forms acceptable must, at a minimum, require that "the will be in writing and subscribed by the testator" is analogous to von Overbeck's qualification that to be formally valid wills must conform "à un ordre juridique quelconque, éventuellement avec la restriction que cet ordre doit connaître des formes suffisamment sûres."⁴³ Thus, except for Professor Lorenzen's obvious maintenance of some form of scission and his thesis that expanding the number of connecting factors available should be based on practical reasons rather than upon both theoretical and practical reasons, the underlying principles evidenced in the two works are not all that different, despite the fact that half a century separates them.

F. GENERAL INTRODUCTION TO THE HAGUE CONVENTION

The key provisions of the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions⁴⁴ will be set out at the beginning of this part of the paper since they will be referred to frequently. In the case of this particular Convention, the French version is the authoritative version; therefore, it is the French version of the Convention which will be referred to as the primary document. The key provisions of the Convention concluded in October of 1961 are as follows:

Les Etats signataires de la présente Convention,
 Désirant établir des règles communes de solution des conflits de lois en matière de forme des dispositions testamentaires,
 Ont résolu de conclure une Convention à cet effet et sont convenus des dispositions suivantes:

Article premier

Une disposition testamentaire est valable quant à la forme si celle-ci répond à la loi interne:

- a) du lieu où le testateur a disposé, ou
- b) d'une nationalité possédée par le testateur, soit au moment où il a disposé, soit au moment de son décès, ou
- c) d'un lieu dans lequel le testateur avait son domicile, soit au moment où il a disposé, soit au moment de son décès, ou
- d) du lieu dans lequel le testateur avait sa résidence habituelle, soit au moment où il a disposé, soit au moment de son décès, ou
- e) pour les immeubles, du lieu de leur situation.

Aux fins de la présente Convention, si la loi nationale consiste en un système non unifié, la loi applicable est déterminée par les règles en vigueur dans ce système et, à défaut de telles règles, par le lien le plus effectif qu'avait le testateur avec l'une des législations composant ce système.

⁴³ A. E. von Overbeck, *supra*, note 5 at 40.

Trans.: *to some legal system, eventually with the restriction that that system must require adequate formalities.*

⁴⁴ For general reference, see the following: K. H. Nadelmann, *The Hague Conference on Private International Law: Ninth Session* (1960), 9 Am. J. Comp. L. 583 at 584-85; J.-G. Castel, *Canada and the Hague Conference on Private International Law 1893-1967* (1967), 45 Can. Bar Rev. 1 *passim*; Conférence de la Haye de Droit International Privé, *Actes et Documents de la Douzième Session, Tome 1, Matières diverses* (La Haye, Imprimerie Nationale, 1974) at 129-31, 141-42.

La question de savoir si le testateur avait un domicile dans un lieu déterminé est régie par la loi de ce même lieu.

Article 3

La présente Convention ne porte pas atteinte aux règles actuelles ou futures des Etats contractants reconnaissant des dispositions testamentaires faites en la forme d'une loi non prévue aux articles précédents.

Article 9

Chaque Etat contractant peut se réserver, par dérogation à l'article premier, alinéa 3, le droit de déterminer selon la loi du for le lieu dans lequel le testateur avait son domicile.

. . .

Fait à La Haye, le 5 octobre 1961, en français et en anglais, le texte français faisant foi en cas de divergence entre les textes. . .⁴⁵

The corresponding provisions in English are as follows:

The States signatory to the present Convention,
Desiring to establish common provisions on the conflicts of laws relating to the form of testamentary dispositions,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

A testamentary disposition shall be valid as regards form if its form complies with the internal law:

- a) of the place where the testator made it, or
- b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
- c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- e) so far as immovables are concerned, of the place where they are situated.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

Article 3

The present Convention shall not affect any existing or future rules of law in contracting States which recognize testamentary dispositions made in compliance with the formal requirements of a law other than a law referred to in the preceding Articles.

Article 9

Each contracting State may reserve the right, in derogation of the third paragraph of Article 1, to determine in accordance with the *lex fori* the place where the testator had his domicile.

. . .

Done at The Hague the 5th October 1961, in French and in English, the French text prevailing in case of divergence between the two texts. . .⁴⁶

⁴⁵ Recueil des Conventions de la Haye, 1961, at 48.

⁴⁶ *Id.* at 49.

The objectives of the Hague Convention in particular have been referred to as follows:

The aim of the Convention is to provide a wide choice of alternative legal systems in accordance with which the testator might make a valid will, so far as concerns its form.

. . . Une telle convention aurait l'avantage d'éviter que la validité quant à la forme d'un testament ne soit affectée par un changement de nationalité ou de domicile du testateur. . . .

Le but essentiel que l'on s'est efforcé d'atteindre est donc de conférer le maximum de sécurité aux testateurs en leur donnant l'assurance que leur testament sera valable quant à la forme dans les différents Etats signataires lorsqu'ils auront respecté la règle de conflit d'ailleurs extrêmement libérale posée par la Convention. Cette dernière est donc tout entière dominée par la *favor testamenti*.

Cette considération déterminante explique la pluralité de rattachements retenus par l'articles premier de la Convention.⁴⁷

The following discussion is organized around the various connecting factors available. Von Overbeck classifies the connecting factors as "direct" or "indirect" and defines these terms as follows:

Il n'y a en la matière que quatre rattachements fondés directement sur des circonstances de fait ou de droit inhérentes, soit à la personne du testateur, soit aux biens dont il dispose. Quant à la fixation du rattachement dans le temps, deux moments sont, selon la nature des choses, importants en la matière: celui de la rédaction de la disposition, et le moment auquel, par le décès du testateur, elle devient irrevocable et déploie ses effets.

A côté [des rattachements directs], on en trouve que nous appellerons [indirects], parce qu'en règle générale [ils] peuvent se ramener aux [premiers]. [Ils] ne déterminent pas, comme les [rattachements directs], directement la loi applicable à la forme des testaments, mais font dépendre celle-ci de la solution de conflits donnée sur d'autres points, tels que la détermination de la loi successorale ou du for. Or la loi applicable à ces questions est le plus souvent déterminée en fonction d'une des circonstances de rattachement directes, si bien que les rattachements indirects ne désignent qu'exceptionnellement une loi qui n'est pas déjà visée par un des rattachements directs.⁴⁸

The direct connecting factors to be considered are the place of making the

⁴⁷ R. H. Graveson, *The Ninth Hague Conference of Private International Law* (1961), 10 Int. & Comp. L. Q. 18 at 22; Y. Loussouarn, *La IX^e Session de la Conférence de la Haye de Droit International Privé* (1961), 88 Journal du Droit International 654 at 668 (English translation 655 at 669).

Trans.: *The Convention would prevent the formal validity of a will being affected by changes in the nationality or domicile of the testator.*

The essential objective is the assurance of testators that their wills will be formally valid in the signatory countries if they are within the extremely liberal rules of the first article of the Convention.

⁴⁸ A. E. von Overbeck, *supra*, note 5, at 8, 12.

Trans.: *There are only four connecting factors in this area of the law which are based directly on facts relating to the testator himself or his property. The relevant times to be considered are the time of execution and the time of death.*

In addition to the direct connecting factors, there are factors which we shall call indirect because, unlike the direct connecting factors, they do not lead directly to the law applicable to the form of wills but rather lead, in the first instance, only to one of the direct connecting factors. Only exceptionally will the indirect connecting factors lead in the result to a law not foreseen by one of the direct connecting factors.

will, the nationality of the testator, the domicile of the testator, the habitual residence of the testator and the *situs* of the property bequeathed or devised under the will, which, if adopted, lead to the competence of the following laws respectively: the *lex loci actus*, the law of nationality (*lex patriae*), the law of the domicile (*lex domicilii*), the law of the place of habitual residence and the *lex rei sitae*. In this paper, the connecting factors of domicile and habitual residence will be considered together since that is how the majority of the literature to be considered deals with them⁴⁹ and since the factual and theoretical considerations relating to each other are basically the same.⁵⁰

The indirect connecting factors to be considered are the *lex causae*, the *lex fori*, the *lex magistratus* and the law of choice, i.e., the law designated by the testator. The indirect connecting factors, being themselves bodies of law rather than facts, do not lead directly to a law which yields up the rule to be applied in the particular case but rather to another connecting factor, which is almost invariably one of the direct connecting factors, that connecting factor in turn indicating the competent law which yields up the rule to be applied.⁵¹

G. LAWS INDICATED BY THE DIRECT CONNECTING FACTORS

1. *Lex loci actus*

The Special Commission appointed at the 8th Session of the Hague Conference presented a draft Convention dated May 15th, 1959, to the delegates at the beginning of the 9th Session. The *lex loci actus* ("la loi . . . du lieu où le testateur a disposé"⁵²) was included in that draft. As the Commission said in its report accompanying the draft:

La compétence de cette loi est prévue par la majorité des systèmes existants. Elle répond à l'idée que les prescriptions de forme doivent être connues et respectées au moment même où un acte est rédigé et que la loi du lieu où l'auteur se trouve est celle dont il connaîtra le plus facilement les prescriptions.⁵³

⁴⁹ This is because of the virtual identity, except for certain formal requirements associated with domicile, between domicile and habitual residence in most continental legal systems.

⁵⁰ Even in legal systems, such as the common law, which do not equate domicile and habitual residence, the two are very similar and in practice very difficult to distinguish. This is because the considerations relating to each are basically the same, the only difference probably being in the degree of *animus* required.

⁵¹ Regarding the application and interpretation of different connecting factors in general and of provisions in international conventions, see A. Makarov, *Réflexions sur l'interprétation des circonstances de rattachement dans les règles de conflit faisant partie d'une Convention internationale*, in I Faculté de Droit de Toulouse, *Mélanges offerts à Jacques Maury* (Paris: Librairie Dalloz & Sirey, 1960) 207 *passim*.

⁵² Recueil des Conventions de la Haye, 1961 at 48.

Trans.: *the law of the place in which the testator made the disposition.*

⁵³ Actes, III at 19.

Trans.: *The competence of this law is recognized by the majority of existing legal systems. The formalities necessary in executing a will must be known and followed at the time of execution. The formalities of the law of the place where the testator is at that time are those with which he can most easily familiarize himself.*

The Austrian delegate on the Commission had suggested that the draft contain some definition of "*lex loci actus*" but the majority of the delegates on the Commission felt that this would be too complex and that the law in effect in a particular place had to be determined in accordance with the law of that place. The connecting factor of "[le] lieu où le testateur a disposé"⁵⁴ remained unchanged throughout the proceedings of the Session and appears in Article 1(a) of the Convention.⁵⁵

The acceptance of the *lex loci actus* as a competent law in determining the formal validity of a will is merely an application of the rule *locus regit actum* and presents no special problems:

La détermination de la loi locale ne posera en général guère de problèmes juridiques. Dans les Etats composés à droit non unifié la loi locale sera celle en vigueur au lieu où le testament a été fait. Des difficultés pourront surgir là où sur un même territoire coexistent des lois différentes régissant les divers groupes de population.⁵⁶

Although there is no theoretical justification for the competence of the *lex loci actus* in terms of "reasonable connection with the testator" as discussed, the practical necessity of being able to make use of the forms recognized by the local law and the fact that such law is recognized in many legal systems militate against the theoretical problem and in favour of the acceptance of this factor:

Most authors do not attempt to justify the rule *locus regit actum* upon principle, but base it upon mere tradition or upon grounds of utility.⁵⁷

This justifiable rationalization for the acceptance of the *lex loci actus* is what was referred to above as "constructive reasonable connection."

2. Law of nationality (*lex patriae*)

The law of the state of which the testator is a national is obviously a law with which the testator has a "reasonable connection" and which therefore should, unless there are serious problems involved in its recognition as one of the competent laws, be one of the available laws to which a will may conform. In the words of the Special Commission:

. . . Cette loi est prévue, comme celle du lieu où le testament a été rédigé, par un grand nombre de systèmes contemporains, parfois même dans des pays qui

⁵⁴ Trans.: *the place in which the testator made the disposition.*

⁵⁵ Actes, III at 19, 161; G. A. L. Droz, *supra*, note 28 at 5.

⁵⁶ A. E. von Overbeck, *supra*, note 5 at 8-9.

Trans.: *The determination of the local law will in general pose no problems. In states in which there are non-unified laws, the local law will be that which was in effect in the place where the will was made. Difficulties may arise in cases in which different laws governing different groups of people co-exist in one jurisdiction.*

The references to systems of law consisting "des lois différentes régissant les divers groupes de population" (Trans.: *different laws governing different groups of people*) is to systems of law in the Moslem world and parts of Asia in which religious law prevails and the law applicable to any particular person is determined by his religion. *Lord Kingsdown's Act* effected such a distinction, based though on citizenship rather than religious belief.

⁵⁷ E. G. Lorenzen, *supra*, note 5 at 455.

rattachent le statut personnel au domicile et non à la nationalité, [. . . l'idée est que] le testateur peut connaître les dispositions de sa loi nationale sur les formes des testaments et ignorer celles de la loi locale; il importe de lui permettre d'exprimer valablement ses dernières volontés sans avoir recours à une consultation.⁵⁸

With respect to the use of the nationality of the testator as a connecting factor, three main issues must be considered. First, if the testator is a multi-national, should each of his nationalities be recognized? Secondly, should nationality *tempore testamenti* or *tempore mortis* or at either time be recognized? Thirdly, how is "the law of nationality" to be defined if the testator was a national of a non-unitary state?⁵⁹

The draft Convention of May 15, 1959, suggested that a will should be formally valid if it conformed with the law "d'une nationalité possédée par le testateur, soit au moment où il a disposé, soit au moment de son décès."⁶⁰

With respect to the problem of multi-nationals, the use of "une" instead of "la" would allow a testator with several nationalities to make a formally valid will if it conformed with any one of his laws of nationality. The Commission had considered giving competence to "la loi de la nationalité effective."⁶¹ However, because of the uncertainties that this would create and because of the underlying principle of *favor testamenti* (albeit that the Commission did not specifically refer to this principle with respect to this matter), the above version was chosen. This option available to multi-nationals was adopted in the Convention.⁶²

Should nationality *tempore testamenti*, nationality *tempore mortis* or both be recognized as connecting factors? This problem is similar to the problem of multi-nationals in that it involves the possibility of more than one law of nationality being competent with respect to the formal validity of a will. However, it is different in that in the former problem it was possible that there be more than one law of nationality at one point in time whereas here we have two relevant points in time. Recognizing both, as did the Commission's draft, serves *favor testamenti*. However, in addition to the general theoretical problem referred to above,⁶³ where consideration was given to the possibility of a will made in compliance with a law with which the testator had no reasonable connection at the time of the making of the will but later validated by a change in the connecting factor, there is a problem which can work the other way. A testator may make a will, intending that it comply with the formal requirements of his law of nationality and later discover it

⁵⁸ Actes, III at 20, 161-62.

Trans.: *This law is recognized by a large number of legal systems. A testator may be familiar with the formalities requirements of his national law but not with those of the local law. In such a case, he should be able to execute a formally valid will without having to seek legal advice.*

⁵⁹ A. E. von Overbeck, *supra*, note 5 at 9, 56-57.

⁶⁰ Trans.: *of a nationality possessed by the testator, either at the time he made the disposition or at the time of his death.*

⁶¹ Trans.: *the law of real nationality.*

⁶² Actes, III at 21, 162; for a general comment, see G. A. L. Droz, *supra*, note 28 at 6.

⁶³ See text, *supra*, following note 31.

is formally invalid and therefore ineffective. Subsequently he may change his mind and decide that his estate devolve according to the rules of intestate succession anyway and therefore be content with the fact that his will is invalid. If the testator subsequently changes his nationality and the newly acquired law of nationality recognizes his will as formally valid, the result of course is that the testator's intention will be frustrated. However, despite this problem, both times were retained and appear in the final Convention as adopted. The principal reason was the desire to serve *favor testamenti*, which is in accord with the desire indicated by the Conference to reconcile and recognize as many of the existing systems of law as possible. Many countries' substantive legal systems recognize the time of execution, others the time of death, and still others, both. Further, the problem raised above can be met by the observation that a will is a revocable act and that a testator is presumed to know the law affecting him. Thus, the fact that he does not revoke the will is taken as an implicit expression of his desire to maintain the will which he knows conforms to the new law of nationality.⁶⁴ While this line of reasoning is rather difficult to accept if one disagrees with "presumed knowledge of the law" arguments, the adoption of both relevant times is the correct approach in view of the fact that these times are *de facto* and *de jure* widely recognized.

Finally, how should "law of nationality" be defined if the testator is a national of a non-unitary state? The draft Convention submitted by the Special Commission made no attempt to define "law of nationality."⁶⁵ The British delegation to the 9th Session maintained that the "law of nationality" for non-unitary states should be specifically dealt with in the Convention and suggested that "law of nationality" be defined as "the law with which the testator has the most real connection." In situations in which it is impossible to determine with which state the testator had the most real connection, then one or more states with which the testator had a connection should be recognized.⁶⁶ Following considerable hesitation and reluctance on this point by several of the other delegations,⁶⁷ the matter was referred to the Drafting Committee, which added the following paragraph to Article 1 in the draft of October 17, 1960:

Aux fins de la présente Convention, si la loi nationale consiste en un système non unifié, la loi applicable est déterminée par les règles en vigueur dans ce système et, à défaut de telles règles, par le lien le plus effectif qu'avait le testateur avec l'une des législations composant ce système.⁶⁸

The delegates and observers from federal countries such as the United Kingdom, the United States and Spain indicated satisfaction with this draft.

⁶⁴ Actes, III at 21, 72-73, 162-63; H. Batiffol, *supra*, note 28 at 466.

⁶⁵ Actes, III at 20.

⁶⁶ Actes, III at 45.

⁶⁷ Actes, III at 65-68.

⁶⁸ Actes, III at 111.

Trans.: *For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connection which the testator had with any one of the various laws within that system.*

Delegates from some of the unitary European countries continued to indicate their doubt as to the need for such a definition. The Yugoslavian delegate initially suggested that some more precise meaning be given to "le lien le plus effectif"⁶⁹ but did not insist on such an addition when it was suggested that the concrete factors,⁷⁰ which could be used in determining "le lien le plus effectif" would be set out in the explanatory report accompanying the Convention.⁷¹ The following are appropriate evaluations of the formula adopted:

. . . In this choice of law rule it is interesting to see how the formal reference to the domicile of origin has been abandoned in favour of the idea of the objective proper law, or the law with which a person has the most real connection for a particular purpose; . . . it is thought that the formula in the Hague Convention . . . offers a good solution consistent with modern thinking along the lines of a general concept of proper law.

The matter [of defining "law of nationality" for nationals of non-unitary states] is squarely dealt with in the wills convention. . . . This formula is undoubtedly vague and general, but it is believed to be as good as any that could be devised in the light of present knowledge.⁷²

This definition of "law of nationality," which may be considered experimental, has subsequently been employed in the draft Hague Convention on Adoption.⁷³

3. *Law of domicile (lex domicilii)*

4. *Law of habitual residence*

As mentioned above,⁷⁴ the connecting factors of domicile and habitual residence will be considered together. The draft of the Special Commission of May 15, 1959, provided that a will would be formally valid if it complied with the law "d'un lieu dans lequel le testateur avait son domicile, soit au moment où il a disposé, soit au moment de son décès, la question de savoir si le testateur avait un domicile dans un lieu déterminé étant régie par la loi de ce même lieu" or with the law "du lieu dans lequel le testateur avait sa résidence habituelle, soit au moment où il a disposé, soit au moment de son décès."⁷⁵

⁶⁹ Trans.: *the most real connection*.

⁷⁰ These factors include the maintenance of a house, family relations and property or business interests.

⁷¹ Actes, III at 116-18.

⁷² R. H. Graveson, *supra*, note 47 at 23; W. L. M. Reese, *The Ninth Session of The Hague Conference on Private International Law* (1961), 55 Am. J. of Int. L. 447 at 452.

⁷³ Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session, Tome II, Adoption* (La Haye: Imprimerie Nationale, 1965) at 105 (English translation at 109). For a good general summary of the Conference proceedings on the law of nationality, see Actes, III at 162. For general comments on this matter, see H. Batiffol, *supra*, note 28 at 466; G.A.L. Droz, *supra*, note 28 at 8.

⁷⁴ See text, *supra*, accompanying footnote 49.

⁷⁵ Actes, III at 16.

Trans.: *of a place in which the testator had his domicile either at the time when he made the disposition or at the time of his death, the determination of whether or not the testator had a domicile in a particular place being governed by the law of that place; of the place in which the testator had his habitual residence, either at the time when he made the disposition or at the time of his death.*

Both domicile and habitual residence are reasonable connecting factors if one applies the objective test of "reasonable connection." The Commission specifically referred to both domicile and habitual residence since either or both are recognized by many countries and, further, since the definitions of "domicile" and "habitual residence" vary greatly among countries; thus, rather than accepting one or the other, in the interests of *favor testamenti*, both were included.⁷⁶ Two problems must be considered with respect to the use of domicile and habitual residence as connecting factors: how should "domicile" and "habitual residence" be defined and should the relevant time for the determination of these factors be the time of execution or the time of death or both?

The latter problem involves the same considerations as were discussed above with respect to nationality⁷⁷ and no further analysis is required here. Suffice it to say that, as in the case of nationality, the Convention as finally adopted refers to both the time of execution and the time of death.

Neither the Commission's original draft nor the Convention as finally adopted contains a definition of "habitual residence." Although the Conference recognized that the use of "habitual" implied some element of intention, it concluded that the determination of "habitual residence" was essentially a question of fact and was appropriately left unspecified.⁷⁸

The problem of determining how, if at all, "domicile" should be specified was more difficult. The Commission in its original draft proposed that "domicile" be defined by the law of the place where the beneficiary of a will contends that the testator was domiciled.⁷⁹ This was suggested on the ground that determining the domicile of the testator by the *lex fori* might result in the application of a definition of "domicile" different from that contained in the law which the testator considered as his *lex domicilii* and upon which he relied in making his will. Further, the Commission felt that any precise definition of "domicile," i.e., a definition other than one referring to a system of law which would in turn yield up a precise definition, was probably impossible in view of the wide divergence among definitions of "domicile" employed by the various member countries.⁸⁰ The United Kingdom delegation submitted that the problem relating to the testator's reliance on his assumed *lex domicilii* was not a serious one since the law of the testator's habitual residence was also to be recognized as a competent law. Also, in view of common law probate procedure, it would be necessary in each case to prove the content of a foreign law before a will could be admitted to probate, which would be highly inconvenient. The United Kingdom delegation therefore wanted "domicile" determined by the *lex fori*. The delegates from non-

⁷⁶ Actes, III at 22, 163-64.

⁷⁷ See text, *supra*, following note 62.

⁷⁸ Actes, III at 22, 163-64.

⁷⁹ Actes, III at 22. ". . . la question des voir si le testateur avait un domicile dans un lieu déterminé étant régie par le loi de ce même lieu . . ."

Trans.: *the determination of whether or not the testator had a domicile in a particular place being governed by the law of that place.*

⁸⁰ Actes, III at 22.

common law countries clearly had difficulty understanding the United Kingdom's submission with respect to the practical, as distinct from theoretical, problems involved in determining "domicile" as proposed by the Commission,⁸¹ and the United Kingdom's suggestion that "domicile" be determined by the *lex fori* was rejected.⁸² However, the United Kingdom did succeed in having a reservation clause included in the draft of October 19, 1960, which states:

Article 9

Chaque Etat, en signant ou ratifiant la présente Convention, ou en y adhérant, peut se réserver, par dérogation à l'article premier, . . . le droit de déterminer selon la loi du for le lieu dans lequel le testateur avait son domicile.⁸³

In summary, both domicile and habitual residence were included as connecting factors in the Convention as finally adopted, either factor being determinable at the time of the making of the will or at the time of death. While "habitual residence" was considered to be essentially a question of fact and was, therefore, not defined, the Special Commission's original proposal with respect to the determination of "domicile" was essentially adopted, i.e., "domicile" was to be determined by the law of the place where it was alleged that the testator was domiciled, but a reservation was included to the effect that signatory countries could instead determine "domicile" by the *lex fori*.⁸⁴ This was the best result possible.

It is difficult to interpret the clause in the Convention respecting domicile. That clause recognizes as competent the law "d'un lieu dans lequel le testateur avait son domicile."⁸⁵ While a clause which provided for the recognition as competent the law "d'un lieu dans lequel le testateur avait un domicile"⁸⁶ would clearly recognize the possible competence of more than one law of domicile, as was the case with respect to the laws of nationality of multi-nationals, and a clause which provided for the recognition as competent the law "du lieu dans lequel le testateur avait son domicile"⁸⁷ would clearly recognize the competence of only one law of domicile, the clause as actually adopted seems to be some kind of middle ground. The English version of the Convention, which is in any event not an authoritative version in the case of this Convention, presents the same problem by referring to the

⁸¹ Actes, III at 68-70.

⁸² Actes, III at 70.

⁸³ Actes, III at 132.

Trans.: *Each state, in signing or ratifying the present Convention, or in adhering hereto, may reserve, in derogation of Article 1, . . . the right to determine in accordance with the lex fori the place where the testator had his domicile.*

For the proceedings concerning the adoption of this reservation, see Actes, III at 135-36.

⁸⁴ Actes, III at 163-64; G. A. L. Droz, *supra*, note 28 at 8; Y. Loussouarn, *supra*, note 47 at 672 (English translation at 673); for miscellaneous references to these problems, see the following: H. Batiffol, *supra*, note 28 at 466-67; A. E. von Overbeck, *supra*, note 5 at 10, 58-63; G. A. Droz, *supra*, note 28 at 6-7.

⁸⁵ Trans.: *of a place in which the testator had his domicile.*

⁸⁶ Trans.: *of a place in which the testator had a domicile.*

⁸⁷ Trans.: *of the place in which the testator had his domicile.*

competence of the law "of a place in which the testator had *his* domicile." It is probably the case that if a testator had more than one domicile at either of the relevant times for the determination thereof, then any of those domiciles are available as connecting factors. This conclusion is supported by the fact that many legal systems recognize the possibility of a person being domiciled in more than one state at a given point in time, by analogy to the clear recognition of the possible competence of more than one law of nationality in the case of multi-nationals and, as always, by referring to the primary objective of *favor testamenti*.

5. *Lex rei sitae (lex loci rei sitae, lex situs)*⁸⁸

The validity of the connecting factor of *situs* in general must first be considered: does the *situs* of the property transferred under a testator's will meet the objective test of having a reasonable connection with the testator or, stated in terms of the law to which the *situs* connecting fact obviously leads, does the *lex rei sitae* meet the objective requirement of being reasonably connected with the testator? It is reasonable to conclude that it does: surely a testator is "reasonably connected" with his property in general and, *a fortiori*, is connected therewith in relation to the making of wills. However, this conclusion raises a number of theoretical and practical problems.

First, there is the usual time-related problem of a change in connecting factor: if the *situs* of the property changes after the making of the will, should the *situs tempore testamenti* or the *situs tempore mortis* or both be recognized as available connecting factors? The same considerations as were discussed above in the context of a change in the connecting factor of nationality apply here.⁸⁹ This problem is not extensively discussed in the literature.⁹⁰ This is probably due to the fact that most commentators on this matter focus on the scission problem raised in connection with the *lex rei sitae*, that the matter is more appropriately discussed in connection with the connecting factors of nationality and domicile and that the *lex rei sitae* as a competent law is invariably confined to the context of immovables, in which *situs* obviously does not change with time.⁹¹ It is reasonable, in order to serve *favor testamenti*, and, since both the time of execution and the time of death have been accepted as relevant times for the determination of nationality, domicile and habitual residence, in the interests of consistency, to conclude that both times should be considered relevant for the determination of *situs*. Changes in *situs* with time will not be considered further.

⁸⁸ As an introductory *caveat*, the reader should be warned at the outset that *situs* is the most difficult of the connecting factors with which to deal. While the four connecting factors already dealt with are fairly clearly acceptable as such in view of the general principles discussed and similarly while the indirect connecting factors to be considered below are equally clearly unacceptable, the principles and problems involved in a consideration of *situs* and the *lex rei sitae* tend to be more difficult to resolve. Further, the topics dealt with in this section of the paper, namely an evaluation of the *lex rei sitae* as a competent law, a consideration of the "scission problem" and an outline of the proceedings leading up to the relevant provisions of the Hague Convention, are very closely inter-related and total separation of treatment has been impossible.

⁸⁹ See text, *supra*, following note 62.

⁹⁰ For an exception, see A .E. von Overbeck, *supra*, note 5 at 12.

⁹¹ Ignoring changes in *situs* due to territorial changes effected by wars, etc.

Secondly, what if property of only a small value is located within a given jurisdiction? Should the *situs* of that property be acceptable as a connecting factor?

Thirdly, should the type of property located within a given jurisdiction matter? This last question raises the issue of whether some system of scission, i.e., a system of law in which different rules exist with respect to different subsets of property, should exist in relation to the rules governing the formal validity of wills. While the policy analysis underlying the consideration of scission usually revolves around the interest of the state having control over land, the second question raised above is directly related to the consideration of the scission problem since one of the main considerations with respect to scission will be the ability of the testator to go "law shopping" by placing property, or acquiring property, in a jurisdiction whose law regarding the formal requirements of wills meets the testator's satisfaction. Von Overbeck succinctly previews the problems regarding the use of *situs* as a connecting factor as follows:

[La situation de la chose dont il est disposé comme un rattachement] a pour les immeubles l'avantage de sa grande certitude et de sa stabilité, toutefois la qualification d'un bien comme immobilier ou non peut parfois présenter des difficultés. En matière mobilière, au contraire, la compétence de la *lex rei sitae* semble de nature a soulever des difficultés de droit et de fait considérables⁹²

In the Special Commission's draft of May 15, 1959, the *lex rei sitae* was not included in the list of competent laws. The reasoning of the Special Commission in omitting the *lex rei sitae* ran somewhat as follows. While the acceptance of the *lex rei sitae* by many countries, at least with respect to immovables, suggested its inclusion as a competent law in the Convention, if the *lex rei sitae* were available as a competent law, then either that law would apply only to wills of property within the territory of the state of that *lex rei sitae* or to wills of all the property of the testator, wherever situate. Either result led to difficulties. If the latter were the case, it would be possible for a testator to acquire a minimal amount of property in a jurisdiction which had only rudimentary requirements of form and then make a formally valid will in compliance with that law. While *favor testamenti* was the guiding principle in choosing the connecting factors available and, therefore, the competent laws, that principle had to be tempered by an objective constraint which has been referred to as a "reasonable connection" between the testator and a given law. Clearly that constraint would not be met here. If the former were the case, then the testator would have to make several wills, assuming, of course, that his will was not entirely valid with respect to form because of its conformity to one of the other competent laws. Thus, the Commission rejected, neatly, logically and without any reference to scission, the *lex rei sitae* as a competent law.⁹³

However, the British delegation felt that it is reasonable for a testator to think that the *lex rei sitae* is a competent law in the case of immovables. The Commission's comment that the *lex rei sitae* would always be available in any particular legal system because of Article 3 of the draft Convention,

⁹² A. E. von Overbeck, *supra*, note 5 at 12.

⁹³ Actes, III at 23, 164; H. Batiffol, *supra*, note 28 at 467.

which provided that "La présente Convention ne porte pas atteinte aux règles actuelles ou futures des Etats contractants reconnaissant des dispositions testamentaires faites en la forme d'une loi non prévue à l'article premier,"⁹⁴ did not dissuade the British.

Therefore, the British delegation suggested that the *lex rei sitae* be added to the list of competent laws, at least with respect to wills of immovables.⁹⁵ The proposed change was an important one: whereas Article 3 merely permitted countries to apply laws other than those enumerated in Articles 1 within their own jurisdiction, including the *lex rei sitae* in Article 1 would mean that that law would have to be recognized as competent everywhere. In addition to the reasons given by the Commission for not including the *lex rei sitae* in the enumerated list of competent laws,⁹⁶ it was recognized that adoption of the *lex rei sitae* leads to a system of scission, unless the *lex rei sitae* is made applicable to wills of all kinds of property and not merely to wills of immovables. This would derogate from the objective of uniformity of decisions in its aspect of having one rule or set of rules governing the formal validity of a will regardless of whether that will deals with movables, immovables or both. The Yugoslavian delegation seemed to suggest that there was no need to distinguish between employing either the *situs* of an immovable or the *situs* of a movable as a connecting factor leading to a *lex rei sitae*. This was quickly rejected by the French delegation, probably on the basis, although not explicitly stated, of the problems inherent in such a conclusion and in the resulting use of the *lex rei sitae* of a movable as indicated by von Overbeck.⁹⁷ The United Kingdom delegation recognized that scission had inherent problems, but felt that the widespread recognition of the *lex rei sitae* with respect to wills of immovables and the principle of *favor testamenti* were sufficiently in support of the *lex rei sitae* to warrant its inclusion in the list of competent laws. With respect to the latter viewpoint, the French delegation concurred, noting that, wherever possible, the principle of *favor testamenti* should take precedence over the principle of uniformity of decisions in any conflict between these two principles.⁹⁸ The matter was then referred to the Drafting Committee, which, in its draft of October 17, 1960, included a new clause in Article 1 recognizing the competence of the law "pour les immeubles, du lieu de leur situation."⁹⁹ In considering this addition, the Greek delegation pointed out that it would change nothing since whenever a country in which immovables are situate recognizes the validity of a will with respect to immovables, in particular, with respect to the immovables situated within its territory, the unity of form sought as an objective is compromised since the *lex rei sitae* is in effect then being applied

⁹⁴ Trans.: *The present Convention shall not affect any existing or future rules of law in signatory countries which recognize testamentary dispositions made in compliance with the formal requirements of a law other than a law referred to in Article 1.*

⁹⁵ *Id.* at 36.

⁹⁶ See text, *supra*, following note 92.

⁹⁷ See text, *supra*, following note 92.

⁹⁸ Actes, III at 70-72.

⁹⁹ *Id.* at 111.

to those immovables even though other countries would not recognize the validity of that will. This comment seemed to sway the other delegates who had previously shown hesitation concerning the acceptance of the *lex rei sitae* and the added clause was adopted.¹⁰⁰ This clause appears unchanged in the Convention as finally adopted. In summary, the explanatory report accompanying the Convention said:

L'article premier admet enfin la compétence de la loi de la situation des immeubles dont le testateur dispose. . . .

Il résulte clairement du texte que le testament rédigé selon les formes de cette loi ne vaut que pour les immeubles soumis à ladite loi. La Commission de la Neuvième session a estimé que cette addition, si elle déroge au souci second du projet, la possibilité de disposer de tout le patrimoine dans un seul acte, reste conforme à son objet premier, la faveur au testament. Compte tenu de ce que la détermination de la loi immobilière ne prête pratiquement à aucune équivoque et compte tenu aussi du lien étroit qui unit dans beaucoup de pays le droit immobilier et la forme des actes, il a paru que la règle adoptée pouvait faciliter l'application, donc la ratification de la convention.¹⁰¹

Von Overbeck evaluated the Convention's treatment of the possibility of recognizing the *lex rei sitae* as a competent law as follows:

Selon le système admis dans la convention, le testateur aura, si son immeuble est situé dans un Etat partie à la convention, intérêt à se conformer à l'une des [autres] lois prévues [à l'article premier] qui lui permettent de faire un testament valable pour tous ses biens. Il choisira la *lex rei sitae* si elle est la seule reconnue en matière de forme dans l'Etat non contractant où est situé son immeuble, mais il devra alors faire un testament distinct pour s'assurer de la reconnaissance des dispositions sur ses autres biens. Si [la *lex rei sitae*] n'avait pas été introduit, le testateur aurait pu atteindre le même résultat, mais en faisant un testament (selon la *lex rei sitae*) uniquement destiné à valoir dans le pays de situation de l'immeuble, et un second testament (selon l'une des [autres] lois prévues [à l'article premier]) pour assurer la validité de ses dispositions, tant mobilières qu'immobilières, dans les Etats contractants.

Le testateur qui, à côté d'autres biens, possède un immeuble dans un Etat non contractant ne reconnaissant que la forme de la *lex rei sitae* doit donc de toute façon faire deux testaments. Mais la nouvelle règle sera utile dans d'autres situations, et notamment pour assurer partout la validité d'une disposition immobilière faite selon la *lex rei sitae* par un testateur qui ne s'est pas posé la question de la reconnaissance de son testament en dehors du pays de situation de l'immeuble.¹⁰²

¹⁰⁰ *Id.* at 115-16.

¹⁰¹ *Id.* at 164.

Trans.: *If the recognition of the lex rei sitae as a competent law detracts from the objective of uniformity of decisions, such recognition nevertheless serves the primary objective of favor testamenti. This law was recognized as competent largely to facilitate adoption and ratification of the Convention.*

¹⁰² A. E. von Overbeck, *supra*, note 5 at 64-65.

Trans.: *Under the rules of the Convention, a testator with movable property situated in a signatory country should make a will which conforms with one of the laws recognized by the Convention other than the lex rei sitae: these other laws permit him to make a will which is valid for his entire estate. He will choose the lex rei sitae if it is the only law recognized by a non-signatory country in which he has immovable property; in such a case, though, he will have to make a separate will in order to ensure that his dispositions of his other property are recognized.*

Since the connecting factor of *situs* is such a troublesome one, the scission problem involved therein is of such importance in the Canadian context, and the Conference's treatment of the matter is not unquestionable (which was on the other hand the case, at least in general terms, in its dealing with the other connecting factors), what other "solutions" are possible in dealing with *situs* and the *lex rei sitae*? Von Overbeck referred to a number of possible solutions.¹⁰³

First, the *lex rei sitae* could be entirely ignored in an international convention dealing with the conflicts rules governing the formal validity of wills; von Overbeck feels this is impossible in view of the importance of this law in many legal systems. His conclusion is correct not only on the basis of this point but also, as suggested by the British delegation, on the basis of the reasonableness of a testator thinking that, at least with respect to immovables, a will can be made in compliance with the formal requirements of the *lex rei sitae*.

Secondly, the *lex causae* could be recognized as an available connecting factor; this would render unnecessary inclusion of the *lex rei sitae* as a competent law since in cases in which the *lex rei sitae* governs the formal validity of wills, usually of wills of immovables, it is almost always also the *lex causae*. However, for reasons to be discussed below¹⁰⁴ the *lex causae* is unsatisfactory as a connecting factor.

Thirdly, as initially suggested by the Special Commission, the *lex rei sitae* could be left out of a list of competent laws to be recognized by all the states subscribing to an international Convention, with an accompanying proviso to the effect that any state may recognize the *lex rei sitae* if it so chooses. This solution is unacceptable since it does not achieve the objective of uniformity of decisions.

Fourthly, as adopted in the Hague Convention, the *lex rei sitae* of an immovable could be accepted as a competent law but only with respect to wills of immovables located within the territory of the state of that *lex rei sitae*. This solution has been discussed above.¹⁰⁵ The main difficulty here is that scission remains.

Fifthly, a solution advocated by von Overbeck and styled by him as "une solution *optimum*" or "une solution *maxima*," the *lex rei sitae* of an immovable could be accepted as a competent law in respect of the entire estate of the testator. With respect to this solution, von Overbeck states:

Nous aurions personnellement préféré que la Conférence fasse un pas de plus et retienne une solution *optimum* dans le sens de la *favor testamenti* . . . Cette solution consisterait à prévoir [le rattachement de la situation d'un immeuble dont il est disposé] dans un sens plus large, selon lequel un testament englobant tous les biens du *de cuius* peut être fait dans la forme de la loi désignée par un des immeubles compris dans la succession. Le risque d'abus qui a été invoqué à l'encontre de cette solution ne nous paraît pas grave, et en tout cas moindre que

¹⁰³ *Id.* at 63-65.

¹⁰⁴ See text, *infra*, following note 115.

¹⁰⁵ See text, *infra*, following note 110.

pour la *lex loci actus*. Si quelqu'un veut créer un rattachement, afin d'avoir à sa disposition une forme commode (ce qui ne semble guère devoir se produire fréquemment) il n'achètera certainement pas un immeuble à cet effet! Il se rendra plus facilement dans un autre pays pour profiter d'une loi locale libérale. La certitude du rattachement à la loi de la situation, et le fait qu'un immeuble constitue en général une partie importante d'une succession, sont des arguments pour la solution large.¹⁰⁶

This solution has the advantage of avoiding the scission problem, in that the formal validity of the will with respect to the entire estate of the testator would be governed by the same law. The fact that some dichotomy of property would still be necessary in order to determine what is a movable and what an immovable in order to first select the *lex rei sitae* of an immovable is not a "scission problem" in the sense in which that phrase is used here since the entire estate would be governed by the same rule or set of rules. The classification of property into movables and immovables would only be relevant in a preliminary determination of what those rules were.

There is a sixth solution which is not mentioned by von Overbeck, because it is so untenable, but which is logically the final step in the progression of possible solutions to the treatment of *lex rei sitae* being considered. The *lex rei sitae* of any property in the estate of the testator could be accepted as a competent law with respect to the entire estate of the testator. However, this solution is totally unacceptable since a testator could easily go "law shopping" for a law which required minimal formal requirements in the making of a will by merely ensuring that he had property, although only a small amount of movable property of minimal value, situated within the territorial jurisdiction of that law. Such a law could obviously be one with which the testator had no reasonable connection whatsoever.¹⁰⁷ In summary, then, the *situs* of any property should not be available as a connecting factor since the *lex rei sitae* of any property may be a law with which the testator had no reasonable connection.

Thus, the only solutions at all worthy of serious consideration are the third, fourth and fifth solutions, with the third solution being the least ac-

¹⁰⁶ A. E. von Overbeck, *supra*, note 5 at 65.

Trans.: *It would have been preferred if the Conference had gone one step farther and had recognized as competent for the entire estate of the testator the lex rei sitae of any one of the immovables contained in the estate. The risk of abuse of such a rule does not seem serious; a testator is unlikely to obtain immovable property in a jurisdiction merely to make the law of that jurisdiction available. Such a risk is in any event less than that associated with the lex loci actus: a testator can easily go to another jurisdiction to take advantage of a liberal local law.*

¹⁰⁷ As von Overbeck indicated (see text, *supra*, following note 106, and *id.*) "law shopping" is clearly available if the *lex loci actus* is recognized as a competent law, which it should be. However, the *lex loci actus* is widely recognized as a competent law and, therefore, on practical grounds rather than on theoretical grounds, it should be so recognized in an international Convention. This is not the case with the *lex rei sitae* of a movable; this law is certainly not widely recognized as a competent law and, *a fortiori*, is likely not so recognized under any legal system. Thus, there are no practical grounds militating against the problem of "law shopping" with respect to the *lex rei sitae* of a movable.

ceptable. The choice between the fourth and fifth solutions turns on the question of scission, that being the only effective difference between these two solutions. Therefore it is necessary to consider what the possible advantages and disadvantages of a system of scission, as opposed to a system of unity of succession, are.¹⁰⁸

As indicated before, "scission" simply refers to any system of law in which different types of property are subject to different rules with regard to a given legal question. If scission exists, the classification of property used for conflict of laws purposes is that of movables and immovables. The legal questions which may involve scission include the formal validity of a will and succession to property. It is important and necessary to distinguish between scission with respect to the rules governing succession and scission with respect to the rules governing the formal validity of wills.¹⁰⁹

The serious disadvantages of maintaining scission with respect to the form of wills were very fully discussed by Dr. Cohn in his article, *The Form of Wills of Immovables*.¹¹⁰ It is important to bear in mind that Dr. Cohn's criticisms were written in the context of the *lex rei sitae* being the exclusively competent law with respect to the formal validity of wills of immovables, which was the case at common law. This should be distinguished from the result under The Hague Convention, in which the competence of the *lex rei sitae* with respect to immovables is contained in a permissive rule and under which the *lex rei sitae* co-exists along with other available laws for the determination of the formal validity of a will. Nevertheless, Dr. Cohn's opinions are relevant to this latter situation as well. Dr. Cohn indicated the inefficiency and the injustices which arise from allowing the *lex rei sitae* to be the exclusive law available to determine the formal validity of a will of immovables. It is inefficient in that if a testator has immovable property situated in a country other than the one in which he finds himself at the time he wishes to make a will, he may have considerable difficulty locating a solicitor who is familiar with the *lex rei sitae* of that immovable property. Also, if a testator has immovable property in several countries, he will either have to make a will which complies with the formal requirements of several such *leges* or

¹⁰⁸ The problem of scission with respect to the formal validity of wills appears in three major sources in the literature: G. Bale, *supra*, note 16, particularly at 190-91; E. J. Cohn, *The Form of Wills of Immovables* (1956), 5 Int. & Comp. L. Q. 395; A. E. von Overbeck, *supra*, note 5, particularly 25-26.

¹⁰⁹ See A. E. von Overbeck, *supra*, note 5 at 26, where reference is made to the tenacity of Anglo-Canadian law in maintaining scission with respect to both succession and form: "Le système de la scission est surtout celui du droit anglo-saxon. Nous avons vu à propos de l'Angleterre, des Etats-Unis et du Canada que l'on a préféré ajouter des possibilités pour les successions mobilières que de déroger à la compétence obligatoire de la *lex rei sitae* pour les immeubles, notamment pour ceux situés dans le pays."

Trans: *The system of scission is essentially that of the common law. In England, the United States and Canada, it has been more acceptable to add to the available laws with respect to movables than to derogate from the imperative competence of the lex rei sitae for immovables, especially for those situated in such common law countries.*

¹¹⁰ E. J. Cohn, *supra*, note 108.

else make several wills. It can be unjust in that the testator's intention, clearly and solemnly expressed and perhaps done in compliance with the formal requirements of another law with which he has a reasonable connection, such as his *lex domicilii* or *lex patriae*, will have to be disregarded if the form of his will does not conform to the *lex rei sitae*, with the result that the immovables in question may pass by intestate succession or, what may be even worse, by some former will which the testator had unsuccessfully attempted to revoke. Dr. Cohn summarizes his comparison of the scission doctrine and the doctrine of unity of succession as follows:

There are a number of significant distinctions between the scission doctrine and the doctrine of unity of succession. The former is the result of a long historical development. The latter is the consequence of rational thought. The former is based on conditions of life which no longer persist. The latter takes into account that there is no longer any such fundamental distinction in the economic life of the contemporary world between movable and immovable property as forms the ideological and economic basis of the scission doctrine. The scission doctrine can be justified by one consideration only: the unwarranted assumption that only the *lex situs* can finally decide on the fate of immovable property within its jurisdiction. The doctrine of unity is justified by the need to do justice to the testator, who is often not in a position to comply with the requirements of two or more laws, and to the successors appointed by him who should not be deprived of their rights on merely formal grounds

The most equitable solution may very well be to let the scission doctrine disappear in the dustbin of legal history. Unfortunately the chances that this might happen are practically nil. The scission doctrine belongs to those ghosts which have haunted the world too long to be able to disappear overnight. . . .

It is, however, possible to consider whether the haunting cannot be confined to a narrower sphere than the one in which it takes place now.¹¹¹

Dr. Cohn particularizes this last statement and suggests that even if scission is retained in some areas of the law, for example, the law of succession, it definitely should not be retained with respect to the formal validity of wills. After submitting that the testator in making a will of immovables should be permitted to conform with other laws than the *lex rei sitae* which are more convenient and after referring to the fact that many countries have eliminated scission with respect to form, Dr. Cohn states:

It is suggested that these precedents should be followed by English law . . . consider the question whether the rule of *lex situs* should . . . be abolished in respect of the form of wills of immovable property. There are in fact two aspects of this rule: a person domiciled abroad must make a will of English immovable property in the form of English law and a person domiciled in this country must make a will of foreign immovable property in the form of the foreign law of the *situs*. It is submitted that neither of these two aspects of the rule justifies its retention. In fact, it would seem to be wholly clear that the second of these aspects is the more obnoxious one and the one that has led to greater absurdities, especially in regard to countries which themselves do not recognise the scission doctrine and do not normally require compliance with their own law of form in respect of immovable property. Why should English law insist on compliance with a rule of form of a foreign legal system in which the latter itself is in no way interested? A change is, however, no less justifiable in respect of the first aspect of the rule. . . .

It may, of course, be said that the Continental holograph will is unacceptable

¹¹¹ *Id.* at 400-01.

in this country on the ground of its informality. This would undoubtedly be a weighty consideration. But the answer to it, it is submitted, should not consist in simply retaining the rule of form of *lex situs*, but in the introduction of a fresh rule, which might be incorporated into an international convention throughout Western Europe and beyond. It is suggested that any will made anywhere before a notary public duly certified by the latter should be recognized to be valid as to form in any country.¹¹²

Although it is not entirely clear whether he was advocating the total abandonment of the *lex rei sitae* as a competent law or only the abolition of the imperativeness of the rule that the *lex rei sitae* governs the formal validity of wills of immovables, it would appear that he intended the former. Thus, Dr. Cohn's solution would involve the abolition of the *lex rei sitae* as a competent law with respect to the formal validity of wills and its replacement by other laws which meet a certain standard of formality; under this solution, scission would be totally removed from the law relating to the conflicts rules governing the formal validity of wills.

With respect to the elimination of scission, Professor Bale agreed with Dr. Cohn:

In the common law jurisdictions [of Canada], there is still rigid adherence to the rule that the formal validity of a will of immovables must comply with the law of the situs. This relic from the era of feudalism can no longer command respect. With the passage of time, the distinction between movables and immovables has become less and less meaningful. If the scission principle cannot be excoriated completely, it should at least be eliminated with respect to the formal validity of wills.¹¹³

Dr. Cohn and Professor Bale are correct in stating that scission with respect to form should be totally removed from our law; however, Dr. Cohn's suggestion that the availability of the *lex rei sitae* as a competent law be abolished is open to criticism for the reasons stated above.¹¹⁴ Dr. von Overbeck's "solution *maxima*," to the effect that the *lex rei sitae* of an immovable should be a competent law with respect to the entire estate of a testator is preferable since it would both allow the retention of the *lex rei sitae* of an immovable as a competent law and yet eliminate scission. Thus, of the "solutions" referred to above concerning *situs* and the *lex rei sitae*, the fifth, Dr. von Overbeck's, is the best.

H. LAWS INDICATED BY THE INDIRECT CONNECTING FACTORS

1. *Law indicated by the lex causae*

As an introductory comment, which will serve to recall the nature of the indirect connecting factors, the expression "law indicated by the *lex causae*"

¹¹² *Id.* at 403-04.

¹¹³ G. Bale, *supra*, note 16 at 190.

¹¹⁴ See text, *supra*, following note 103.

is really an abbreviation of "law indicated by the direct connecting factor which was indicated by the *lex causae*."

The expression "use of the *lex causae* as a connecting factor" refers here to the existence of a rule which provides that the formal validity of a will is governed by the *lex causae*, i.e. the law governing the succession,¹¹⁵ and does not refer to the mere coincidence of rules governing succession and the formal validity of wills. Since the *lex causae* in the case of each of the member countries of the Hague Conference refers to either the law of nationality, the law of domicile or, at least with respect to immovables, the *lex rei sitae*, all of which were recognized as competent, and since including the *lex causae* in the list of competent laws would only lead ultimately to one of these laws, such an inclusion would be superfluous.¹¹⁶ However, *a fortiori*, inclusion of the *lex causae* would be undesirable if it were included in the enumerated listing of competent laws instead of, rather than in addition to, the law of domicile, the law of nationality and the *lex rei sitae*, i.e., if the competent laws were listed as the *lex loci actus* and the *lex causae*. There are two problems with including it in the enumerated listing. The *lex causae* usually only leads to one competent law and the testator, at the time of the making of this will, cannot know which law this will be since he cannot anticipate changes in the connecting factors which may subsequently occur. Thus, the *lex causae* does not serve *favor testamenti* as adequately as would an enumerated listing of the laws to which the *lex causae* leads. The *lex fori* will determine the definitions of the connecting factors and whether or not *renvoi* will be employed; the existence of differences in practice among various courts clearly means that the objective of uniformity of decisions will not be met.¹¹⁷ These were essentially the considerations of the Special Commission, which in its draft did not suggest the inclusion of the *lex causae* as a competent law, and of the Conference, which did not suggest such an inclusion either. The resulting Convention therefore makes no mention of the *lex causae*.¹¹⁸

2. Law indicated by the *lex fori*

As in the case of the *lex causae*, the *lex fori* as an indirect connecting factor will ultimately lead to either the law of nationality, the law of domicile or, with respect to immovables, the *lex rei sitae*. Thus, inclusion of the *lex fori* in a list already including those laws would be superfluous. However, the *lex fori* may lead to, for example, the law of the domicile of a beneficiary, a law distinct from any of those enumerated above since there, of course, "law of nationality" refers to the law of the nationality of the testator. Thus, *favor*

¹¹⁵ There appears to be no English word corresponding to the French word "*successoral*" and therefore it is necessary to use the longer expression of "the law governing the succession."

¹¹⁶ The writer is intentionally glossing over the fact that neither the *lex causae* nor the *lex rei sitae* was initially included in the Commission's draft of the Convention.

¹¹⁷ A. E. von Overbeck, *supra*, note 5 at 12-13, 66-67.

¹¹⁸ Actes, III at 24, 165; for additional comments hereon, see: H. Batiffol, *supra*, note 28 at 467-68; G. A. L. Droz, *supra*, note 28 at 10.

testamenti would indicate that the *lex fori* should be included as an available connecting factor. However, as the example given indicates, inclusion of the *lex fori* as an available connecting factor can lead to the formal validity of a will being governed by a law with which the testator thereof had no reasonable connection, contrary to the objective constraint on the bounds of *favor testamenti*. Further, the availability of the *lex fori* as a connecting factor would encourage forum shopping.¹¹⁹ For these reasons, despite the desire of the Yugoslavian delegate that the *lex fori* be included, the Special Commission did not include it in its draft Convention.¹²⁰ The Yugoslavian delegate persisted at the Conference proceedings in his contention that the *lex fori* be included as a connecting factor, but his resolution to this effect was defeated¹²¹ and the Convention, therefore, does not include the *lex fori* as such.¹²²

3. *Law indicated by the lex magistratus*

"*Lex magistratus*" is a general term used to refer to a law which can serve as an indirect connecting factor and which can arise in a wide range of situations. In any given situation, the *lex magistratus* is that law under which a particular class of persons is conferred with the competence and authority to process the making of wills by some other class of persons. Examples of such *leges* include those special laws regulating the making of "consular wills" or the making of wills while on board ships or aircraft. As with the other indirect connecting factors, the *lex magistratus* would indicate a direct connecting factor which would in turn indicate a competent law which would yield up the rule to be applied. The wide variety of special legislation and problems comprised in the consideration of the *lex magistratus* suggests that no attempt should be made to specifically deal with it in an international Convention. Further, except for very rare cases, the *lex magistratus* would not in the result validate any will which would not otherwise be validated by the *lex loci actus*, the law of nationality, the law of domicile or, with respect to immovables, the *lex rei sitae*; in other words, failure to include the *lex magistratus* would not significantly frustrate the objective of *favor testamenti*. For these reasons neither the Special Commission nor the Conference as a whole felt that the *lex magistratus* should be included as a connecting factor.¹²³

4. *Law designated by the testator (law of choice)*

In legal systems which do allow a testator to designate which law should apply to his will, the choice of laws so available is invariably restricted to one of the *lex loci actus*, the law of nationality, the law of domicile or, with respect to immovables, the *lex rei sitae*. To allow more would be contrary to

¹¹⁹ A. E. von Overbeck, *supra*, note 5 at 13-14, 68.

¹²⁰ Actes, III at 24.

¹²¹ *Id.* at 73-74.

¹²² *Id.* at 165-66; for additional comments see: Y. Loussouarn, *supra*, note 47 at 674 (English translation at 675); G. A. L. Droz, *supra*, note 28 at 10.

¹²³ A. E. von Overbeck, *supra*, note 5 at 14-15, 68-69; Actes, III at 24, 166.

the objective constraint of reasonable connection put on the principle of *favor testamenti* and should not be permitted.¹²⁴ For these reasons, the law of choice was included neither in the Special Commission's draft nor in the Convention as finally adopted.¹²⁵

I. MISCELLANEOUS POINTS CONCERNING THE HAGUE CONVENTION

There are several miscellaneous points concerning The Hague Convention which should be mentioned.

Article 1 of the Convention refers to "la loi interne"¹²⁶ of each of the places enumerated therein, thus excluding any possibility of the application of *renvoi*. This is appropriate since the availability, or lack thereof, of *renvoi* varies greatly from country to country. This creates uncertainty and detracts from the objective of uniformity of decisions.¹²⁷

Several delegates to the Conference objected to the complexity of having as many as seven competent laws with respect to the formal validity of a will of movables and as many as eight in the case of wills of immovables. However, both a majority of the Special Commission and of the Conference as a whole felt that this did not create any real difficulty.¹²⁸ It is to be recalled that the modern trend is away from exclusive imperative rules and towards co-existing permissive rules.

Article 3 of the Convention allows for the competence of laws in addition to those enumerated in Article 1 within jurisdictions choosing to recognize additional laws. In particular, therefore, the *lex causae* and the *lex fori*, although rejected by the Conference for inclusion as available connecting factors in Article 1, may nevertheless be used in jurisdictions choosing to do so. While it was stated that these laws would almost always be one of the laws recognized as competent by Article 1, this would not necessarily be the case and a distinct law might, therefore, be recognized as competent.¹²⁹

Although changes with time in connecting factors due to acts of the testator are dealt with in Article 1, general changes in the law of a jurisdiction independent of anything the testator does are not dealt with in the Convention. On this problem, Professor Graveson states:

. . . in view of the general liberality of this Convention and of the policy of giving

¹²⁴ A. E. von Overbeck, *supra*, note 5 at 69.

¹²⁵ Actes, III at 24, 166; for additional comments see: Y. Loussouarn, *supra*, note 47 at 674 (English translation at 675); G. A. L. Droz, *supra*, note 28 at 10.

¹²⁶ Trans.: *the internal law*.

¹²⁷ Actes, III at 160-61; G. A. L. Droz, *supra*, note 28 at 5.

¹²⁸ Actes, III at 23, 165.

¹²⁹ See text, *supra*, following note 118. For comments see: R. H. Graveson, *supra*, note 47 at 24; A. E. von Overbeck, *supra*, note 5 at 65-66.

as many alternatives as reasonably possible to a testator; in view also of the alternative times available where a testator himself is responsible for a change of applicable law, no good reason is seen why reference in all the cases under Article 1 should not be made to the applicable law at the date when the testator made the will, or at the date of his death, whichever is necessary to give formal validity to his will.¹³⁰

As will be seen later,¹³¹ the *Wills Act, 1963 (U.K.)* deals specifically with this problem.

Some doubt has been expressed concerning the number of reservations contained in the Convention, which lead to the risk that the unifying goal might be impaired. One such reservation, to which reference has been made, is contained in Article 9,¹³² which permits any signatory state to determine domicile by the *lex fori*, in derogation of the third paragraph of Article 1. However, such reservations were probably necessary if there was to be any Convention at all: "... dans les conférences internationales le mieux est souvent l'ennemi du bien."¹³³

It is to be noted that since a will is formally valid if it conforms with any of the laws enumerated in Article 1, it may be formally valid by the law of one state and formally invalid by the law of another state and yet in the result be formally valid in both states because of the provisions of Article 1. In particular, the will may so be held to be formally valid in the state whose law governs the substantive aspects of the will even though by the law of that state the will would be formally invalid.

In summary, the Convention is a significant achievement in view of the diversity of laws and opinions among the signatory states thereto and in view of the often conflicting principles of *favor testamenti* and uniformity of decisions. In the words of Professor Batiffol:

La convention . . . constitue un instrument solide et prudent. Son objet peut paraître relativement étroit. . . . Cependant ces problèmes en apparence limités posent des questions complexes de conflits de lois; leur solution est en un sens une réussite dont il faut attribuer le mérite principal aux travaux préparatoires . . . l'utilité pratique directe de la convention n'est pas niable.¹³⁴

J. THE WILLS ACT, 1963 (U.K.)

The *Wills Act, 1963 (U.K.)* completely overhauled the English law re-

¹³⁰ R. H. Graveson, *supra*, note 47 at 23.

¹³¹ See text, *infra*, accompanying note 139.

¹³² See text, *supra*, following note 83.

¹³³ Y. Loussouarn, *supra*, note 47 at 680 (English translation at 681).

Trans.: . . . in international conferences the best is often the enemy of the good.

¹³⁴ H. Batiffol, *supra*, note 28 at 470.

Trans.: *The Convention is a sound and prudent document. Its object may seem relatively narrow. However, the problems it deals with, apparently straightforward, raise complex questions of conflict of laws; the solution achieved is due largely to the preparatory work done. The direct practical usefulness of the Convention cannot be denied.*

lating to the formal validity of wills and brought it in line with the objectives of *favor testamenti* and uniformity of decisions underlying the Hague Convention. The Act was the result of work done by the United Kingdom Parliamentary Private International Law Committee¹³⁵ and essentially gives effect to the recommendations of that Committee as modified to comply with the Hague Convention, which was signed on behalf of the United Kingdom on February 13, 1962.

The Act repealed *Lord Kingsdown's Act*.¹³⁶ The "demise" of *Lord Kingsdown's Act* was announced as follows by Professor Bale:

At Westminster, in its one hundred and third year, Lord Kingsdown's Act passed quietly away. The death was not sudden. The afflictions from which this tenacious statute suffered were serious and had been diagnosed many years before. It is a case in which a notice that flowers are declined would be superfluous. The only regret that can be voiced is that legal reform is so tardy.¹³⁷

The key provisions of the *Wills Act, 1963 (U.K.)* are as follows:

An act to repeal the Wills Act 1861 and make new provision in lieu thereof; and to provide that certain testamentary instruments shall be probative for the purpose of the conveyance of heritable property in Scotland. [31st July 1963]

Whereas a Convention on the conflicts of laws relating to the form of testamentary dispositions was concluded on 5th October 1961 at the ninth session of the Hague Conference on Private International Law and was signed on behalf of the United Kingdom on 13th February 1962:

And whereas, with a view to the ratification by Her Majesty of that Convention and for other purposes, it is expedient to amend the law relating to wills:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows: —

1. A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.

2. (1) Without prejudice to the preceding section, the following shall be treated as properly executed —

(a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the territory with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the territory where the property was situated;

...

¹³⁵ See, *Fourth Report (Formal Validity of Wills), United Kingdom Parliamentary Private International Law Committee* (Cmd. 491), which set out recommendations regarding changes in the conflict of laws rules governing the formal validity of wills; for comments thereon, see the following: Morris, *supra*, note 16; E. J. Cohn, *A Further Comment on the Fourth Report of the Private International Law Committee* (1959), 22 M.L.R. 413.

¹³⁶ *Wills Act, 1963, c. 44, s. 7(3) (U.K.)*.

¹³⁷ G. Bale, *supra*, note 16 at 179.

6. (1) In this Act —

“internal law” in relation to any territory or state means the law which would apply in a case where no question of the law in force in any other territory or state arose;

“state” means a territory or group of territories having its own law of nationality;

. . .

(2) Where under this Act the internal law in force in any territory or state is to be applied in the case of a will, but there are in force in that territory or state two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows —

(a) if there is in force throughout the territory or state a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed, or

(b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is the time of the testator’s death where the matter is to be determined by reference to circumstances prevailing at his death, and the time of execution of the will in any other case.

(3) In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution, but this shall not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.

7. (1) This Act may be cited as the Wills Act 1963.

(2) This Act shall come into operation on 1st January 1964.

(3) The Wills Act 1861 is hereby repealed.

(4) This Act shall not apply to a will of a testator who died before the time of the commencement of this Act and shall apply to a will of a testator who dies after that time whether the will was executed before or after that time, but so that the repeal of the Wills Act 1861 shall not invalidate a will executed before that time.¹³⁸

Pursuant to section 1 and paragraphs 2(1)(a) and 2(1)(b) of the Act, all seven competent laws with respect to movables and eight competent laws with respect to immovables as recognized by the Hague Convention are adopted. This was not only desirable in the interests of *favor testamenti* and uniformity of decisions but also, in view of the ratification by the United Kingdom of the Hague Convention, necessary to fulfill its international commitment.

Thus, two connecting factors, habitual residence and nationality, are made available for the first time in English law and the antiquated connecting factor of domicile of origin is removed. Further, the numerous distinctions contained in *Lord Kingsdown’s Act* — the distinction between British subjects and others, the distinction between wills made outside the United Kingdom and those made within the United Kingdom, and, most importantly, the distinction among different kinds of property — are removed. Scission with respect to the rules governing the formal validity of wills is virtually eliminated, remaining only to the extent that the *lex rei sitae* is one of the competent laws for wills of immovables but not for wills of movables. This

¹³⁸ *Wills Act*, 1963, c. 44 (U.K.).

is probably the most significant achievement effected by the Act. The Act thus serves the two basic principles to be considered in drafting any conflict of laws statute concerning the formal validity of wills: it serves *favor testamenti* in that it greatly expands the number of competent laws and the objective of uniformity of decisions in that scission, except for a very minor exception, is eliminated. In general, it follows from the similarity of The Hague Convention and the *Wills Act, 1963 (U.K.)* that what was said about the accomplishments of the former apply equally to the latter.

Certain miscellaneous features of the Act are of interest. The Act, as does the Hague Convention, refers to "internal laws," thus excluding *renvoi* and thereby furthering the objective of uniformity of decisions. The Act adopts pursuant to subsection 6(2) a means of determining the relevant internal law of a non-unitary state analogous to that adopted in the Hague Convention for determining the law of nationality. With respect to time problems the Act is very well drafted. Changes with time in connecting factors due to acts of the testator are dealt with, as in the Hague Convention, by providing that a recognized connecting factor may be determined either *tempore testamenti* or *tempore mortis*. This is done for each of the connecting factors except the *situs* of an immovable. As mentioned above, in the interests of consistency and *favor testamenti*, the connecting factor of *situs* should also be determinable either *tempore testamenti* or *tempore mortis* to account for those cases, although relatively uncommon,¹³⁹ in which the *situs* of an immovable changes with time. The existence of subsection 6(3) of the Act does not solve the difficulties which may arise in such a situation since that provision deals with, *inter alia*, changes in the law of a particular *situs*, for example, England, and not with changes in *situs per se*. Changes in laws due to circumstances independent of the acts of the testator were not dealt with in the Hague Convention. Subsection 6(3) of this Act, however, provides that retrospective alterations in the law of a place are relevant if they validate a will but irrelevant if they invalidate it. Subsection 7(4) provides that the Act, upon its coming into force, governs all wills, whenever executed, of persons dying after that date, with the saving provision that wills formally valid under *Lord Kingsdown's Act* but not so under the *Wills Act, 1963 (U.K.)* will be formally valid. This is necessary to ensure that wills made under *Lord Kingsdown's Act* in compliance with the law of a domicile of origin do not run the risk of being held formally invalid. Finally, an example of a specific *lex magistratus* provision is contained in paragraph 2(1)(a), that provision dealing with wills made on board ships or aircraft; this provision is borrowed from the Hague Convention.

The value of the *Wills Act, 1963 (U.K.)* can be summarized by referring to the following by Professor Morris:

The statute has effected a notable simplification and improvement of the English rules of the conflict of laws for the formal validity of wills, both of movables and immovables. By allowing a wider choice than formerly, it has made it practically

¹³⁹ Resulting only from territorial changes due to war, etc.

impossible for a will to be formally invalid so far as the conflict of laws is concerned.¹⁴⁰

K. WORK OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA AFTER 1953

From 1959 forward, the Conference followed closely the developments at The Hague and in the United Kingdom relating to the formal validity of wills, postponing any definite action until the Hague Convention and the *Wills Act, 1963 (U.K.)* were available for study.¹⁴¹ The Conference focussed its considerations on the questions of whether the connecting factors concerning an interest in movables should be extended to interests in land¹⁴² and whether domicile of origin should be abolished as a connecting factor.¹⁴³

In 1961, following the adoption of the Hague Convention in 1960 by the Hague Conference on Private International Law, Dean Horace E. Read, who has been chiefly responsible for work in this area in Canada in recent years, submitted a report to the Conference. He recommended that Part II of the *Uniform Wills Act* provide that the same connecting factors and, therefore, the same laws, be available with respect to both interests in movables and interests in land and that the relevant times for the ascertainment of the connecting factors be either the time of the making of the will or the time of death. Dean Read also recommended that consideration be given to broadening the *Uniform Wills Act* by including habitual residence and nationality as connecting factors and by defining "national law" in a manner similar to the way in which "law of nationality" was defined in The Hague Convention.¹⁴⁴

¹⁴⁰ J. H. C. Morris, *Note on The Wills Act, 1963* (1964), 13 Int. & Comp. L. Q. 684 at 691. (It should be noted that Dr. Morris expressed doubt about the use of nationality as a connecting factor). For additional comments on the *Wills Act, 1963 (U.K.)*, see the following; G. Bale, *supra*, note 16 at 182-88; J.-G. Castel, *Conflict of Laws: Cases, Notes and Materials* (3d ed. Toronto: Butterworths, 1974) at 652; O. Kahn-Freund, *Wills Act, 1963* (1964), 27 M.L.R. 55, in which at 55 it is pointed out that the "key innovation" effected by the *Wills Act, 1963 (U.K.)* is that "freehold property may now be disposed of in accordance with the formalities provided by the laws of the domicile, habitual residence, nationality . . ." or the *lex loci actus* in addition to the common law *lex situs*.

¹⁴¹ Proceedings of the Forty-first Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1959) at 29, 132-36 [hereinafter cited as 1959 Proceedings]; Proceedings of the Forty-second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1960) at 27, 90. [hereinafter cited as 1960 Proceedings].

¹⁴² Using the "interests in movables" and "interests in land" terminology of the 1953 version of Part II of the *Uniform Wills Act*, Proceedings of the thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1953).

¹⁴³ 1959 Proceedings at 136.

¹⁴⁴ Proceedings of the Forty-Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Regina, 1961) at 22, 96-99 [hereinafter cited as 1961 Proceedings].

In 1964 Dean Read submitted a report¹⁴⁵ to the Conference commenting on the *Wills Act, 1963 (U.K.)* and recommending amendments to Part II of the *Uniform Wills Act*. Dean Read recommended that habitual residence be included as a connecting factor, that nationality not be included as a connecting factor, that domicile of origin be abandoned as a connecting factor, that the same rules be applied in determining the formal validity of wills of interests in land and interests in movables, that the laws recognized as competent be clearly stated as referring to the relevant "internal laws," that term being defined as in the *Wills Act, 1963 (U.K.)* so as to exclude *renvoi*, and that a provision similar to that in paragraph 2(1)(a) of the *Wills Act, 1963 (U.K.)* relating to wills made while on board ships or aircraft be included. Dean Read's recommendations were based on a desire to give effect to the principle of *favor testamenti*. His recommendation that the law of nationality not be adopted as a competent law was based on his doubts concerning how such a law would be determined in the case of a non-unitary state and his opinion that a definition of "law of nationality" such as that contained in The Hague Convention or the *Wills Act, 1963 (U.K.)* would not "solve the inherent difficulties of utilizing nationality as a connecting factor between the constituent units of federal states"¹⁴⁶

It is to be noted that if effect had been given to all of the recommendations contained in Dean Read's 1961 and 1964 reports, Part II of the *Uniform Wills Act* would have been exactly like the *Wills Act, 1963 (U.K.)*, at least insofar as is relevant for the purposes of this paper, except that nationality would not have been included as a connecting factor.¹⁴⁷

At the 1964 meeting of the Conference, the Commissioners rejected Dean Read's recommendation that domicile of origin be abandoned as a connecting factor. They also rejected his recommendation that the law of nationality be excluded as a competent law but decided instead that it should be competent with respect to wills made by nationals of unitary states. The Commissioners expressed doubts about including habitual residence as a connecting factor and about applying the same rules to interests in movables and to interests in land. They agreed that further consideration should be given to these matters.¹⁴⁸

¹⁴⁵ Proceedings of the Forty-sixth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Montreal, 1964) at 89-97 [hereinafter cited as 1964 Proceedings].

¹⁴⁶ *Id.* at 93. Recall Dr. Morris' doubts about the use of nationality as a connecting factor, referred to *supra*, note 140.

¹⁴⁷ This comment is subject to the following *caveat*. For a reason which the writer has been unable to determine from the reports of the Conference's proceedings, although Dean Read in his 1961 report recommended that both the time of the making of the will and the time of death be relevant times for the determination of the connecting factors and took account of this recommendation in the draft Part II he submitted accompanying that report, the draft of Part II submitted by Dean Read in 1964, which incorporated the recommendations he made in his 1964 report (which included nothing to the effect that he had changed his views on the time problem since his draft of 1961), refers only to the time of the making of the will. Compare draft section 35(1), 1961 Proceedings 98, with draft section 41(1), 1964 Proceedings 96.

¹⁴⁸ 1964 Proceedings at 24-25.

At the 1965 meeting of the Conference, a revised draft of Part II of the *Uniform Wills Act* was agreed upon by the Commissioners and was sent out to the provinces for their consideration. The draft was to be recommended by the Conference for enactment in that form by the provinces unless objected to by two jurisdictions within a specified time. The relevant provisions of that draft would have added habitual residence and, for nationals of unitary states, nationality, as connecting factors, would have retained domicile of origin as a connecting factor, would have made the same rules applicable to both interests in movables and interests in land and would have eliminated the possibility of *renvoi* by referring to "internal laws."¹⁴⁹ This draft Part II went a great way towards serving the principle of *favor testamenti* and, except for its retention of domicile of origin as a connecting factor and its omission of the time of death as a relevant time for the determination of connecting factors, would have achieved what the *Wills Act, 1963 (U.K.)* had done. The limitation of the law of nationality as a competent law in the case of wills of nationals of unitary states was unnecessary, since the way in which "law of nationality" for nationals of non-unitary states was defined in The Hague Convention and the *Wills Act, 1963 (U.K.)* is satisfactory, even though the terms "le lien le plus effectif"¹⁵⁰ and "most closely connected" are necessarily vague. Unfortunately, British Columbia and Saskatchewan registered disapproval within the specified time, the Saskatchewan Commissioners making the important substantive objection that the various connecting factors made available with respect to interests in movables should not be made available with respect to interests in land.¹⁵¹

At the 1966 meeting of the Conference, Dean Read submitted to the Commissioners a further draft of Part II of the *Uniform Wills Act*, which took into account some of the suggestions received by him during the foregoing year but which retained the same rules with respect to interests in movables and interests in land.¹⁵² The Commissioners, however, did not accept the retention in the draft of the same rules with respect to interests in movables and interests in land. The draft that they adopted preserved the imperativeness of the rule recognizing the *lex rei sitae* as the sole law competent in determining the formal validity of a will of interests in land, thus maintaining the system of scission. One improvement was, however, made in the adopted draft: domicile of origin was abandoned as a connecting factor.¹⁵³

¹⁴⁹ Proceedings of the Forty-seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Niagara Falls, 1965) at 26, 67-70 (report of Dean Read on behalf of the Nova Scotia Commissioners), 71-74 (draft Part II which was sent out to the provinces); for comments on this draft by Prof. J.-G. Castel, Prof. G. C. Bale and Dean W. F. Bowker, see Proceedings of the Forty-eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (Minaki, Ont., 1966) at 131-33 (contained in report of Dean Read on behalf of the Nova Scotia Commissioners) [hereinafter cited as 1966 Proceedings].

¹⁵⁰ Trans.: *the most real connection*.

¹⁵¹ 1966 Proceedings at 131, 133.

¹⁵² *Id.* at 133-36.

¹⁵³ *Id.* at 23-24 (the reasons for the Commissioners' retention of scission is not apparent from the proceedings as reported).

This draft was sent out to the provinces and, no objections thereto having been received within the time allowed for such objections, the draft was adopted by the Conference and recommended for enactment by the provinces. The relevant provisions of the 1966 version of Part II of the *Uniform Wills Act* are as follows:

38. In this Part,

- (a) an interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property;
- (b) an interest in movables includes an interest in a tangible or intangible thing other than land, and includes personal property other than an estate or interest in land;
- (c) "internal law" in relation to any place excludes the choice of law rules of that place.

39. This Part applies to a will made either in or out of this Province.

40.—(1) The manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2) Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his death.

41.—(1) As regards the manner and formalities of making a will of an interest in movables, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where,

- (a) the will was made; or
- (b) the testator was then domiciled; or
- (c) the testator then had his habitual residence; or
- (d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

(2) Without prejudice to subsection (1), as regards the manner and formalities of making a will or an interest in movables, the following are properly made:

- (a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;¹⁵⁴

This version of Part II, in comparison with the *Wills Act, 1963 (U.K.)*, may be severely criticized.

The following defects are contained in the 1966 version of Part II of the *Uniform Wills Act*: the time relevant for determining certain connecting factors is restricted to the time of the making of the will; nationality as a connecting factor is unnecessarily limited to the nationals of unitary states; most importantly, scission is retained.

As a result, Part II of the *Uniform Wills Act* does not serve *favor testamenti* as well as does the *Wills Act, 1963 (U.K.)*. Under the latter there are eight¹⁵⁵ connecting factors available with respect to wills of movables and

¹⁵⁴ *Uniform Wills Act* (1966), 1966 Proceedings at 138-39.

¹⁵⁵ Place of execution, domicile at time of execution, domicile at time of death, habitual residence at time of execution, habitual residence at time of death, nationality at time of execution, nationality at time of death, "vessel or aircraft connecting factor" (*Wills Act, 1963 (U.K.)*, s. 2(1)(a)).

nine¹⁵⁶ with respect to wills of immovables whereas under the former there are only five or six¹⁵⁷ connecting factors (the exact number depending on whether the testator is a national of a unitary or federal state) available with respect to wills of movables and only one¹⁵⁸ for wills of interests in land. How well a piece of legislation in this area serves *favor testamenti* cannot be determined by a mere "head count" of the number of connecting factors available since these could easily be added indiscriminately; however, all of the connecting factors available under the *Wills Act, 1963 (U.K.)* are ones which should be available, either because they come within the reasonable connection constraint placed on *favor testamenti* or, as is the case with the *lex loci actus*, there are strong practical reasons for making them available.

Further, Part II of the *Uniform Wills Act* does not serve the objective of uniformity of decisions as well as does the *Wills Act, 1963 (U.K.)* The latter, except for the minor qualification discussed, adopts a system of unity with respect to the formal validity of wills whereas the former retains an antiquated scission system.

Having criticized the 1966 version of Part II of the *Uniform Wills Act*, it should be mentioned that the real criticism should be of the Commissioners who adopted this version in the face of the precedents set by The Hague Convention and the *Wills Act, 1963 (U.K.)*, in the face of Dean Read's recommendations and in the face of the general consensus among commentators to the effect that the number of competent laws with respect to both wills of movables and of interests in land should be expanded and that scission should be abolished.

From the adoption of the 1966 version of Part II of the *Uniform Wills Act* up to and including the 1975 proceedings of the Conference, no further work has been done by the Commissioners on the conflicts rules governing the formal validity of wills. While it is only conjecture, it is likely that those Commissioners who sought to have a Part II similar in effect to that of the *Wills Act, 1963 (U.K.)* and who were not in the majority at the 1966 meeting of the Conference have been of the opinion in the interim that they have done all they can for the time being with respect to this matter.

L. RELEVANT LAW PRESENTLY EXISTING IN THE COMMON LAW PROVINCES AND TERRITORIES OF CANADA

The law in the various common law jurisdictions of Canada is at various stages in the evolutionary development discussed above. Only those parts of the relevant legislation which set out the connecting factors available, and

¹⁵⁶ As in note 155 plus the *situs* of the immovable property.

¹⁵⁷ Place of execution, domicile at time of execution, domicile at time of death, habitual residence at time of execution, nationality at time of execution if national of a unitary state, "vessel or aircraft connecting factor" (as in 1966 version of the *Uniform Wills Act*, s. 41(2)(a)).

¹⁵⁸ *Situs* of the immovable property.

therefore the laws recognized as competent, or which provide necessary definitions are referred to below.

Alberta: The Wills Act, R.S.A. 1970, c. 393, ss. 38-39. These provisions are identical to the 1953 version of Part II of the *Uniform Wills Act*.

British Columbia: The Wills Act, R.S.B.C. 1960, c. 408, ss. 42-43. These provisions are the same as the 1953 version of Part II of the *Uniform Wills Act* except that the additional laws declared competent with respect to wills of movables are available only with respect to wills "made without the Province." This limitation is clearly unjustifiable.

Manitoba: The Wills Act, R.S.M. 1970, c. W-150, ss. 37-40(2) (a), as substituted by S.M. 1975, c. 6, ss. 1,4. These provisions are identical to the 1966 version of Part II of the *Uniform Wills Act*.¹⁵⁹

New Brunswick: The Wills Act, R.S.N.B. 1973, c. W-9, ss. 36-37. These provisions are identical to the 1953 version of Part II of the *Uniform Wills Act*.

Newfoundland: The Wills Act, R.S.N. 1970, c. 401, ss. 21-22. These provisions are identical to the 1953 version of Part II of the *Uniform Wills Act*.

Northwest Territories: The Wills Ordinance, R.O.N.W.T. 1974, c. W-3, ss. 2(b)-2(c), 27-28. These provisions are identical to the 1929 version of Part II of the *Uniform Wills Act*.

Nova Scotia: The Wills Act, R.S.N.S. 1967, c. 340, s. 14. This provision is rather unique and is as follows:

14. Every will made *out of the Province* (whatever was the domicile of the testator at the time of making the same, or at the time of his death) shall, *as regards personal property*, be held to be well executed for the purposes of being admitted to probate in Nova Scotia, if the same is made according to the forms required, either,
 - (a) *by the law of this Province*; or
 - (b) by the law of the place where the same was made; or
 - (c) by the law of the place where the testator was domiciled when the same was made; or
 - (d) by the law then in force in the place where he had his domicile of origin. [emphasis added]

Essentially, this provision is the same as section 1 of *Lord Kingsdown's Act* except that, first, no limitation is made to British subjects or to domiciles of origin within the British Empire and, secondly, the law of Nova Scotia, i.e., the *lex fori*, is added as a competent law.

Ontario: The Wills Act, R.S.O. 1970, c. 499, ss. 19(1)-19(4). These

¹⁵⁹ *An Act to Amend the Wills Act*, S.M. 1975, c. 6, received royal assent on June 19, 1975, and sections 1 and 4 thereof, the relevant sections for our purposes, came into force on July 1, 1975. Before July 1, 1975, the relevant law in force in Manitoba was identical to the 1953 version of Part II of the *Uniform Wills Act*.

provisions are identical to the 1953 version of Part II of the *Uniform Wills Act*.¹⁶⁰

Prince Edward Island: The relevant statute, *The Probate Act*, R.S.P.E.I. 1974, c. P-19, contains nothing concerning the conflict of laws rules governing the formal validity of wills. Therefore, the law on this matter in Prince Edward Island is entirely governed by the common law.

Saskatchewan: *The Wills Act*, R.S.S. 1965, c. 127, ss. 35-36. These provisions are identical to the 1929 version of Part II of the *Uniform Wills Act*.

Yukon Territory: *The Wills Ordinance*, R.O.Y.T. 1971, c. W-3, ss. 2(b)-2(c), 26-27. These provisions are identical to the 1929 version of Part II of the *Uniform Wills Act*.

In summary, the law varies greatly among the provinces and territories — from the pure common law in Prince Edward Island to the 1966 version of Part II of the *Uniform Wills Act* in Manitoba. One characteristic, though, which the laws in the various provinces and territories do have in common is that none approaches the degree to which the *Wills Act, 1963 (U.K.)* serves the objectives of *favor testamenti* and uniformity of decisions.

M. CONCLUSIONS

In view of the diversity of Canadian legislation dealing with the formal validity of wills and the general principles underlying the drafting of legislation on this matter, what suggestions may be made for reform in Canada?

From the outset, it must be recognized that it is necessary to work within the constraint that legislation on this matter should set out some definite list as to the connecting factors available and the laws recognized as competent. To merely provide that, for example, "a will may be formally valid if it conforms with the formalities requirements of a law with which the testator had a reasonable connection, either at the time of the making of the will or at the time of the testator's death" is far too general and would lead to great uncertainty. Von Overbeck is correct in stating that conflicts rules on this matter must be exact rules and not generalities.

The first conclusion is that there should be some kind of uniform legislation among the provinces so as to achieve uniformity of decisions among provinces. Having decided this, what should the precise content of such uniform legislation be? In considering this question, two matters arise.

First, whatever the rules governing the formal validity of wills are, should they be the same for wills of movables and for wills of immovables?

¹⁶⁰ Ontario Bill 85, 1976, *An Act to reform the Law respecting Succession to the Estates of Deceased Persons*, sections 34-41, would adopt the 1966 version of Part II of the *Uniform Wills Act* as the law in Ontario. At the time of writing, this Bill had not yet been passed by the Legislature.

It would seem that they should be: scission with respect to the formal validity of wills should be abolished. This is necessary so as to achieve uniformity of decisions within a given province with respect to the total property comprising an estate. *The Wills Act, 1963 (U.K.)* could be used as an important precedent in this regard.¹⁶¹

Secondly, having concluded that the rules governing the formal validity of wills of movables and those governing the formal validity of wills of immovables should be the same, what should these rules actually be? In other words, which connecting factors should be recognized and therefore which laws should be considered competent in determining the formal validity of wills? Here *favor testamenti*, as tempered by the objective constraint that to be competent a law must be one with which the testator had a reasonable connection, is the guiding principle.

All of the connecting factors recognized by the *Wills Act, 1963 (U.K.)* are acceptable and should be contained in uniform Canadian legislation. While there is little real doubt regarding most of the factors contained in that Act, some comment concerning certain of the factors and concerning extensions to that Act suggested above is necessary.

There is no reason for not accepting connecting factors determined *tempore mortis* in addition to those determined *tempore testamenti*. In fact, one could even go beyond the *Wills Act, 1963 (U.K.)* in this regard and make the connecting factor of *situs*, in addition to the other connecting factors, determinable either *tempore testamenti* or *tempore mortis*. The fact that the law of the *situs tempore mortis* will determine what actually becomes of property within its jurisdiction, i.e., what exactly happens to the succession, should not deter one from accepting the *lex rei sitae tempore testamenti* as a competent law with respect to determining the formal validity of wills any more than it deters one from accepting other *leges tempore testamenti* as competent laws in this matter.

With respect to the law of nationality, the difficulty associated with that law in the case of non-unitary states is not so great as to necessitate limiting the availability of the connecting factor of nationality to nationals of unitary states or, *a fortiori*, to necessitate leaving it out entirely as a connecting factor.

Von Overbeck's suggestion that the *lex rei sitae* of an immovable should be a competent law with respect to the entire estate of the testator is a good one: there are no serious theoretical or practical disadvantages in doing this

¹⁶¹ Another important precedent adopting unity of succession with respect to the formal validity of wills is the *Uniform Probate Code*, §2-506 (Choice of Law as to Execution), which was approved by the (United States) National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969.

The writer is temporarily glossing over the fact that the *Wills Act, 1963 (U.K.)* retains scission to the slight extent that the *lex rei sitae* is a competent law with respect to wills of immovables but not with respect to wills of movables; however, scission can be totally eradicated by adopting von Overbeck's "solution *maxima*": see text, *supra*, following notes 106 and 114.

but there is the substantial advantage of totally eliminating scission with respect to the form of wills while at the same time retaining the *lex rei sitae* of an immovable as a competent law.

Finally, for the reasons given in the general discussion of connecting factors, if the connecting factors recognized by the *Wills Act, 1963 (U.K.)* were included in uniform Canadian legislation, there would be no need to include any of the indirect connecting factors discussed.

In conclusion, then, the sooner the provinces of Canada enact uniform legislation regarding the conflict of laws rules governing the formal validity of wills the better. That uniform legislation should resemble the *Wills Act, 1963 (U.K.)*, as extended by making the *lex rei sitae* of an immovable a competent law with respect to both wills of immovables and wills of movables and by making that law determinable either by the *situs tempore testamenti* or by the *situs tempore mortis*.¹⁶² However, in view of the fate of Dean Read's draft which included some of these suggestions, notably the unity of succession doctrine, and in view of the general tardiness of the provincial Legislatures in enacting uniform legislation in this area,¹⁶³ it is difficult to be too optimistic in this regard. As one commentator has said:

Reform of private law is a slow and laborious process. [Interprovincial] unification of private law is even slower and much more difficult. . . . In the realms of geology and law reform [a century] is but a short period.¹⁶⁴

¹⁶² G. Bale, *supra*, note 16 at 190-91.

¹⁶³ To date, for example, only one province, Manitoba, has even adopted the rather modest reforms contained in the 1966 version of Part II of the *Uniform Wills Act* and, even in that case, only a decade after its recommendation for enactment by the Conference of Commissioners on Uniformity of Legislation. (As mentioned, *supra*, at note 160, legislation is now before the Ontario Legislature which would adopt the 1966 version of Part II of the *Uniform Wills Act*.)

¹⁶⁴ W. F. Fratcher, *supra*, note 12 at 496. Fratcher's comment was made in the context of international unification; it is equally valid in the context of interprovincial unification.